IF IT QUACKS LIKE A DUCK: PSEUDO-SANCTUARY ACCOUNTABILITY THROUGH CONSUMER PROTECTION LAW

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INTRODUCTION

I would like to start this article with a confession. I fed the giraffes; I paid money to drink wine next to a sloth; and I went to fundraisers where a penguin was propped up on a plastic table for no reason other than for humans to ogle. I have always loved animals and took every opportunity I could to get closer to them. I realize now, and should have realized then, that the penguin would have probably preferred to huddle up with other penguins than be jostled about in a loud lecture hall. But I happily poured money into these experiences thinking I was helping the creatures I held so dear. The facility was begging for donations to continue their conservation mission, to

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educate people about unique animals, and breed endangered species to bring them back from the brink of extinction. I was caught up in the thrill of up-close animal encounters and did not take time to think critically about the message I was being told. I saw "Accredited," "Species Survival Plan," and "registered charity" and by default assumed that this zoo "was one of the good ones." I was lost in the conservation-washing.

To its credit, the zoo is well managed, has a good compliance record, and engages in local conservation projects. I do not doubt the love that the volunteers, veterinarians, and handlers have for the animals at the zoo. But what became clear to me years later was that those donations were more for the people that like to watch animals than the animals themselves. Parading a wild animal around a fluorescent-lit room full of loud humans is not in the animal's best interest. By engaging in these encounters, I was prioritizing my own entertainment over an animal's wellbeing. My money was not being used to give vulnerable animals a gentle and dignified existence when they had nowhere else to go. Rather, I was funding programs that bred animals into existence that would live their entire lives in captive enclosures, subjected to human whims.

To be clear, this article is not debating the ethics of animal captivity, nor is it about outright shaming zoos. Rather, this article is more about promoting desperately needed transparency in the world of animal exhibition—calling a zoo a zoo. In doing so, this Article explores one way to prevent the worst animal exhibitors from guilting charitable people into donating money while hiding their cruelty and greed behind a false conservation narrative.

People have been progressively questioning the ethics behind animal enterprises like zoos, performing animal shows, and trophy hunting.[1] To avoid this increased skepticism and scrutiny, some animal enterprises have chosen to brand themselves as *sanctuaries*, *refuges*, *rescues*, *preserves*, or other terms that imply a place of animal

[1] *See* Kelly A. George et al., *Changes in Attitudes Toward Animals in the United States from 1978 to 2014*, 201 BIO. CONSERV. 237, 237, 239 (July 2016) (suggesting that positive changes in public perception of wild animals since 1978 as well as increased awareness of animal treatment through media correlates to greater concern for animals generally).

protection rather than exploitation.[2] These enterprises use sympathetic branding and misleading advertisements to appear more legitimate to attract consumers that would otherwise choose not to visit the exhibition.[3] Neither U.S. federal nor state governments regulate these terms, allowing exploitative animal industries to rebrand and benefit from unearned goodwill and marketability; these enterprises are *pseudo-sanctuaries*.[4]

Considering the lack of legislative intervention, consumer protection laws should be able to respond to misleading ethical marketing. However, using consumer protection laws to address pseudo-sanctuaries pose unique challenges.

This Article opens with a discussion on what is a *sanctuary* versus what is a *pseudo*-sanctuary.[5] This Part also explains why pseudo-sanctuaries persist and why pseudo-sanctuaries are a problem for consumers, the public, regulators, and animal advocates.[6] Next, this Article provides legal background for three different consumer protection laws: the federal Lanham Act, California state consumer protection laws, and Florida's False Advertising Law.[7] These laws provide distinct examples for how individuals can hold pseudo-sanctuaries accountable when governments have failed or declined to act. Part II analyzes whether falsely claiming to be a sanctuary is actionable under consumer protection laws.[8] In so doing, this Article introduces a central challenge of using consumer protection laws to address pseudo-sanctuaries: defining *sanctuary*.[9] I propose that, rather than searching for a single definition of sanctuary, courts should instead consider a fact-based balancing test that considers Animal

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[2] *See* Delcianna J. Winders, *Captive Wildlife at a Crossroads—Sanctuaries, Accreditation, and Humane-Washing*, 6 ANIMAL STUD. J. 161, 164 (2017), https://ro.uow.edu.au/cgi/viewcontent.cgi?article=1325&context=asj (highlighting the number of captive animal exhibitors using the term *sanctuary*, with only 8% having reputable accreditation).
[3] *Id.*
[4] *Id.* at 164, 168.
[5] *See infra* Part I.A.1.
[6] *See infra* Part I.A.
[7] *See infra* Part I.B.
[8] *See infra* Part II.
[9] *See infra* Part II.

Welfare Act compliance, public expectations regarding on-site practices, and financial management.[10] This Article then demonstrates how this balancing test could apply under the Lanham Act, California consumer protection laws, and Florida's false advertising law.[11] Additionally, this Part addresses possible defenses to a consumer protection claim, such as corporate speech protections under the First Amendment.[12] This Article closes with other important considerations to evaluating consumer protection law's potential efficacy in addressing pseudo-sanctuary accountability.[13]

I. BACKGROUND

A. Pseudo-Sanctuaries

1. What Is a Pseudo-Sanctuary?

A pseudo-sanctuary is precisely what it sounds like: a fake sanctuary.[14] Then, the definition of *sanctuary* becomes incredibly important in determining what a *pseudo*-sanctuary is. The term sanctuary is rather amorphous and there is no legal definition to rely upon.[15] The Global Federation of Animal Sanctuaries (GFAS), largely considered to be the premier sanctuary accreditation group, describes sanctuaries as:

> [A]ny facility providing temporary or permanent safe haven to animals in need while meeting the principles of true sanctuaries: providing excellent and humane

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[10] *See infra* Part II.
[11] *See infra* Parts II.A–B.
[12] *See infra* Part II.C.
[13] *See infra* Conclusion.
[14] *See pseudo-*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/pseudo (last visited May 10, 2022) (defining *pseudo-* as "pretended and not real").
[15] *But see* 9 C.F.R. § 1.1 (2021) (defining *sanctuary area* as "that area in a primary enclosure for a swim-with-the-dolphin program that is off-limits to the public and that directly abuts the buffer area").

> care for their animals in a non-exploitative environment and having ethical policies in place, regarding:
> - tours,
> - commercial trade,
> - exhibition,
> - acquisition and disposition,
> - breeding and more.[16]

However, understanding what *is* or *is not* a sanctuary is easier when considering "the principles of true sanctuaries."[17] Above all else, a sanctuary is a place where the interests of nonhuman animals are the primary consideration in all decisions, rather than human interests.[18] When evaluating how sanctuaries put animal interests first, it is important to note that sanctuaries exist as a practical solution to an ethical problem: animal captivity.[19] Very rarely is captivity in an animal's best interest.[20] The following discussion does not debate whether holding an individual animal in captivity is ethical, but rather whether holding an animal in captivity for exhibition is in *that* individual animal's best interest.

Ideally, animals could live their lives in the environment their species evolved to thrive in, engaging in behaviors and relationships they choose. However, the practical reality is that humans have made this scenario impossible through habitat destruction, removing wild animals from their environment, selective breeding, and precluding captive-bred animals from ever reentering "the wild."[21] Given this

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[16] *What Is a Sanctuary*, GLOB. FED'N OF ANIMAL SANCTUARIES (emphasis omitted), https://www.sanctuaryfederation.org/about-gfas/what-is-a-sanctuary/ (last visited May 10, 2022) [hereinafter GLOB. FED'N OF ANIMAL SANCTUARIES, *What Is a Sanctuary*].

[17] *Id.* (emphasis omitted).

[18] *See generally id.* (describing what a sanctuary is and how identifying true sanctuaries provides a model for others to follow).

[19] *See* Winders, *supra* note 2, at 164.

[20] *See, e.g.*, *id.* at 163 (providing an example of conflicting human and animal interests).

[21] *See* Sarah P. Otto, *Adaptation, Speciation and Extinction in the Anthropocene*, 285 PROCS. ROYAL SOC'Y BIOLOGY 1891, 1891, 1898 (2018), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6253383/pdf/rspb20182047.pdf (describing the impact of human development on the earth's ecosystems).

practical reality, sanctuaries exist as a second-best option.[22] There are several arenas where this philosophy plays out, such as breeding, human interaction, environment, acquisition, and disposition.[23]

One example where this animal-first priority is obvious is in captive breeding. Sanctuaries generally do not intentionally breed animals.[24] Returning to the premise that animal captivity is generally not in an animal's best interests, it follows that sanctuaries should not increase the number of animals in captivity. Breeding animals increases the number of animals in captivity. This conclusion may feel uncomfortable for many people. What about endangered species? Breeding in captivity may be the only way to ensure that a species does not go extinct. Certainly, species extinction is one of the greatest human-caused tragedies.[25] But breeding animals from endangered species for conservation can only go two ways: (1) the animals are bred to exist solely in captivity; or (2) the animals are being bred for eventual reintroduction. Breeding animals to exist solely in captivity is not prioritizing that animal's interests and does not align with sanctuary principles.[26]

Species reintroduction, at first, seems to be the best option for both captivity opponents and proponents. However, practically, species

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[22] *See* Winders, *supra* note 2, at 164.

[23] GLOB. FED'N OF ANIMAL SANCTUARIES, *What Is a Sanctuary*, *supra* note 16.

[24] *Position Statement: Breeding of Animals in Captivity*, GLOB. FED'N OF ANIMAL SANCTUARIES (2019), https://www.sanctuaryfederation.org/wp-content/uploads/2019/10/GFAS-Position-Statement-Captive-Breeding.pdf [hereinafter GLOB. FED'N OF ANIMAL SANCTUARIES, *Position Statement*].

[25] Gerardo Ceballos et al., *Accelerated Modern Human–Induced Species Losses: Entering the Sixth Mass Extinction*, 1 SCI. ADVANCES 1, 3–4 (2015), https://www.science.org/doi/epdf/10.1126/sciadv.1400253?adobe_mc=MCMID%3D33507152379678301942118810134397558057%7CMCORGID%3D242B6472541199F70A4C98A6%2540AdobeOrg%7CTS%3D1636764506 (concluding that modern extinction rates are exceptionally high and "[a]rguably the most serious aspect of the environmental crisis is the loss of biodiversity—the other living things with which we share Earth.").

[26] GLOB. FED'N OF ANIMAL SANCTUARIES, *Position Statement*, *supra* note 24 ("Animals are not brought into captivity for the purpose of breeding. Animals that are allowed to breed should enter a facility as a result of normal acquisition protocols such as surrender or government confiscation.").

reintroduction is almost always unsuccessful.[27] There is a reason the species is endangered, and without addressing that underlying issue, reintroduction is bound to fail. Unless the animals' habitat and population health are stable, reintroduction is likely to fail.[28] With largely unmitigated climate change and continued habitat destruction, there are fewer and fewer opportunities for reintroduction.[29] Therefore, if there are no stable habitat and population for the animal to return to, the animal is actually being bred to exist in captivity or to serve as an additional breeding machine for some remote possible future population. This is not putting the individual animal's interests first.

2. Why Do Pseudo-Sanctuaries Exist?

The primary reason pseudo-sanctuaries continue to exist is because the "sanctuary" designation is more profitable than not.[30] A "sanctuary" designation may draw the critical consumer's gaze away from looking further into the operation. A captive animal operation's image is more important than ever as more consumers are questioning captivity's place in the world.[31]

Following exposés on the treatment of elephants used for entertainment in circuses, ticket sales fell so dramatically that in 2016 the largest circus entertainment company, Ringling Bros. and Barnum

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[27] *See* Natasha M. Robinson et al., *Be Nimble with Threat Mitigation: Lessons Learned from the Reintroduction of an Endangered Species*, 28 RESTORATION ECOLOGY 29, 29 (2020) (documenting low success rates of species reintroduction).

[28] T. Gilbert et al., *Contributions of Zoos and Aquariums to Reintroductions: Historical Reintroduction Efforts in the Context of Changing Conservation Perspectives*, 51 INT'L ZOO Y.B. 15, 15 (2017), http://www.rhinoresourcecenter.com/pdf_files/157/1574515374.pdf.

[29] *Id.*

[30] *See* Neil Carr & Scott Cohen, *The Public Face of Zoos: Images of Entertainment, Education and Conservation*, 24 ANTHROZOOS 175, 178–80 (explaining the historical movement of public perception of zoos from a place of entertainment to a place of conservation).

[31] *See* Laure Boissat et al., *Nature Documentaries as Catalysts for Change: Mapping Out the 'Blackfish Effect*,*'* 3 PEOPLE & NATURE 1179, 1181 (detailing SeaWorld's "aggressive brand restoration campaign" after *Blackfish*).

& Bailey's Circus, ended animal entertainment.[32] The following year, the circus closed entirely after failing to recover from the poor publicity.[33] Similarly, in what has been called the *Blackfish* effect, SeaWorld has struggled to regain public confidence and ticket sales following the documentary *Blackfish*, which exposed the traumatic conditions imposed on captive cetaceans.[34] Consequently, SeaWorld is still facing hemorrhaging ticket sales,[35] the resignation of at least four different CEOs in the last seven years,[36] and has been subject to federal investigations and shareholder lawsuits.[37] The world is watching, and the captive-animal industry must respond.[38] While some operations chose to increase animal care standards, others simply masked their exploitative practices in hopes of evading public scrutiny.[39]

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[32] Cathy Free, *Former Circus Elephants Just Arrived at a New Sanctuary. They Are Swimming and Grazing on Fruit Buffets.*, WASH. POST (May 13, 2021), https://www.washingtonpost.com/lifestyle/2021/05/13/circus-elephant-ringling-sanctuary/.

[33] *See* Emma Bowman, *After 146 Years, Ringling Bros. and Barnum & Bailey Circus To Shut Down*, NPR (Jan. 15, 2017), https://www.npr.org/sections/thetwo-way/2017/01/15/509903805/after-146-years-ringling-bros-and-barnum-bailey-circus-to-shut-down. *But see* Jay Handelman, *Ringling Bros. and Barnum & Bailey Circus Could Be Making Comeback – But Without the Animals*, USA TODAY (Oct. 27, 2021), https://www.usatoday.com/story/money/2021/10/26/ringling-brothers-circus-comeback-without-animals/8551976002/ (announcing that Feld Entertainment plans to reopen circus performances without animal shows).

[34] Boissat et al., *supra* note 31, at 1188.

[35] *See id.* (detailing the continuous loss in income and visitors following the *Blackfish* documentary).

[36] *SeaWorld CEO Steps Down After Just Five Months on the Job*, REUTERS (Apr. 6, 2020), https://www.reuters.com/article/us-seaworld-entrnmt-ceo/seaworld-ceo-steps-down-after-just-five-months-on-the-job-idUSKBN21O1FU.

[37] *See, e.g.*, *id.* ("The company and an ex-CEO had agreed to pay more than $5 million to settle U.S. Securities and Exchange Commission charges in 2018 for misleading investors about the negative impact of the documentary.").

[38] *See generally*, Carr & Cohen *supra* note 30, at 176 ("In contrast to the original image of zoos as primarily sites of entertainment, according to contemporary socially/morally acceptable public opinion, zoos exist to aid the conservation of species under threat of extinction.").

[39] *See, e.g.*, Toria Barnhart, *New York Man Posing as Rescue Organization Charged with Trafficking Exotic African Cats*, NEWSWEEK (Oct. 18, 2021), https://www.newsweek.com/new-york-man-posing-rescue-organization-charged-

One major market the captive-animal industry relies on is millennials.[40] Millennials and their young children make up a substantial portion of zoo traffic, accounting for 32% and 57% respectively.[41] However, the millennial generation is more likely to look critically at captive animal operations for several reasons. First, they are more likely than other generations to spend their money on "ethical" products.[42] Millennials are also more likely than previous generations to be concerned with animal welfare.[43] Additionally, millennials prefer to spend their money on experiences rather than desirable products.[44] This creates a major target demographic that has more access to information than any other generation in history[45] and

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trafficking-exotic-african-cats-1640142 ("Casacci said that he was operating a big cat rescue organization to avoid New York's law against possessing and selling wild animals."); *In re* Stark, 79 Agric. Dec. 1, 15, 17 (U.S.D.A. 2020) (affirming the Chief Administrative Law Judge's decision that Wildlife in Need did not in operate in good faith as a rescue, rehabilitation, and wildlife sanctuary and amassed over 100 Animal Welfare Act violations).

[40] *Visitor Demographics*, ASSOC. OF ZOOS & AQUARIUMS, https://www.aza.org/partnerships-visitor-demographics (last visited May 10, 2022).

[41] *Id.*

[42] *See* Gui Costin, *Millennial Spending Habits and Why They Buy*, FORBES (May 1, 2019) https://www.forbes.com/sites/forbesbooksauthors/2019/05/01/millennial-spending-habits-and-why-they-buy/?sh=2ce2dc14740b ("Millennials consider social responsibility and environmental friendliness when considering their purchases . . . . Other values that brands should center upon are authenticity, local sourcing, ethical production, a great shopping experience, and giving back to society. 75% of Millennials consider it fairly or very important that brands give back to society instead of just making a profit.").

[43] Michael P. Rowland, *Millennials Are Driving the Worldwide Shift away from Meat*, FORBES (Mar. 23, 2018), https://www.forbes.com/sites/michaelpellmanrowland/2018/03/23/millennials-move-away-from-meat/?sh=48ad5ac4a4a4.

[44] *The Experience Movement: How Millennials Are Bridging Cultural and Political Divides Offline*, EVENTBRITE 4 (2017), https://s3.amazonaws.com/eventbrite-s3/marketing/landingpages/assets/pdfs/Eventbrite+Experience+Generation+report-2017.pdf.

[45] Sarah Landrum, *Here's Why Millennials Are the Most Data-driven Generation*, FORBES (Aug. 29, 2017), https://www.forbes.com/sites/sarahlandrum/2017/08/29/an-inside-look-at-millennials-love-of-data/?sh=2343dff3271e ("[M]illennials are effectively the first generation to grow up with nearly unlimited access to information.").

is willing to spend money on a specific experience but is concerned about ethical spending and ethical treatment of animals.

One relatively easy way to appeal to this demographic and try to evade the misfortune of SeaWorld and Ringling Bros. is to slap "sanctuary" in the title of the operation. Not only does this strategy evoke sympathy from critical demographics, it may serve as a driver of further revenue.[46] The public at large does not know the nuanced differences between a state-registered public charity, a 501(c)(3), and a for-profit operation that claims to be a "rescue" or "sanctuary."[47] It is very likely that members of the general public could think they are donating money to a registered, above-board, charity when they are simply handing over money to a road-side zoo.[48]

3. Are Sanctuaries and Pseudo-Sanctuaries Regulated?

Many people assume that all animals are protected by the Animal Welfare Act (AWA), as the name implies.[49] However, research suggests that very few people understand basic components of the

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[46] *See* Sean Norris, *The Art of the Rebrand: When, Why and How to Rebrand Your Nonprofit*, NONPROFIT PRO (July 14, 2015), https://www.nonprofitpro.com/article/art-rebrand-rebrand-nonprofit/all/ ("[M]ore than 50 percent of nonprofits that rebrand report that they've seen an increase in their revenue.").

[47] *See* Mckenzee Griffler, *Starting a Nonprofit Organization for Animal Sanctuaries in the United States*, OPEN SANCTUARY PROJ. (Aug. 19, 2020), https://opensanctuary.org/article/starting-a-non-profit-organization-for-animal-sanctuaries-in-the-united-states/ (explaining the difference between a public charity, a 501(c)(3), and a for-profit operation).

[48] *Cf. Before You Donate*, GLOB. FED'N OF ANIMAL SANCTUARIES, https://www.sanctuaryfederation.org/how-to-help/before-you-donate/ (last visited May 10, 2022).

[49] Mitchell M. Metzger, *Knowledge of the Animal Welfare Act and Animal Welfare Regulations Influences Attitudes Toward Animal Research*, 54 J. AM. ASS'N. FOR LAB'Y ANIMAL SCI. 70, 71 (2015) (drawing attention to a previous 1996 article that found that 19% of undergraduate psychology students were able to correctly answer a similar question, implying that the majority of educated students that may conduct research that falls under the AWA were not familiar with the basic mechanics of the law); *see* S. Plous, *Attitudes Toward the Use of Animals in Psychological Research and Education: Results from a National Survey of Psychology Majors*, 7 PSYCH. SCI. 352, 355 (1996).

AWA; one study found that only 2.5% of participants accurately identified which animals were protected by the Act.[50] Beyond which animals are protected, many people may be surprised to see how the AWA is actually administered and enforced.[51]

The basic regulatory scheme of the AWA requires persons engaging in regulated activities to receive a license from the United States Department of Agriculture (USDA) and abide by minimum care standards promulgated by the USDA Animal and Plant Health Inspection Service (APHIS).[52] Regulated activities include breeding, dealing, exhibition, and experimentation.[53] The AWA regulations set standards for the minimum care, treatment, transportation, and housing requirements of animals covered by the Act as well as record-keeping requirements.[54]

Despite the name, the AWA does not apply to most animals.[55] Arguably, it was not designed to.[56] The AWA as it is known today began as the Laboratory Animal Welfare Act of 1966, and accordingly,

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[50] Metzger, s*upra* note 49, at 74.

[51] Because this Article is limited to a discussion of animals in captivity, this discussion on other regulated activities like breeding, dealing, and research is limited. *See* Animal Welfare Act, 7 U.S.C. §§ 2131–2136 for provisions concerning other regulated activities.

[52] *Id.* §§ 2133–2134 (registration and licensing); *id.* § 2143 (a)(2)(A) (requiring the USDA to promulgate standards that "include minimum requirements for handling, housing, feeding, watering, sanitation, ventilation, shelter from extremes of weather and temperatures, adequate veterinary care, and separation by species where the Secretary finds necessary"); 7 C.F.R. § 2.22(a)(2)(vi) (2021) (authorizing APHIS' authority over the Laboratory Animal Welfare Act, which is now known as the AWA).

[53] 9 C.F.R. §§ 2.1, 2.30 (1989).

[54] *See generally id.* §§ 3.1–3.142 (1967).

[55] 7 U.S.C. § 2132(g) (defining *animal* as "any live or dead dog, cat, monkey (nonhuman primate mammal), guinea pig, hamster, rabbit, or such other warm-blooded animal, as the Secretary may determine is being used, or is intended for use, for research, testing, experimentation, or exhibition purposes, or as a pet").

[56] *Animal Dealer Regulation: Hearings on S. 2322, S. 3059, and S. 3138 Before the S. Comm. on Com.*, 89th Cong. 14 (1966) (statement of Sen. Joseph S. Clark) ("The bill in no way curtails, curbs, or governs the handling of animals during or after experimentation. That kind of regulation would belong in a humane treatment bill . . . .").

only applied to animals used in experimentation.[57] But, more specifically, Congress enacted this law following public concern spurred by 1965 *Life* and *Sports Illustrated* exposés on "dog farms" and pet theft.[58] According to these articles, the animal laboratory suppliers would kidnap household pets to supply their dog farms.[59] Once on the farms, the dogs were kept in deplorable conditions, inspiring the *Life* article's title: *Concentration Camp for Dogs*.[60] Congress responded by regulating the purchase and sale of animals and setting minimum standards of care and housing for dogs, cats, primates, rabbits, hamsters, and guinea pigs—the animals most often kept as pets.[61] Interestingly, the incredible majority of animals used for experimentation, such as rats and mice, are explicitly excluded from protection.[62]

Since 1966, Congress has amended the AWA and has expanded protections to some animals not previously covered.[63] Under the AWA, *animal* is now defined as:

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[57] 7 U.S.C. §§ 2131–2156 ("[T]o insure that animals intended for use in research facilities . . . are provided humane care and treatment . . . it is essential to regulate . . . the transportation, purchase, sale, housing, care, handling, and treatment of such animals by carriers or by persons or organizations engaged in using them for research or experimental purposes or for exhibition purposes or holding them for sale as pets or for any such purpose or use.").

[58] *Id.* §§ 2131(1), 2131(3) ("The Congress finds that . . . regulation of animals and activities as provided in this chapter is necessary to prevent and eliminate burdens upon such commerce and to effectively regulate such commerce, in order—(1) to insure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment . . . [and] (3) to protect the owners of animals from the theft of their animals by preventing the sale or use of animals which have been stolen.").

[59] Benjamin Adams & Jean Larson, *Legislative History of the Animal Welfare Act*, ANIMAL WELFARE INFO. CTR., https://web.archive.org/web/20130327214345/http://www.nal.usda.gov/awic/pubs/AWA2007/intro.shtml.

[60] *Id.*

[61] 7 U.S.C. §§ 2131–2156.

[62] *Id.* § 2132(g) (excluding cold-blooded animals, birds, rats, and mice bred for research from the definition of *animal*); *Animal Welfare Act*, ANIMAL WELFARE INST., https://awionline.org/content/animal-welfare-act (last visited May 10, 2022) (estimating that 95% of all animals used in research are excluded from protection).

[63] *See, e.g.*, 7 U.S.C. § 2156(f)(4) (amending the AWA in December 2019 to prohibit

> [A]ny live or dead dog, cat, monkey (nonhuman primate mammal), guinea pig, hamster, rabbit, or such other warm-blooded animal, as the Secretary may determine is being used, or is intended for use, for research, testing, experimentation, or exhibition purposes, or as a pet; but such term excludes (1) birds, rats of the genus Rattus, and mice of the genus Mus, bred for use in research, (2) horses not used for research purposes, and (3) other farm animals, such as, but not limited to livestock or poultry, used or intended for use as food or fiber, or livestock or poultry used or intended for use for improving animal nutrition, breeding, management, or production efficiency, or for improving the quality of food or fiber. With respect to a dog, the term means all dogs including those used for hunting, security, or breeding purposes.[64]

However, many animals used in exhibition are not covered by the AWA, including reptiles, amphibians, and fish.[65] Notably, the definition of *animal* depends *both* on the animal's intended use and their biology. All cold-blooded animals like reptiles, amphibians, and fish are excluded from the definition of *animal*, and are not protected under the Act.[66] But some animals are not considered *animals* under the AWA's definition because of how humans intend to use them. Birds, mice, and rats that are intended to be used for experimentation are not protected, but conceivably the same animals could be protected

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animal fighting and defining *animal* as "any live bird, or any live mammal, except man" as it is used in the animal fighting section exclusively); *see also* ANIMAL WELFARE INST., *supra* note 62 (summarizing the AWA amendments, including the notable 1970 amendment extending the animal definition to include all warm-blooded animals in laboratories).

[64] 7 U.S.C. § 2132(g).

[65] *See id.* (protecting only warm-blooded animals, therefore excluding cold-blooded animals).

[66] *See* Henry Cohen, *The Animal Welfare Act*, 2 J. ANIMAL L. 13, 16 (2006) (providing a detailed history of the term *warm-blooded* as used in the Act, which does not include reptiles, amphibians, and fish).

if they were used for some other purpose.[67] Both horses *not* used for experimentation and "farm animals" that *are* used for experimentation are unprotected under the act.[68] Keeping this definition in mind, it is no wonder why 97.5% of people would misunderstand the AWA.[69]

Many may also be surprised to find out what standard of care the AWA requires. The AWA does not actually prevent all that many activities or require high quality exhibits. Rather, the AWA sets minimum care standards.[70] The AWA does impose administrative and record-keeping requirements, including allowing detailed APHIS inspections of facilities.[71] Further, the Act requires that each exhibitor has an attending veterinarian who is competent to treat each animal.[72] Animal care standards are broken into sections based on the animal species: dogs and cats; guinea pigs and hamsters; rabbits; non-human primates; marine mammals; and all other warm-blooded animals.[73] Each section is then divided into standards for facilities, animal health and husbandry, and transportation.[74] While the Act's regulations are relatively lengthy and can be quite specific for some categories of animals, it is important to note that quantity does not necessarily mean quality as the AWA sets *minimum* standards.[75] Certainly, regulated animals were far more vulnerable to abuse, exploitation, violence, and

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[67] *Id.* at 19–20.

[68] *See* ERIN H. WARD, CONG. RSCH. SERV., R46672, FEDERAL STATUTES PROTECTING DOMESTICATED AND CAPTIVE ANIMALS 2 (2021).

[69] Metzger, *supra* note 49, at 74 (referencing a study where "only 2.5% of the sample answered the first question (species covered by the AWA) entirely correctly," which implies that the majority of educated students that may conduct research that falls under the AWA were not familiar with the basic mechanics of the law); *see* Plous, *supra* note 49.

[70] 7 U.S.C. § 2143(a)(2).

[71] *See, e.g.*, 9 C.F.R. §§ 2.1–2.12 (1989).

[72] 9 C.F.R. § 2.40 (2021). As part of the veterinary care, the exhibitor must ensure there is a veterinary plan that accounts for "[t]he use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, and the availability of emergency, weekend, and holiday care." Additionally, exhibitors must provide for "[d]aily observation of all animals to assess their health and well-being," though the observation does not need to be by a veterinarian as long as there is a way to contact the attending veterinarian.

[73] *See generally* 9 C.F.R. §§ 3.1–3.142 (1967) (listing each subpart subject).

[74] *Id.*

[75] 7 U.S.C. § 2143(a)(2).

neglect prior to the AWA and its amendments.[76] However, when people see questionable conditions or activities at regulated facilities, they should not assume that the animals are being treated humanely because the AWA does not prevent all inhumane situations.[77]

Not only are many animals exempted from the AWA's protection of minimum care requirements, but enforcement of these minimum standards is insufficient and diminishing.[78] A recent review of agency enforcement actions conducted by People for the Ethical Treatment of Animals (PETA) found that "[b]etween FY2015 and FY2020, enforcement actions brought against AWA licensees plummeted by 90 percent, settlement agreements dropped by 86 percent, and warnings plunged by 100 percent." [79]

For decades, the USDA has been unable to adequately enforce the AWA. Since at least 1992, the USDA Office of the Inspector General (OIG) audits have found significant flaws in APHIS' ability to

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[76] *See, e.g.*, *Care of Animals Used for Research, Experimentation, Exhibition, or Held for Sale as Pets: Hearings on H.R. 13957 Before the H. Comm. on Agric.*, 91st Cong. 24–25 (1970) (statement of S. E. Badger). Discussing her career with captive animals during the debate to amend the AWA to include animals used in exhibition, Badger noted: "People come to look at them . . . and they do not know very much about them, they assume they are all right, they cannot see the cages very well, because usually they are dark. . . . No one worried about it. We, who worked there, were always pleased when some animal died to be out of a miserable life."

[77] *See, e.g.*, *Big Cat Public Safety Act*, ANIMAL WELFARE INST., https://awionline.org/legislation/big-cat-public-safety-act (last visited May 10, 2022) (urging support for the pending Big Cat Safety Act to protect big cats from, among other things, exploitative "cub petting" which is currently permissible under the AWA, and claiming that cub petting "fuels a vicious cycle of breeding and dumping . . . . After [the cats] outgrow their usefulness and profitability at about 12 weeks old, these cubs are funneled into the exotic pet trade, sold to another disreputable exhibitor, or killed to supply the black market trade for wildlife parts.").

[78] *Cf.* Rachel Fobar, *USDA Accused of Ignoring Animal Welfare Violations in Favor of Business Interests*, NAT'L GEO. (Oct. 13, 2021), https://www.nationalgeographic.com/animals/article/usda-accused-of-ignoring-animal-welfare-for-business-interests ("Between 2015 and 2020, U.S. enforcement actions brought against licensed animal facilities fell by 90 percent, according to a PETA assessment.").

[79] Letter from Rachel Mathews, Dir. of Captive Animal L. Enf't, PETA, to Thomas J. Vilsack, Sec'y of Agric., U.S. Dep't of Agric. & Phyllis K. Fong, Inspector General, U.S. Dep't of Agric. (June 3, 2021) (on file with PETA).

enforce the AWA.[80] The 1992 OIG report concluded that "APHIS could not ensure the humane care and treatment of animals at all dealer facilities as required by AWA" because the Agency did not inspect facilities frequently enough and did not penalize violators.[81] A follow-up 1995 audit revealed that the Agency "did not fully address problems disclosed in the prior report."[82] A 2005 audit concluded that "[d]ue to a lack of clear National guidance, [Animal Care]'s Eastern Region is not aggressively pursuing enforcement actions against violators of the AWA."[83] The audit found: issues in the rate of enforcement; frequent discounting of fines for violations; unreliable tracking of violation histories; and APHIS mismanagement of $398,354 worth of delinquent penalty payments.[84]

In 2010, the OIG audit concluded that, in attempting to address problematic animal dealers, Animal Care "chose to take little or no enforcement action against most violators" including repeat violators that "ignored minimum care standards."[85] A significant number of inspectors did not correctly report some of the more serious violations that affect animal health.[86] The lack of adequate reporting led to problems later during an administrative hearing against dealers.[87] Further, penalties continued to be minimal, and in nearly one-third of cases APHIS misused penalty guidelines to lower penalties for violators.[88] That same year, the OIG conducted an audit of animal

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[80] U.S. DEP'T OF AGRIC., OFF. OF INSPECTOR GEN., ANIMAL AND PLANT HEALTH INSPECTION SERVICE ANIMAL CARE PROGRAM INSPECTIONS OF PROBLEMATIC DEALERS, AUDIT REP. 33002-4-SF 6 (2010) [hereinafter INSPECTIONS OF PROBLEMATIC DEALERS] (noting that a 1992 OIG audit found that "APHIS could not ensure the humane care and treatment of animals at all dealer facilities as required by AWA" and that a follow up 1995 audit found that "that APHIS did not fully address problems disclosed in the prior report").

[81] *Id.*

[82] *Id.*

[83] *See* U.S. DEP'T OF AGRIC., OFF. OF INSPECTOR GEN., W. REGION APHIS ANIMAL CARE PROGRAM INSPECTION AND ENFORCEMENT ACTIVITIES, AUDIT REP. 33002-3-SF i (2005). The Animal Care Unit's Eastern Region covers Minnesota, Puerto Rico, and states east of the Mississippi River.

[84] *Id.* at ii–iii.

[85] INSPECTIONS OF PROBLEMATIC DEALERS, *supra* note 80, at 8.

[86] *Id.*

[87] *Id.*

[88] *Id.* at 30.

exhibitor licensing.[89] That audit found that inspectors did not report safety issues because they were not given sufficient guidance to conduct their inspections.[90] Additionally, the report noted significant issues with inspectors being unable to locate traveling exhibitors.[91]

In 2017, when addressing enforcement of marine mammal care standards, the OIG concluded "[i]nspections are not always uniformly completed or adequately documented because of insufficient guidance; this reduces assurance that those exhibitors are in compliance with the AWA."[92] A 2021 audit focusing on oversight of dog breeders found that information maintained by APHIS' Animal Care Information System database is unreliable due to mismanagement.[93] Further, APHIS did not "consistently address complaints it received or adequately document the results of its follow-up," resulting in potentially unregulated dog breeding.[94] Another 2021 audit focusing on licensing of animal exhibitors concluded that due to a lack of oversight, "APHIS cannot fully ensure the safety of animals exhibited or the safety of the public who view those animals."[95]

Even in light of its consistently poor enforcement history, APHIS formalized its "Teachable Moments" practice in 2016.[96] APHIS inspectors began using Teachable Moments as an alternative to citing licensees for violations for *minor noncompliant items*.[97] Teachable Moment violations are still violations of the AWA, but in theory will be corrected quickly, are not affecting animal welfare, and

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[89] U.S. DEP'T OF AGRIC., OFF. OF INSPECTOR GEN., CONTROLS OVER APHIS LICENSING OF ANIMAL EXHIBITORS, AUDIT REP. NO. 33601-10-CH 1 (2010), https://www.usda.gov/sites/default/files/33601-10-CH.pdf.
[90] *Id.* at 2.
[91] *Id.*
[92] U.S. DEP'T OF AGRIC., OFF. OF INSPECTOR GEN., APHIS: ANIMAL WELFARE ACT – MARINE MAMMALS (CETACEANS), AUDIT REP. 33601-0001-31 (2017).
[93] U.S. DEP'T OF AGRIC., OFF. OF INSPECTOR GEN., ANIMAL CARE PROGRAM OVERSIGHT OF DOG BREEDERS, AUDIT REP. 33601-0002-31 3 (2021).
[94] *Id.* at 6.
[95] U.S. DEP'T OF AGRIC., OFF. OF INSPECTOR GEN., FOLLOW-UP TO ANIMAL AND PLANT HEALTH INSPECTION SERVICE'S CONTROLS OVER LICENSING OF ANIMAL EXHIBITORS, AUDIT REP. 33601-0003-23 (2021).
[96] B. Taylor Bennett & Matthew R. Bailey, *Adapting to Change: The USDA's 'Teachable Moment*,*'* 45 LAB ANIMAL 207, 207 (June 2016).
[97] *Id.*

have not been previously cited.[98] The Teachable Moments practice has been criticized as a way to avoid public disclosure of violations and enable violators to continue to operate.[99]

Depending on the animals being exhibited, a captive animal operation may be required to comply with the Endangered Species Act (ESA).[100] The ESA, enforced primarily by the U.S. Fish and Wildlife Service (USFWS), applies to animals classified as *endangered* or *threatened*.[101] If an animal is covered by the ESA, no person may use the animal in interstate or international commerce unless they receive a permit to do so.[102] Further, no person may "take" a protected species without a permit.[103] Under the ESA, to *take* means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."[104]

The ESA applies to captive animals in two major ways: (1) exhibitors must receive a permit from USFWS to obtain or sell an endangered species in interstate commerce;[105] and (2) while an endangered species is held captive, no person may harm or harass the animal.[106] However, the AWA somewhat undercuts the latter requirement. *Harass* is defined by regulation as "an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt

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[98] *USDA Animal Care Revises Its Animal Welfare Inspection Guide USDA Animal Care Revises Its Animal Welfare Inspection Guide*, ANIMAL AND PLANT HEALTH INSPECTION SERV. (U.S. Dep't of Agric., Washington, D.C.), (Jan. 26, 2016), https://content.govdelivery.com/accounts/USDAAPHIS/bulletins/13044a6.

[99] *See, e.g.*, Press Release, David Perle, PETA, PETA Statement: Spending Bill Tackles USDA Secrecy, (June 5, 2019) (on file with PETA), https://www.peta.org/media/news-releases/peta-statement-spending-bill-tackles-usda-secrecy/ ("So-called 'teachable moments' are thinly veiled attempts to shield violators from public scrutiny and should never have been allowed.").

[100] *See Captive Animals*, ANIMAL LEGAL DEF. FUND, https://aldf.org/focus_area/captive-animals/ (last visited Mar. 21, 2022).

[101] Endangered Species Act, 16 U.S.C. §§ 1533(a)–(b) (2018). USFWS is part of the Department of the Interior, and the Secretary of the Interior is primarily responsible for ESA enforcement.

[102] *Id.* §§ 1538(a)(1), 1539(a)(1).

[103] *Id.* §§ 1538 (a)(1)(B)–(C).

[104] *Id.* § 1532(19).

[105] *Id.* § 1539(a)(1).

[106] Kuehl v. Sellner, 887 F.3d 845, 852 (8th Cir. 2018).

normal behavioral patterns which include, but are not limited to, breeding, feeding or sheltering."[107] However, as it applies to captive animals, *harass* does not include practices that meet or exceed the minimum care standards in the AWA.[108] Simply holding a license under the AWA does not provide shelter if the facility is still otherwise violating the AWA.[109] The regulatory definition of *harm*, does not include the same deference to the AWA: *harm* is defined as "an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering."[110] This interpretation of the ESA was supported in *Kuehl v. Sellner*, a 2018 Eighth Circuit case challenging the Cricket Hollow Zoo's treatment of captive endangered species.[111] The court in *Sellner* affirmed the lower court's finding that the Sellners' frequent AWA violations and treatment of endangered lemurs and tigers amounted to harm and harassment.[112] This means that a captive animal facility that kills or injures endangered species without a permit or fails to meet AWA care requirements may be violating the ESA.[113]

Importantly, the ESA does not establish care requirements but only prohibits certain activities without first obtaining a license and protects only specifically listed species.[114] The AWA does establish minimum care requirements, but those requirements only apply to a minority of animals.[115] Whether an animal is protected by law is only part of the equation—the AWA depends on government enforcement

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[107] 50 C.F.R. § 17.3(c) (1981).
[108] *Id.*
[109] *Kuehl*, 887 F.3d at 852.
[110] *Id.* (quoting 50 C.F.R. § 17.3(c)).
[111] *Kuehl*, 887 F.3d at 848.
[112] *Id.* at 853–54.
[113] *Id.* at 852.
[114] Endangered Species Act, 16 U.S.C. § 1538(a).
[115] *See supra* text accompanying notes 62–68.

which has been consistently insufficient.[116] The ESA does allow citizen suits, but as stated, the ESA applies only to some animals.[117]

So, what happens to the cold-blooded and non-endangered species? Some animals may be protected by state animal cruelty laws. State laws rarely provide specific requirements for animals, and if so, usually only encompass adequate food, water, shelter, and potentially veterinary care.[118] More often, state laws prohibit unjustified cruelty to animals such as torture, overloading, sexual contact, or withholding veterinary treatment.[119] But these laws generally make exceptions for: accepted animal husbandry practices; animals used for food or fiber; wildlife used for hunting; animals used for experimentation; "nuisance" animals; or whatever the state considers "justified" harm.[120] Even where an animal should be protected by state law, enforcement may still pose a substantial barrier to adequate protection.[121]

In reality, captive animals have very few meaningful legal protections. The treatment of captive animals is further complicated by trade association requirements. The Association of Zoos and Aquariums (AZA) is widely recognized by American consumers.[122] However, it remains unclear whether the general public understands what AZA accreditation—or any private accreditation—actually means.[123] Muddying the waters even more, is the presence of other accrediting groups that lend an air of credibility without actually requiring much from their members—if they require anything above legal compliance.[124] Given this complex legal framework, rife with

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[116] *See supra* text accompanying notes 77–97.
[117] *See* 16 U.S.C. § 1540(g) (allowing citizen suits to protect endangered or threatened species).
[118] Rebecca F. Wisch, *Brief Summary of State Cruelty Laws*, ANIMAL LEGAL & HIST. CTR. (2010), https://www.animallaw.info/intro/state-anti-cruelty-laws.
[119] *Id.*
[120] *See id.*
[121] *See id.* (listing enforcement issues such as "limited resources, incomplete investigations, pressure from the community to focus on other crimes, and even the personal feelings of the prosecutor toward animal abuse").
[122] *Benefits of Accreditation*, ASSOC. OF ZOOS AND AQUARIUMS, aza.org/benefits-of-accreditation?locale=en (last visited May 10, 2022).
[123] Winders, *supra* note 2, at 168.
[124] *Id.* at 165.

exceptions, it is easy to see how consumers can easily be misled by the unregulated claims of exhibitors.

B. Consumer Protection Law & Policy

While each consumer protection law is drafted differently with unique policy goals in mind, the underlying principle is the same: creating a fair market for businesses and consumers.[125] When facilities call themselves sanctuaries, consumers have expectations about the way animals are treated there.[126] The higher quality of care consumers expect from a sanctuary justifies their donation. When facilities fail to provide that quality of care, consumers should have some form of recourse.

Consumer protection laws have wide applicability, making them potentially useful for holding pseudo-sanctuaries accountable. Consumer protection laws also provide multiple forms of relief such as injunctions,[127] monetary damages,[128] and even punitive damages[129] in the most egregious cases. These laws may empower individuals to hold accountable pseudo-sanctuaries that deceptively solicited donations or delivered an experience far different from that advertised. Genuine sanctuaries may also have a cause of action against pseudo-sanctuaries

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[125] *See e.g.*, Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts*, 54 U. KAN. L. REV. 1, 8 (2005) (describing the Federal Trade Commission's dual purposes in regulating commercial activity and false advertising).

[126] *See* Rachel Hartigan, *Are Wildlife Sanctuaries Good for Animals?*, NAT'L GEO., (Mar. 20, 2014), https://www.nationalgeographic.com/animals/article/140320-animal-sanctuary-wildlife-exotic-tiger-zoo ("Animal lovers go to wildlife sanctuaries because they want to see animals up close and because they believe sanctuaries are in the business of taking care of animals that have nowhere else to go.").

[127] *See* DEE PRIDGEN ET AL., CONSUMER PROTECTION AND THE LAW § 6.9, fn. 2, Westlaw (database updated Nov. 2021) (listing the 33 states with private injunction remedies).

[128] *See* Syreeta Tyrell & Matthew du Mee, *Restitution: The Superior Remedy*, NAT'L ASSOC. OF ATT'YS GEN. (May 3, 2021), https://www.naag.org/attorney-general-journal/restitution-the-superior-remedy/ (discussing the benefits of restitution damages in consumer protection actions).

[129] *See* PRIDGEN ET AL., *supra* note 127, § 6.16, n.1 (listing the nine states with punitive damages available as relief in consumer protection cases).

that unfairly use the genuine sanctuaries' good reputation enable captive animal exploitation.[130] Similarly, advocacy groups may be able to show that pseudo-sanctuaries have frustrated their animal protection mission, requiring them to spend their limited resources.[131] These private causes of action may prove invaluable given that the government does not adequately enforce existing animal protection laws.

1. The Lanham Act

This Part looks at the Lanham Act's False Advertising section as a federal law that can be used without relying on government enforcement. The Lanham Act can only be used by a business competitor, but the underlying policy is still that of consumer protection.[132] The Lanham Act could possibly be used by a genuine sanctuary that is in competition with a pseudo-sanctuary.

The Lanham Act is a federal trademark law that includes consumer protection by preventing unfair competition through false advertising.[133] The false advertising provision is designed to make "actionable the deceptive and misleading use of marks in such commerce" and "protect persons engaged in such commerce against unfair competition."[134] The Lanham Act creates a cause of action for a business to sue a competitor for business practices that unfairly skew the market to favor the competitor.[135]

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[130] *Cf.* Paleteria La Michoacana, Inc. v. Productos Lacteos Tocumbo S.A. De C.V., 69 F. Supp. 3d 175, 216 (D.D.C. 2014) (stating that the complainant successfully showed that a competing ice cream manufacturer attempted to use the complainant's "business reputation and goodwill" for the defendant's benefit).

[131] *See, e.g.*, Animal Legal Def. Fund v. Hormel Foods Corp., 258 A.3d 174, 179 (D.C. 2021) (finding non-profit ALDF had standing under D.C. consumer protection law to challenge false advertising by Hormel).

[132] POM Wonderful LLC v. Coca-Cola Co., 573 U.S. 102, 107 (2014) ("The Lanham Act creates a cause of action for unfair competition through misleading advertising or labeling. Though in the end consumers also benefit from the Act's proper enforcement, the cause of action is for competitors, not consumers.").

[133] *Id.*

[134] 15 U.S.C. § 1127.

[135] *POM Wonderful LLC*, 573 U.S. at 107; *see also* Keebler Co. v. Rovira Biscuit

The false advertising section is divided into two distinct kinds of claims.[136] Section 43(a)(1)(A) applies to "false designation of origin" or "'passing off.'"[137] This subsection is a more traditional trademark protection approach, designed to prevent consumer confusion as to the "affiliation, connection, or association" or "the origin, sponsorship, or approval" of the goods or services at issue.[138] Section 43(a)(1)(B) applies to false advertising that misrepresents the "nature, characteristics, qualities, or geographic origin" of the goods or services advertised.[139] This Part analyzes the latter.[140]

Notably, the Lanham Act only gives competitors a cause of action, not consumers.[141] Proper plaintiffs need to be within the "zone of interests" protected by the Lanham Act where the defendant's action is the proximate cause of the plaintiff's injury.[142] The Supreme Court has found that the Lanham Act's zone of interests requires a plaintiff show "an injury to a commercial interest in reputation or sales. A consumer who is hoodwinked into purchasing a disappointing product

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Corp., 624 F.2d 366, 372–73 (1st Cir. 1980) (citing Alfred Dunhill, Ltd. v. Interstate Cigar Corp., 499 F.2d 232, 236–37 (2d Cir. 1974)) ("The protection afforded by § 43(a) was designed to expand the rights of a 'purely commercial class' against the unscrupulous practices of their business competitors."), *overruled by* Miller Brewing Co. v. Falstaff Brewing Corp., 655 F.2d 5, 7 (1981) (overruling *Keebler* on a separate issue not related to the court's interpretation of § 43(a)).

[136] THOMAS M. WILLIAMS, FALSE ADVERTISING AND THE LANHAM ACT: LITIGATING SECTION 43(A)(1)(B) 5 (2012).

[137] *Id.* at 5–6.

[138] *Id.* (quoting Trademark Act of 1946 (Lanham Act) § 43(a)(1)(A), 15 U.S.C. § 1125(a)(1)(A)).

[139] *Id.* at 6 (quoting 15 U.S.C. § 1125(a)(1)(B)).

[140] At first read, it might seem that the trademark section (§ 43(a)(1)(A)) would also apply because a pseudo-sanctuary deceives people by attempting to pass as a genuine sanctuary. However, the term *sanctuary* is likely considered a generic term incapable of trademark protection because the term *sanctuary* and related terms describe the way in which the facility engages with the animals rather than a discrete and identifiable service. *See* Gimix, Inc. v. JS & A Grp., Inc., 699 F.2d 901, 906 (7th Cir. 1983) (quoting Union Carbide Corp. v. Ever-Ready Inc., 531 F.2d 366, 378 (7th Cir. 1976)) (describing generic terms as "merely descriptive of the ingredients, qualities, or characteristics of an article of trade" rather than denoting a specific source of a good or service).

[141] POM Wonderful LLC v. Coca-Cola Co., 573 U.S. 102, 107–08 (2014).

[142] Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 130 (2014).

may well have an injury-in-fact . . . , but he cannot invoke the protection of the Lanham Act."[143] Further, a competitor need not be a *direct* competitor, but the plaintiff must still show proximate causation between the defendant's acts and the plaintiff's commercial injury.[144]

To successfully use the Lanham Act against a competitor for misleading advertising, the plaintiff must show that the defendant: (1) made false or misleading statements about the plaintiff or defendant's services or product; (2) through advertisements or promotions in interstate commerce; (3) that misrepresent "the nature, characteristics, qualities, or geographic origin of" the product or service;[145] (4) the deception is material to the target consumer's purchasing decision; (5) the advertisements have deceived, or are likely to deceive, consumers; and (6) causing, or likely to cause, the plaintiff injury.[146]

The false statement can be either literally false, false by necessary implication, or literally true but nonetheless misleading.[147] A literally false statement is one that makes a factual statement that is plainly false on its face.[148] Judge Posner describes a literally false statement as "bald-faced, egregious, undeniable, over the top."[149] However, if the challenged statement is ambiguous, and thus has more than one reasonable interpretation, it cannot be considered literally

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[143] *Id*. at 132.

[144] *Id.* at 134 (citing Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 458 (2006) ("For example, while a competitor who is forced out of business by a defendant's false advertising generally will be able to sue for its losses, the same is not true of the competitor's landlord, its electric company, and other commercial parties who suffer merely as a result of the competitor's 'inability to meet [its] financial obligations.'" (insertion in original)).

[145] 15 U.S.C. § 1125(a)(1)(B).

[146] J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 27:24, Westlaw (5th ed. database updated Dec. 2021) (detailing elements of a prima facie case under § 43(a)(1)(B) for false misrepresentation); WILLIAMS, s*upra* note 136, at 38–39.

[147] *See generally* Church & Dwight Co., Inc. v. SPD Swiss Precision Diagnostics, GMBH, 843 F.3d 48, 65 (2d Cir. 2016) (showing how a pregnancy test advertisement was impliedly false).

[148] Fair Isaac Corp. v. Experian Info. Sols., Inc., 650 F.3d 1139, 1151 (8th Cir. 2011).

[149] Schering-Plough Healthcare Prods., Inc. v. Schwarz Pharma, Inc., 586 F.3d 500, 513 (7th Cir. 2009).

false.[150] This is because a literally false statement, as compared to a misleading statement, does not require the complainant to show actual deception.[151] The court assumes that a literally false statement has probably misled some people and was made for "a malign purpose."[152]

A false statement by necessary implication is a statement that unambiguously and necessarily leads the listener to believe a falsehood.[153] False statements by necessary implications "leave[] 'an impression on the listener or viewer that conflicts with reality.'"[154] The court found a possible false statement by necessary implication in a TV advertisement for a satellite TV company in *Time Warner Cable.*[155] In an advertisement by DirectTV, William Shatner (playing Captain Kirk from *Star Trek*) states that "settling for cable would be illogical," much to Mr. Spock's umbrage.[156] Though William Shatner did not outright say that cable is clearly inferior to satellite TV, that was the necessary implication from the statement in that context.[157] A false statement by necessary implication is still a false statement, and accordingly receives the same evidentiary benefits as a literally false statement.[158]

A particularly useful aspect of the Lanham Act is that it does not require the plaintiff to show intent to deceive.[159] However, if the plaintiff can show an intent to deceive and literal falsity, some courts will presume injury to the plaintiff and/or consumer deception.[160] Showing literal falsity is also preferred because relying on misleading

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[150] Time Warner Cable, Inc. v. DIRECTV, Inc., 497 F.3d 144, 158 (2d Cir. 2007).
[151] *See Schering-Plough Healthcare Prods., Inc*., 586 F.3d at 512.
[152] *Id.*
[153] *Time Warner Cable, Inc.*, 497 F.3d at 158 .
[154] Church & Dwight Co., Inc. v. SPD Swiss Precision Diagnostics, GMBH, 843 F.3d 48, 65 (2d Cir. 2016) (quoting *Time Warner Cable, Inc.*, 497 F.3d at 153).
[155] *Time Warner Cable, Inc.*, 497 F.3d at 158.
[156] *Id.*
[157] *Id.*
[158] *See* Richard J. Leighton, *Literal Falsity by Necessary Implication: Presuming Deception Without Evidence in Lanham Act False Advertising Cases*, 97 TRADEMARK REP. 1286, 1287 (2007).
[159] *See* Suntree Techs., Inc. v. Ecosense Int'l, Inc., 693 F.3d 1338, 1348 (11th Cir. 2012) (listing the prima facie elements in a Lanham Act false advertising case).
[160] MCCARTHY, *supra* note 146, § 27:51.

statements requires the plaintiff to show extrinsic evidence of consumer confusion.[161]

A misleading statement may be a statement that is not literally false, but a reasonable person would nonetheless be misled.[162] To establish a misleading statement, there must be evidence that ordinary consumers are misled.[163] However, a term is not misleading simply because the defendant's use does not align with the plaintiff's chosen meaning.[164] Similarly, if there is proof that consumers misunderstand a literally true statement, such evidence may be insufficient to show consumer deception.[165] Misunderstanding a plainly true and unambiguous statement is not equivalent to being misled.[166] Further, plaintiffs cannot claim a statement is misleading where the defendant's advertisement clarifies the meaning of a term, thus removing any ambiguity.[167]

Whether false or misleading, courts require the plaintiff to show that the misrepresentation was material.[168] A material misrepresentation often involves an "inherent quality or characteristic" of the product or service.[169] The misrepresentation must be material in that it is likely to influence purchasing decisions.[170]

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[161] MALLA POLLACK, 111 AM. JUR. TRIALS 303, Westlaw (2d ed. database updated Feb. 2022).
[162] Johnson & Johnson * Merck Consumer Pharms. Co. v. Smithkline Beecham Corp., 960 F.2d 294, 297 (2d Cir. 1992).
[163] *Id*. at 298.
[164] First Health Grp. Corp. v. BCE Emergis Corp., 269 F.3d 800, 804–05 (7th Cir. 2000).
[165] Mead Johnson & Co. v. Abbott Lab'ys, 209 F.3d 1032, 1034 (7th Cir. 2000).
[166] Pernod Ricard USA, LLC v. Bacardi U.S.A., Inc., 653 F.3d 241, 252 (3d Cir. 2011) ("[T]here are circumstances under which the meaning of a factually accurate and facially unambiguous statement is not open to attack through a consumer survey. In other words, there may be cases, and this is one, in which a court can properly say that no reasonable person could be misled by the advertisement in question.").
[167] *Id.* (finding that the term *Havana Club* is not misleading because the phrase is not interpreted in isolation and the label makes clear the product was from Puerto Rico).
[168] *See e.g.*, N. Am. Med. Corp. v. Axiom Worldwide, Inc., 522 F.3d 1211, 1224 (11th Cir. 2008).
[169] Nat'l Ass'n of Pharm. Mfrs., Inc. v. Ayerst Lab'ys, Div. of/& Am. Home Prods. Corp., 850 F.2d 904, 917 (2d Cir. 1988).
[170] Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911 F.2d 242, 245 (9th Cir. 1990).

The actionable misrepresentation must be from an interstate advertisement or promotion.[171] Showing the interstate commerce requirement of the Lanham Act is fairly simple in the internet age. Internet advertising is consistently considered interstate commerce.[172] Some courts have even gone as far as finding interstate activity where the defendant's *intrastate* activities affected the plaintiff's interstate sales. Whether the statement was made in an advertisement and promotion is often analyzed by determining whether the statement was "(1) commercial speech; (2) by a defendant who is in commercial competition with plaintiff; (3) for the purpose of influencing consumers to buy defendant's goods or services[;]' and (4) 'the representations . . . [sic] must be disseminated sufficiently to the relevant purchasing public to constitute 'advertising' or 'promotion' within that industry."[173] Commercial speech generally is a statement made for commercial or economic interests.[174] Read together, an actionable statement must be made for commercial purposes with the intent to persuade consumers to purchase a specific good or service where the statement is actually disseminated to the target audience. While this definition is expansive, it does not include all statements that represent an opinion or misrepresent a fact.[175] Whether a statement is commercial becomes more difficult when the statement is soliciting donations for a non-profit. The Supreme Court established that:

> Soliciting financial support is undoubtedly subject to reasonable regulation but the latter must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and

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[171] Suntree Techs., Inc. v. Ecosense Int'l, Inc., 693 F.3d 1338, 1348 (11th Cir. 2012) (listing interstate commerce as a required element in a prima facie case of false advertising under the Lanham Act).

[172] *See* Patrick Frye, *An Internet Advertising Service Can Constitute Use in Commerce*, SANTA CLARA COMPUT. & HIGH TECH. L.J. 89, 108 (2005–2006).

[173] Edward Lewis Tobinick, MD v. Novella, 848 F.3d 935, 950 (11th Cir. 2017) (quoting *Suntree Techs., Inc.*, 693 F.3d at 1349) (punctuation in original).

[174] *Id.*

[175] *See* Radiance Found., Inc. v. NAACP, 786 F.3d 316, 326 (4th Cir. 2015) ("[T]he specific use of the marks at issue here was too attenuated from the [NAACP's] donation solicitation and the billboard campaign to support Lanham Act liability.").

> perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues, and for the reality that without solicitation the flow of such information and advocacy would likely cease. Canvassers in such contexts are necessarily more than solicitors for money.[176]

Non-profits are not totally immune to Lanham Act challenges, but solicitations for charitable donations cannot be automatically classified as "purely commercial."[177] To come within the Lanham Act's authority, the statement should clearly be to induce some commercial transaction.[178]

The Lanham Act presents some way for a genuine sanctuary to hold a pseudo-sanctuary accountable. By empowering a genuine sanctuary, the Lanham Act could restore some of the lost donations that are mistakenly given to pseudo-sanctuaries.[179] If there is a settlement or damages awarded to the genuine sanctuary, obviously that monetary award will immediately serve the animals in the genuine sanctuary.[180] If the resolution is in the form of an injunction, at least this may prevent more mistaken donations in the future. In this way, the Lanham Act could serve as a direct means to help captive animals in genuine sanctuaries.

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[176] Vill. of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 633 (1980).
[177] *Radiance Found. Inc.*, 786 F.3d at 326 (quoting *Vill. of Schaumburg*, 444 U.S. at 632).
[178] AvePoint, Inc. v. Power Tools, Inc., 981 F. Supp. 2d 496, 512 (W.D. Va. 2013) (discussing cases where internet advertising was held to be interstate commerce).
[179] *See, e.g.*, Birthright v. Birthright, Inc., 827 F. Supp. 1114, 1143 (D.N.J. 1993) ("In the context of not-for-profit fundraising, an award of all donations made to a willfully infringing defendant emerges from the deterrence rationale for awarding lost profits. This remedy protects the mark by functioning as a deterrent to potential infringers seeking to take advantage of the good will and reputation of a non-profit organization by fundraising under its protected mark. Moreover, it advances the interests of the relevant consuming public by ensuring that contributions reach their likely intended target.").
[180] *See id.*

2. State UDAP Statutes

Every state has its own consumer protection statutes and framework, protecting consumers from unfair and deceptive acts and practices (UDAP).[181] While there are some general similarities between state UDAP statutes, each state varies in interpretation. For that reason, this Part provides a broad overview of UDAP statutes' common features before calling attention to two state consumer protection laws. As discussed below, state UDAP laws tend to be more flexible than federal standards. For this reason, state consumer protection laws may be more effective at holding pseudo-sanctuaries accountable. Further, state UDAP laws directly empower consumers, in this case visitors and donors of pseudo-sanctuaries.

UDAP statutes arose out of common law fraud and breach of warranty actions.[182] At common law, purchasers were often held to *caveat emptor*, or the *buyer beware* standard.[183] This made proving fraud or deception incredibly difficult for ordinary consumers, except in the most egregious cases.[184] UDAP statutes have largely displaced these common law approaches, lowering the barrier to entry for ordinary consumers.[185] Further, every state has a private cause of action under their respective UDAP statutes.[186] UDAP statutes tend to lean strongly in favor of consumers as the purpose of such laws are to protect the consumer.[187] To this end, UDAP statutes tend to be interpreted broadly.[188]

Because the purpose of UDAP statutes is protecting the consumer, the intent of the deceptive actor is not necessarily dispositive

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[181] PRIDGEN ET AL., *supra* note 127, § 3:1.
[182] *Id.* § 2:1.
[183] *Id.*
[184] *Id.* § 2:9.
[185] *Id.*
[186] CAROLYN L. CARTER & JONATHAN SHELDON, NAT'L CONSUMER L. CTR., UNFAIR AND DECEPTIVE ACTS AND PRACTICES 816 (10th ed. 2021).
[187] *See* New York v. Colorado State Christian Coll. of Church of Inner Power, Inc., 346 N.Y.S.2d 482, 489 (N.Y. Sup. Ct. 1973) ("[T]he purpose of the statute is not to punish the wrongdoer but to protect the public.").
[188] CARTER & SHELDON, *supra* note 186, at 815.

to whether a violation has actually occurred.[189] In some states, the UDAP statutes impose *knowing* scienter. However, appeals courts have interpreted *knowing* as closer to an imputed knowledge standard—that the actor *should* have known their actions would be misleading.[190] Even by this standard, the actor does not need to intend to defraud the public, but after reasonable diligence should know their actions could be misleading.

There is considerable variation among the states as to whether, and to what degree, consumers need to show reliance on misleading statements. Some jurisdictions require a showing of justifiable reliance, while others do not. On one end of the reliance spectrum there are states such as New York, which extend protection to those "ignorant, [] unthinking, and [] credulous [consumers] who, in making purchases, do not stop to analyze but are governed by appearances and general impressions."[191] On the other far end are states such as Georgia and Pennsylvania that adhere to a similar standard to the *caveat emptor* standard at common law.[192] Somewhere between these standards is the Federal Trade Commission's "reasonable consumer" standard which asks whether the act is "likely to mislead consumers acting reasonably under the circumstances."[193]

Some states also impose on private litigants (rather than government actors like attorneys general) an actual reliance

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[189] PRIDGEN ET AL., *supra* note 127, § 3:2 (explaining that Missouri, Alabama, Illinois, Utah, Kansas, and Pennsylvania impose some version of an intent to deceive standard, and that Connecticut allows a "good faith" defense to an Unfair Trade Practices Act violation).

[190] *See, e.g.*, Stevenson v. Louis Dreyfus Corp., 811 P.2d 1308, 1311–12 (N.M. 1991) ("We agree that the misrepresentation need not be intentionally made, but it must be knowingly made . . . . The 'knowingly made' requirement is met if a party was actually aware that the statement was false or misleading when made, or in the exercise of reasonable diligence should have been aware that the statement was false or misleading.").

[191] Guggenheimer v. Ginzburg, 372 N.E.2d 17, 19 (N.Y. 1977).

[192] *See* PRIDGEN ET AL., *supra* note 127, §§ 3:1–3:2 (discussing various Georgia and Pennsylvania consumer protection cases).

[193] U.S. FED. TRADE COMM'N, ENFORCEMENT POLICY STATEMENT ON DECEPTIVELY FORMATTED ADVERTISEMENTS 10 (Dec. 22, 2015), https://www.ftc.gov/system/files/documents/public_statements/896923/151222deceptiveenforcement.pdf.

requirement.[194] Therefore, private litigants must show that they actually relied on the seller's actions, causing the complainant actual injury. Further still, states like Illinois impose a proximate causation analysis to the actual reliance requirement.[195] In short, both reliance and causation standards are highly jurisdictionally dependent and are therefore difficult to paint in broad strokes. Yet, many states look to the Federal Trade Commission's (FTC) regulations and analysis to interpret their own legislation.[196]

State UDAP statutes may prove to be an exceptional tool to hold pseudo-sanctuaries accountable because of their flexibility. To demonstrate differences between UDAP laws, California and Florida provide excellent examples.

California has one of the most expansive consumer protection legal frameworks. Additionally, the California UDAP laws have significant case law and interpretation behind them.[197] California consumers have access to the California False Advertising Law (FAL),[198] Consumer Legal Remedies Act (CLRA),[199] and the Unfair

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[194] *See* CLRA, *infra* Part II.B.

[195] Shannon v. Boise Cascade Corp., 805 N.E.2d 213, 217 (Ill. 2004) ("[D]eceptive advertising cannot be the proximate cause of damages under the Act unless it actually deceives the plaintiff.").

[196] PRIDGEN ET AL., *supra* note 127, § 3:22.

[197] *See, e.g.*, Perdue v. Crocker Nat'l Bank, 702 P.2d 503, 510, 513, 524 (Cal. 1985) (applying the UDAP statute to creditors); Quelimane Co., Inc. v. Stewart Title Guaranty Co., 960 P.2d 513, 523–24 (Cal. 1998) (applying the state's UDAP law to rate setting for insurance companies); People *ex rel.* Orloff v. Pac. Bell, 80 P.3d 201, 207–08, 212 (Cal. 2003) (applying the state's unfair competition law to utility services).

[198] CAL. BUS. & PRO. CODE § 17500 (West 2022), *recognized as preempted by* Silvas v. E*Trade Mortg. Corp., 421 F. Supp.2d 1315, 1319 (2006) (holding that the Home Owner's Loan Act expressly preempted state law claims regarding deceptive representations about a federal savings and loan's lending activities, including "its loan related fees or disclosure and advertising practices").

[199] CAL. CIV. CODE § 1750 (West 2022), *limited on preemption grounds by* Perez v. Nidek Co. Ltd., 657 F. Supp. 2d 1156, 1164 (S.D. Cal. 2009) (holding that the Food, Drug, and Cosmetic Act (FDCA) preempted § 1750, preventing private enforcement of the FDCA under the CLRA) and *In re* Apple iPhone 3G Products Liability Litigation, 728 F. Supp. 2d 1065, 1072 (N.D. Cal. 2010) (holding that the Federal Communications Act of 1934 completely preempted CLRA claims about commercial mobile service providers' rates and market entry).

Competition Law (UCL).[200] These laws work together to prohibit a wide range of activities and empower consumers directly.[201] This Article focuses on the FAL and CLRA.

California courts have often analyzed the FAL and CLRA together because of their similarities.[202] The FAL prevents any person from disseminating:

> [I]n any newspaper or other publication, or any advertising device . . . or in any other manner or means whatever, including over the Internet, any statement . . . which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading . . . .[203]

Similarly, the CLRA gives consumers a cause of action against unfair and deceptive business practices, such as those prohibited by the Lanham Act.[204] Like many UDAP statutes, the FAL and CLRA require: (1) that the defendant made a material misrepresentation; (2) the complainant actually relied on that misrepresentation; (3) the complainant was injured; and (4) the defendant's misrepresentation was the immediate cause of the injury.[205] Both the misleading and materiality requirements are evaluated using an objective reasonable

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[200] CAL. BUS. & PRO. CODE § 17200 (West 2022). Several cases preempted this statute's applicability to furnishing information to credit reporting agencies, interstate sales of wholesale electricity, federal thrift regulation, and commercial mobile service providers' rates and market entry.

[201] *Id.* § 17500 (West 2022).

[202] *See, e.g.*, Boris v. Wal-Mart Stores, Inc., 35 F. Supp. 3d 1163, 1169 (C.D. Cal. 2014) ("The same standard determines whether a representation is misleading under the FAL and the CLRA."); *see also* Colgan v. Leatherman Tool Grp., Inc., 38 Cal. Rptr. 3d 36, 46 (Cal. Ct. App. 2006) ("The standards for determining whether a representation is misleading under the False Advertising Law apply equally to claims under the CLRA.").

[203] CAL. BUS. & PRO. CODE § 17500 (West 2022).

[204] CAL. CIV. CODE § 1770(a)(1) (West 2022) (amended Feb. 9, 2022) (amendment did not alter relevant provision).

[205] Wilson v. Frito-Lay N. Am., Inc., 260 F. Supp. 3d 1202, 1208–09 (N.D. Cal. 2017); Bower v. AT&T Mobility, LLC, 196 Cal. App. 4th 1545, 1556 (Cal. Ct. App. 2011).

person standard.[206] That is, whether the reasonable consumer would be misled by the statement.[207] Likewise, whether a statement is material is not what is material to the individual consumer, but what the reasonable consumer would consider material.[208] The Court stated the materiality requirement as whether "a reasonable [person] would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question."[209]

Florida consumer protection laws deserve attention because of the many captive animal operations present in the state.[210] In comparison to California, however, Florida's consumer protection laws are much more limited in application. Florida has both a false and misleading advertising law and a more general UDAP statute.[211] Florida's false and misleading advertising law (FFAL) maintains much of the common law fraud requirement.[212] By maintaining common law fraud requirements, the Florida law sets a higher bar for successful consumer protection claims.[213] However, both consumers and competitors have a cause of action.[214] To prove a violation of the Florida law, a consumer must show that: (1) the defendant "made a misrepresentation of material fact;" (2) the defendant knew or should have known that the statement was false or misleading; (3) the defendant intended for the misrepresentation to "induce" reliance on

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[206] Freeman v. Time, Inc., 68 F.3d 285, 289 (9th Cir. 1995).
[207] *Id.*
[208] Waller v. Hewlett-Packard Co., 295 F.R.D. 472, 485 (S.D. Cal. 2013).
[209] *Wilson*, 260 F. Supp. 3d at 1208 (quoting *In re Tobacco II* Cases, 207 P.3d 20 (Cal. 2009)).
[210] As of January 4, 2022, USDA APHIS records indicate 222 active exhibitor license holders in Florida. U.S. DEP'T OF AGRIC., USDA ANIMAL CARE PUBLIC SEARCH TOOL, ACTIVE/EXPIRED LICENSE REPORT FOR WEB, (Jan. 4, 2022), https://www.aphis.usda.gov/animal_welfare/downloads/List-of-Active-Licensees-and-Registrants.xlsx [hereinafter U.S. DEP'T OF AGRIC., LICENSE REPORT] (listing persons licensed or registered under the AWA).
[211] *See generally* FLA. STAT. § 817.44 (2021) (prohibiting intentional false advertising); *id.* §§ 501.201–501.213 (2021) (regulating deceptive and unfair trade practices).
[212] Third Party Verification, Inc. v. Signaturelink, Inc., 492 F. Supp. 2d 1314, 1322 (M.D. Fla. 2007).
[213] CAROLYN L. CARTER, NAT'L CONSUMER L. CTR., CONSUMER PROTECTION IN THE STATES 5, 25 (2009), https://www.nclc.org/images/pdf/udap/report_50_states.pdf.
[214] *Third Party Verification, Inc.*, 492 F. Supp. 2d at 1322.

the misrepresentation; (4) the complainant actually and justifiably relied on the misrepresentation; and (5) the misrepresentation caused injury to the complainant.[215] Competitors are held to a similar test but need to show a competitive relationship rather than reliance.[216] The FFAL also entitles the prevailing party to attorney's fees, even following voluntary dismissals where there has been no final judgement.[217] This fee entitlement may increase the financial risk to private litigants.

Because of the flexibility afforded by state UDAPs, they could potentially be the strongest candidate for consumer protection in pseudo-sanctuary accountability. Another factor to consider in selecting potential states would be the number of captive animals currently kept in pseudo-sanctuaries in that state. Depending on each particular state's interpretation of their UDAP statutes, the states of greatest concern may also prove to be the most risky.

II. DEFINING SANCTUARY

This Part analyzes whether consumer protection laws could actually hold pseudo-sanctuaries accountable based on false and misleading claims. Specifically, this Part focuses on the misuse of the term *sanctuary* and other similar animal protection terms like *rescue* or *preserve*. Resting a consumer protection claim only on the false or misleading use of the term *sanctuary* is challenging because the term is imprecise. Consumer protection claims are suited to deal with imprecision.[218] But as imprecision moves closer to vagueness or multiple interpretations, the term loses its actionability.[219] Further, the court is not the nation's lexicographer, and its job is not to create singular definitions.

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[215] *Id.*
[216] *Id.*
[217] Black Diamond Props., Inc. v. Haines, 36 So. 3d 819, 821 (Fla. Dist. Ct. App. 2010).
[218] CARTER, *supra* note 213, at 11 (describing strong UDAP statutes as containing "broad, general prohibitions against both deceptive conduct and unfair conduct" to better protect consumers).
[219] *See infra* Part II.C.

Defining *sanctuary* is important to successfully establish that the term can be false or misleading. This is for two important reasons: (1) showing a false statement comes with advantageous presumptions, like reliance[220]; and (2) a vague term, a subjective opinion, or a claim subject to multiple interpretations may not be actionable.[221] Subjective opinions are not actionable because a consumer cannot reasonably rely on those statements.[222] A consumer's understanding of the claim upon which they rely must be reasonable.[223] To be reasonable, the claim must have some objective meaning against which it can be measured.[224] Therefore, isolating the objective meaning of *sanctuary* is essential to proving consumer deception. Because there is no applicable statutory or regulatory definition, the court must interpret the term according to the common understanding of the word.[225]

Though, initially, finding the common understanding of *sanctuary* is difficult. *Sanctuary* is an imprecise term in application because reasonable people can disagree on the details.[226] But, even if no two consumers have an identical understanding of what a sanctuary is, the reasonable consumer can still identify certain qualities they

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[220] Schering-Plough Healthcare Prods., Inc. v. Schwarz Pharma, Inc., 586 F.3d 500, 512 (7th Cir. 2009).

[221] *See infra* Part III.C.

[222] *See* M. Neil Browne et al., *Legal Tolerance Toward the Business Lie and the Puffery Defense: The Questionable Assumptions of Contract Law*, 37 S. ILL. U. L.J. 69, 80 (2012) (quoting *In re* Countrywide Fin. Sec. Litig., 588 F. Supp. 2d 1132, 1144 (C.D. Cal. 2008)) (noting that terms like *high quality* are generally not actionable because they are "vague and subjective puffery").

[223] *Id.* at 69–70.

[224] *See id.* at 77 (noting that for a party's false advertising claim to go forward they had to show that the claim was "capable of being proved false or of being reasonably interpreted as a statement of objective fact.").

[225] *See* CONG. RSCH. SERV., STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS 19 (2018) ("Where a term is not expressly defined in the statute, courts generally assume 'that Congress uses common words in their popular meaning, as used in the common speech of men.'") (citation omitted).

[226] *See* GLOB. FED'N OF ANIMAL SANCTUARIES, OPERATION STANDARDS 2 (2019) ("GFAS notes that there may be other acceptable ways of meeting the intent of each standard, aside from those detailed below, and that in some instances there may be legal, cultural or other significant barriers to meeting GFAS requirements.").

expect from a sanctuary.[227] Similarly, consumers expect that a sanctuary is somehow different than a regular zoo or a circus.[228] This differentiation is the core of the pseudo-sanctuary charade: pseudo-sanctuaries market themselves as something different from *just* a zoo.[229]

Accordingly, to establish whether the term is being used in a false or misleading way, this Article proposes a balancing test that considers multiple factors: (1) AWA compliance history; (2) on-site practices; (3) financial management; and (4) like all good balancing tests, any other relevant facts as justice may require. These factors align with established consumer protection policy and get to the heart of a common understanding of a sanctuary. This test asks not *what is a sanctuary* but rather—what makes this facility a sanctuary? Importantly, this test considers that there are multiple reasonable interpretations of *sanctuary* but also recognizes when a facility meets no reasonable understanding of the word.

The AWA compliance prong speaks to consumer's expectations that animals in a sanctuary are well-cared for.[230] The on-site practices prong looks to whether the facility behaves how consumers expect a sanctuary to operate. Put another way, this second prong asks whether the facility operates more like facilities we know are sanctuaries, or if it operates more like facilities we know are zoos, circuses, or other forms of exhibition. The third prong looks to whether the facility manages its finances as consumers would expect from a sanctuary; consumers likely expect that a sanctuary is a charity with a significant portion of the proceeds being used for the animals. The final prong is a catch-all that allows the court to consider any other relevant facts. This could be accreditation, whether the facility recently branded itself as a sanctuary, or evidence of other false statements.

Using AWA violations as a basis for distinguishing between sanctuary or pseudo-sanctuary may suggest that I am proposing a specific number of violations that is allowable for a sanctuary before it

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[227] *See* Hartigan, supra note 126 (describing the differences between sanctuaries and zoos from a visitor's perspective).
[228] *Id.*
[229] *See, e.g.*, Boissat et al., *supra* note 31, at 1189.
[230] Hartigan, *supra* note 126.

crosses over into pseudo-sanctuary territory. This is not the case. I argue that AWA violation history should be a major consideration in determining whether a facility is falsely holding itself out as a sanctuary. But, there does not need to be a specific calculation of an acceptable amount, frequency, or severity of violations. Rather, the court should consider the enforcement history as a whole to decide whether a particular facility is closer to a sanctuary than not. I am not recommending a standard of perfection—a genuine sanctuary may have AWA citations, or a facility may have a history of AWA violations but since made significant changes in management and facilities that have led to a demonstrated pattern of compliance. Additionally, not all violations are equal. Even the existing enforcement scheme recognizes this principle by distinguishing between *teachable moments* and violations.[231] A violation for a perimeter fence that is three inches too short is not comparable to a violation for physically battering a captive animal.

Additionally, the court should consider *positive* AWA compliance. That is, does the facility regularly exceed AWA requirements and to what extent? The AWA may set minimum enclosure sizes, but a facility that far exceeds these requirements may indicate that the facility is operating in such a way to justify the price premium and meet consumer expectations. This higher standard of care tends to align more closely with consumer expectations that sanctuaries treat animals differently than other exhibitors.[232]

In *In re Tiger Rescue*, discussed *infra*, the administrative court plainly found as fact that Tiger Rescue was falsely portraying itself as a sanctuary.[233] Though the court did not explicitly state how it came to that conclusion, the long history of non-compliance and severe violations at the facility could not be ignored.[234] While the term *rescue* was imprecise, there was simply no reasonable understanding of the term that would lead a person to think that Tiger Rescue was indeed a

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[231] Bennett & Bailey, *supra* note 96, at 207.
[232] Hartigan, *supra* note 126.
[233] *In re* Tiger Rescue, 67 Agric. Dec. 448, 451 (U.S.D.A. 2008); *see infra* Part II.A.
[234] *In re Tiger Rescue*, 67 Agric. Dec. at 450–51 ("The gravity of the violations detailed in this Decision is of the utmost severity. Respondent Tiger Rescue neglected and abused many animals.").

rescue. This conclusion was possibly so obvious it did not deserve explanation. Additionally, using long-term noncompliance history is common in AWA adjudications.[235] The adjudication takes into account the severity of offenses as well as the frequency and length of time.[236]

However, AWA compliance history should not be the only factor. After all, a pseudo-sanctuary may have a respectable AWA record; but providing minimum care does not make a zoo into a sanctuary. Another factor to consider is on-site practices, and whether they are more like those of a zoo or like known sanctuaries. This allows the court to consider on-site practices without having to determine which practices alone are in line with sanctuary principles. Further, this considers the differences between reputable sanctuaries while still disqualifying pseudo-sanctuaries. For example, consider a facility that exhibits animals but allows breeding for planned reintroduction. Reasonable people could disagree on that facility's sanctuary status.[237] However, a facility that exhibits, breeds for captivity, only temporarily houses animals, and allows direct public interaction, is far closer to operating like a zoo than a sanctuary.[238] This approach also supports the target audience's general expectations about sanctuaries. This prong is similar to evaluating claims like "green" on cleaning products. Just like the target population for sanctuaries may not have a checklist of sanctuary principles or practices, the target audience for "green" cleaning products does not have a list of "green" chemical compositions. Consumer protection laws do not protect only the most sophisticated consumers, they protect *reasonable* consumers.[239]

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[235] *See* 9 C.F.R. § 4.10(a)–(b) (2008) (detailing procedure for license suspension).

[236] *See, e.g.*, *In re* Stark, 79 Agric. Dec. 1, 15–16 (U.S.D.A. 2020).

[237] GLOB. FED'N OF ANIMAL SANCTUARIES, POSITION STATEMENT: BREEDING OF ANIMALS IN CAPTIVITY, (2019) ("GFAS believes that a true sanctuary (including those that rehabilitate animals for eventual release or adoption) does not engage in intentional breeding of animals in captivity, with limited exceptions.").

[238] *Zoo vs. Animal Sanctuary: What's the Difference?*, BLACK PINE ANIMAL SANCTUARY (May 13, 2021), https://www.bpsanctuary.org/blog/zoo-vs-animal-sanctuary-whats-the-difference/.

[239] *See Environmentally Friendly Products: FTC's Green Guides*, FED. TRADE COMM'N: GREEN GUIDES, https://www.ftc.gov/news-events/media-resources/truth-advertising/green-guides (last visited May 15, 2022) (providing guidance to companies on avoiding misleading customers with potentially deceptive marketing claims).

Accordingly, the court should not require consumers to understand every aspect of captive animal care but instead focus on reasonable consumer expectations of general practices.

Consumer surveys could also be used to show whether consumers expect certain practices. Using consumer surveys is standard in proving Lanham Act claims of misleading statements.[240] Accordingly, this method of showing consumer expectations is well established in consumer protection actions.[241] The court may also consider different accreditation standards for sanctuaries. The court does not need to enforce these requirements but rather can look to them for some guidance of what sorts of common practices are allowed or prohibited. The court should measure the facility against the most stringent accreditation standards because, conceivably, if a facility meets the highest standards, they are more likely to meet consumer expectations. Conversely, if the facility meets none of those standards, this weighs against the facility's claim. When looking to independent accreditation, it is important to note that the focus should not be on whether the facility is accredited by any particular organization, but rather on the accreditation standards themselves.

The third balancing consideration I propose is looking to the facility's financial structure and activities. The public likely assumes that a sanctuary would both be a legal non-profit and that the majority of funds would go directly to supporting the animals.[242] A for-profit facility is very likely not the sanctuary consumers expect.[243] Many sanctuaries and pseudo-sanctuaries are non-profits and prominently advertise their charity status.[244] However, failing operations

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[240] Johnson & Johnson * Merck Consumer Pharms. Co. v. Smithkline Beecham Corp., 960 F.2d 294, 298 (2d Cir. 1992).

[241] *Id.*

[242] *See* Carr & Cohen, *supra* note 30, at 178, 183–84 ("One of the most problematic issues that zoos have faced in recent years is that alongside the desire to see zoos as sites of conservation, research, and education is the reality of the need to ensure they gain the financial income to allow them to keep operating.") (citation omitted).

[243] *Id.* at 183.

[244] Karlyn Marcy, *Interesting Zoo and Aquarium Statistics*, ASSOC. OF ZOOS & AQUARIUMS (May 26, 2021), https://www.aza.org/connect-stories/stories/interesting-zoo-aquarium-statistics (estimating that 54% of AZA-accredited zoos are non-profits).

occasionally use a particularly devious method of soliciting donations—"*without immediate donations, the animals face euthanasia*."[245] Statements such as this, even if true, tend to indicate that the facility is not a sanctuary. Sanctuaries plan for life-long care, with many accredited sanctuaries having detailed, long-term succession plans that do not include euthanizing animals that can be transferred or released.[246] This is not to say that every sanctuary has an air-tight financial plan that is impervious to disaster. But, in the event of a financial crisis, euthanasia for the sake of tightening the budget is not in line with sanctuary principles.[247] More importantly to this

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[245] Megan Carr, *Coronavirus Kent: The Fenn Bell Zoo, Hoo, Fears It May Have to Euthanise Animals During COVID-19 Lockdown*, KENT ONLINE (Apr. 24, 2020), https://www.kentonline.co.uk/medway/news/i-dont-want-to-euthanise-our-animals-but-i-dont-see-an-alternative-225977/ (reporting that a UK zoo announced that "without public support they may have to make the tough decision of either letting animals starve or put them to sleep"); Matt Collette, *Patrick Accuses Zoo Officials of Scare Tactics*, BOS. GLOBE (July 13, 2009), http://archive.boston.com/news/local/massachusetts/articles/2009/07/13/patrick_accuses_zoo_officials_of_using_scare_tactics/ (reporting that the Boston governor rejected the zoo's assertion that without more funding the zoo would euthanize animals); *Cherry Brook Zoo at Risk of Closing Again After Guinea Pig 'Rage Killing' Allegations*, CBC NEWS (June 3, 2019), https://www.cbc.ca/news/canada/new-brunswick/cherry-brook-zoo-allegations-guinea-pigs-funding-1.5159826 (reporting that a Canada zoo facing closure alleged that "between 40 and 70 per cent of the animals might have to be euthanized if the zoo shuts down because many of them are elderly and other facilities won't want them"); Hannah C., *Zoos Forced Shut Down Due to Pandemic May Have to Euthanize Animals*, SCI. TIMES (June 17, 2020), https://www.sciencetimes.com/articles/26096/20200617/zoos-forced-shut-down-due-pandemic-euthanize-animals.htm (giving examples of zoos alleging that they may be forced to euthanize animals if they cannot obtain funding or new homes for the animals).

[246] GLOB. FED'N OF ANIMAL SANCTUARIES, OPERATION STANDARDS, *supra* note 226, at 12 ("The succession plan should include an emergency plan outlining who will carry out the key responsibilities in the event of a sudden and unexpected absence by the director or other key management in both short- and long-term scenarios.").

[247] GLOB. FED'N OF ANIMAL SANCTUARIES, *Low Impact Exit Strategy: A Guide for Sanctuaries* 6 (2015), https://www.sanctuaryfederation.org/wp-content/uploads/2013/02/GFAS-Low-Impact.pdf ("Euthanasia certainly is not encouraged as a way of population management or cutting expenses. In fact, GFAS standards state that euthanasia is only to be used as a 'final option.'").

discussion, the public should expect that animals in a sanctuary are not so easily disposable.

Another consideration in looking at financials is how and where the donations go. A higher percentage of funds going directly to animal care rather than salaries or advertisement weighs in favor of a facility being a genuine sanctuary. A facility with the majority of funds used for compensating board members likely does not align with the consumer's expectation for their donation. However, this metric should consider why some donations are spent on administration or advertisement. For example, it may be fully in line with sanctuary principles to spend money on security or bookkeeping. Though these do not directly address animal care, they may be essential to the long-term wellbeing and safety of the animals. Claims that 100% of donations go to animal care deserve particular attention.[248] If this is a true statement, it weighs heavily in favor of finding that the facility is a genuine sanctuary. If this statement is false, it should weigh heavily against the facility as it both misleads the consumer and may be evidence of charitable fraud.[249]

A. Lanham Act False Advertising Clause

This Part analyzes whether the Lanham Act could be applied to a pseudo-sanctuary in a hypothetical suit by a competing sanctuary. The following hypothetical is based on two actual facilities in California, one of which is now closed after the USDA revoked the owner's exhibitors license.[250] The pseudo-sanctuary in this hypothetical is Tiger Rescue owned by John Weinhart.[251] The facility

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[248] *About Us*, CATTY SHACK RANCH WILDLIFE SANCTUARY, https://cattyshack.org/about/ (last visited May 15, 2022) (stating that "100% of your donation goes to program services for the animals."); *Catty Shack Ranch Wildlife Sanctuary Inc.*, CHARITY NAVIGATOR, https://www.charitynavigator.org/ein/593698971 (last visited May 15, 2022) (recent filings suggest about 40% of revenue goes to program service expenses).

[249] CHARITY WATCH, *'100% to Program' Claims Confuse Donors* (Apr. 01, 2011), https://www.charitywatch.org/charity-donating-articles/39100-to-program39-claims-confuse-donors.

[250] *In re* Tiger Rescue, 67 Agric. Dec. 448, 451 (U.S.D.A. 2008).

[251] *Id.* at 469.

advertised itself as a "'sanctuary' for abused animals" and a "rescue" but was an extreme case of animal neglect.[252] A warrant executed in 2003 revealed approximately 90 captive animals died as a result of Weinhart's neglect.[253] Officers found dead and decaying animal bodies, severely malnourished and underweight big cats, animals with open wounds, animals unable to walk due to lack of care, cats with mite infestations so severe they required euthanasia, three dogs housed in a kennel meant for one, and excreta in "nearly all animal enclosures."[254] Despite this extreme cruelty and neglect, the Los Angeles Times printed that Weinhart "was portrayed in the local press and in his own literature as a devoted caretaker, lovingly hand-rearing newborn tiger cubs and, he said, providing 1,000 pounds a day of chicken and beef to their collection of tigers."[255] As far as the public could tell from the outside, Tiger Rescue was a legitimate operation.

However, this is not to say there were no red flags. Tiger Rescue allowed visitors to pet tiger cubs and have photo opportunities with them for a fee.[256] Weinhart was also accused of illegally breeding and selling tigers.[257] Though not easily or instantly accessible by the general public, Weinhart had a long history of noncompliance. In 1975, California authorities seized two dozen animals, including big cats, and charged Weinhart with four counts of permitting an animal to go without care and inadequate exercise for confined animals.[258] In 1981, the USDA ordered him to cease and desist from further violations of the AWA.[259] APHIS inspection records reveal that Weinhart accumulated 362 AWA violations, many of which were direct and repeated violations.[260] Weinhart was repeatedly cited for failing to

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[252] *Id.* at 470.
[253] *Id.*
[254] *Id.* at 475–76.
[255] Lance Pugmire et al., *Clashing Views of Owner of Tiger Sanctuary Emerge*, L.A. TIMES (Apr. 25, 2003), https://www.latimes.com/archives/la-xpm-2003-apr-25-me-tigers25-story.html.
[256] *Id.*
[257] *Id.*
[258] *Charges To Be Brought Against Animal Owner*, SUN-TELEGRAM, Aug. 29, 1975, at C-3.
[259] *In re Tiger Rescue*, 67 Agric. Dec. at 470.
[260] *Id.* at 466–67.

provide adequate veterinary care for multiple animals that were emaciated, clearly very ill, or had open untreated wounds.[261]

Compare Tiger Rescue to Shambala Preserve, owned by actress Tippi Hedren.[262] Shambala Preserve is a big-cat sanctuary located just over an hour away from Weinhart's facility and was in operation at the same time as Tiger Rescue.[263] Few would deny Shambala's sanctuary status. It is accredited by the American Sanctuary Association,[264] does not breed animals, has a consistent AWA compliance record,[265] does not allow public contact with the animals, and limits exhibition to a guided tour for one weekend a month.[266] In fact, once Weinhart's facility was closed, Hedren took in some of the displaced big cats.[267]

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[261] *See id.* at 471–86.

[262] This is not an endorsement of Shambala preserve, and as of writing, this author has not personally been to Shambala. This hypothetical is based off of publicly available information. SHAMBALA ROAR FOUND.: ABOUT US, http://shambala.org/about.htm (last visited May 15, 2022).

[263] Hedren has owned big cats since the early 70s and, by her own admission, was not always the most responsible owner, often letting her "pet" lion roam freely around the house. She previously used animals in films. She has since reformed her stance on interaction with big cats. Chloe Foussianes, *Dakota Johnson Confirms that Tippi Hedren Still Lives with Lions and Tigers*, TOWN & COUNTRY (May 26, 2020), https://www.townandcountrymag.com/leisure/arts-and-culture/a32671401/tippi-hedren-dakota-johnson-lives-with-lions-tigers/.

[264] *List of Accredited Sanctuaries*, AM. SANCTUARY ASS'N, https://www.americansanctuaries.org/accredited-sanctuaries (last visited May 15, 2022). The ASA has valid criticisms and the presence of a third-party certification is not a sole determination.

[265] The USDA issued one citation to Shambala in 2015 for problems with the height of a perimeter fence and not locking the back entrance to the facility; otherwise, the facility has a consistent record of compliance with the AWA and minimal citations. U.S. DEP'T OF AGRIC., INSPECTION REPORT 202151717450325 (July 21, 2015), https://aphis-efile.force.com/PublicSearchTool/s/inspection-reports (under "Customer/Organization Name" enter "Roar Foundation," under "State" select "California (CA)," click "Search" and then click "Query Inspection Reports"; select "View Inspection Report" for July 21, 2015). The USDA issued one citation in 2010 for the height of a gate on the perimeter fence. *Id.*

[266] *Safari Tours*, SHAMBALA, https://www.shambala.org/visitor_safari.htm (last visited May 15, 2022).

[267] Sandra Stokely, *Actress' Tiger that Mauled Caretaker Came from Notorious Colton*, PRESS-ENTER. (Dec. 05, 2007).

Could Hedren use the Lanham Act against Weinhart based solely on his use of the word *sanctuary* in advertising his facility? First, Hedren would need to have standing to bring a Lanham Act claim. Hedren could likely assert that Tiger Rescue unfairly drew away donations and potential visitors because the public mistakenly believed that Tiger Rescue was a sanctuary. Both facilities are in the same geographic region exhibiting many of the same animals, presumably competing for the same pool of potential donors or visitors.[268] Based on the good reputation of sanctuaries, many people may choose to donate to or visit a sanctuary *because* it is a sanctuary.[269] However, Weinhart had an unfair advantage because he was able to run his facility without the added costs and considerations of sanctuary philosophies. Further, he benefited from money-generating practices, such as cub petting, that a genuine sanctuary does not. This amounts to a commercial injury to Hedren and Shambala by unfairly collecting donations that could have otherwise gone to Shambala.[270] By falsely portraying its facility to the public as a sanctuary for abused animals, Hedren could likely assert that Tiger Rescue unfairly attracted donations and potential visitors away from Shambala because the public mistakenly believed that Tiger Rescue was a sanctuary.

Assuming that Hedren would have standing as a competitor, a successful Lanham Act claim requires the plaintiff to show: (1) the defendant made false or misleading statements about the plaintiff or defendant's services or product; (2) the falsely advertised or promoted services or product entered interstate commerce; (3) the defendant misrepresented "the nature, characteristics, qualities, or geographic

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[268] *Id.* (explaining that Tiger Rescue is located in Colton, CA and Shambala Preserve is located in Acton, CA, which are less than 75 miles from each other). *See* Driving Directions from Colton, CA to Acton, CA, GOOGLE MAPS, https://www.google.com/maps (In the "Search" bar enter "Colton, CA" and hit enter, click "Directions," in the "choose starting point" bar enter "Acton, CA" and hit enter to see the distance between Colton and Acton, CA.).

[269] *See* Hartigan, *supra* note 126 (describing the allure of visiting sanctuaries over zoos because sanctuaries tend to allow up-close, personal visits with wild animals that do not have anywhere else to go).

[270] *See* Birthright v. Birthright, Inc., 827 F.Supp. 1114, 1138–39 (D.N.J. 1993) (holding confusion between the identity of the companies that resulted in misdirected donations satisfied the likelihood-of-injury element of a cause of action under the Lanham Act).

origin of" the product or service;[271] (4) the deception is material to the target consumer's purchasing decision; (5) the advertisements have deceived, or are likely to deceive, consumers; and (6) the defendant has caused, or is likely to cause, the plaintiff injury.[272]

Though several claims could potentially serve as the basis of a Lanham Act challenge, could claiming to be a sanctuary be an actionable statement? Showing that the term *sanctuary* can be true or false is preferable to showing it is misleading.[273] Proving that the statement is literally false would negate the need to show actual public deception.[274] Existing case law seems to remove claims with multiple understandings from the "literally false" domain.[275] However, in the case of pseudo-sanctuaries, this standard is unworkable. Though there are multiple reasonable interpretations, none of those interpretations contemplates a facility like Tiger Rescue.

Tiger Rescue shows why using a fact-based balancing test aligns with consumer expectations. Looking to the first prong of the balancing test, Tiger Rescue's long history of serious non-compliance and patterns of extreme animal abuse weighs heavily against calling the facility a *sanctuary* or a *rescue*. No reasonable consumer would expect a sanctuary to engage in the prolific neglect uncovered at the facility. Tiger Rescue fails the first prong for the seriousness of the violations, the number of animals that faced neglect or abuse, and the decades-long pattern of non-compliance.

Tiger Rescue similarly fails the second prong because the activities taking place at Tiger Rescue are not those expected from a genuine sanctuary. Tiger Rescue allowed the public to have direct contact with animals;[276] was accused of breeding animals for captivity or the pet trade;[277] previously leased out animals to be used in

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[271] Trademark Act of 1946, 15 U.S.C. § 1125(a)(1)(B) (2018).
[272] MCCARTHY, *supra* note 146; WILLIAMS, s*upra* note 136, at 38–39.
[273] *See supra* notes 148–58 and accompanying text.
[274] Schering-Plough Healthcare Prod., Inc. v. Schwarz Pharma, Inc., 586 F.3d at 500, 512–13 (7th Cir. 2009).
[275] *See* Time Warner Cable, Inc. v. DIRECTTV, Inc., 497 F.3d 144, 158 (2d Cir. 2007) (stating that an advertisement cannot be false if it is susceptible to multiple reasonable interpretations).
[276] Lance Pugmire et al., *supra* note 255.
[277] *Id.*

entertainment;[278] and exhibited animals illegally without a license.[279] While consumers might incorrectly believe that breeding the tigers was a sound sanctuary practice, reasonable consumers would not expect that animals in a sanctuary would be exhibited or sold illegally.

Further, GFAS accreditation standards prohibit each of the above-listed activities.[280] The facility did not even meet minimum requirements for the record-keeping regulations under the AWA.[281] In short, the facility failed to meet even the most basic expectations for a zoo, much less the higher expectations of a sanctuary. As to the second prong, Tiger Rescue's standard practices are much further from what we expect from a sanctuary and much closer to a menagerie, animal dealer, or petting zoo.

The third prong, financial management, is more difficult to show in Tiger Rescue's standard practices because relevant documents are largely unavailable. It does appear that Tiger Rescue was a registered charity.[282] However, how the facility managed its donations is unclear. Information that shows financial mismanagement, charitable fraud, coercive solicitation, or false statements regarding the use of donations would all weigh against finding that the facility is a genuine sanctuary. However, based on the information available, the third prong weighs slightly in favor of finding Tiger Rescue as a sanctuary because of its charity status.

The second prong, an advertisement in interstate commerce, may be tricky. Assuming for the sake of the hypothetical that Weinhart's statements were on the internet and thus entered interstate commerce, Tiger Rescue's non-profit status requires further analysis of his claims. The Lanham Act applies only to commercial speech.[283]

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[278] *Id.*
[279] *In re* Tiger Rescue, 67 Agric. Dec. 448, 471 (U.S.D.A. 2008).
[280] GLOB. FED'N OF ANIMAL SANCTUARIES, OPERATION STANDARDS, *supra* note 226, at 16–18.
[281] *In re Tiger Rescue*, 67 Agric. Dec. at 481.
[282] *See Tiger Rescue in Riverside California*, NONPROFITFACTS.COM: TAX-EXEMPT ORGS., http://www.nonprofitfacts.com/CA/Tiger-Rescue.html (last visited May 15, 2022).
[283] Suntree Techs., Inc. v. Ecosense Int'l, Inc., 693 F.3d 1338, 1348–49 (11th Cir. 2012).

Statements by non-profit companies are not necessarily commercial.[284] Here, the central question is whether Tiger Rescue claimed to be a sanctuary to induce donation (commercial) or if the claim was made as part of some larger advocacy or educational scheme (non-commercial). Sanctuaries and pseudo-sanctuaries alike may, and commonly do, engage in education and advocacy.[285] However, simply claiming to *be* a sanctuary does not necessarily make any educational or advocacy claims. If Tiger Rescue were only soliciting donations for *conservation projects* that the facility engaged in because it was a sanctuary, this claim would comingle advocacy support with facility support. Tiger Rescue in effect would be asking for donations to support conservation through captive animal breeding. Even if the statement is false, it may not be a commercial statement capable of regulation under the Lanham Act. However, simply claiming to be a sanctuary does not advance any particular policy position; the donation is for the sake of the facility. Falsely claiming to be a sanctuary to induce donations can thus be considered commercial speech.

The third prong—misrepresentation of "the nature, characteristics, qualities, or geographic origin of" the product or service—can be proved much like the first.[286] The proposed balancing test focuses on the nature and qualities of the facility versus the nature and qualities of accepted sanctuaries. The purpose of a sanctuary is to protect and care for animals.[287] Tiger Rescue was not a facility of this nature. The facility did not protect or care for the animals.[288] Tiger

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[284] *See* Radiance Found., Inc. v. NAACP, 786 F.3d 316, 326–27 (4th Cir. 2015) (noting that charitable donations are not commercial unless the trademark holder shows "a sufficient nexus between the unauthorized use of the protected mark and clear transactional activity").

[285] Carr & Cohen, *supra* note 30, at 177 ("The modern zoo is, therefore, portrayed to the public as being a site of education, research, and conservation.").

[286] 15 U.S.C. § 1125(a)(1)(B).

[287] Hartigan, *supra* note 126.

[288] *In re* Tiger Rescue, 67 Agric. Dec. 448, 450–51 (U.S.D.A. 2008) ("The gravity of the violations detailed in this Decision is of the utmost severity. Respondent Tiger Rescue neglected and abused many animals. By April 2003, approximately 90 animals (mostly tigers) died as a direct result of Respondent Tiger Rescue's lack of care and husbandry. Respondent Tiger Rescue also handled animals in a manner that was unsafe for the animals and the public, failed to provide minimally-adequate

Rescue lacked the hallmark of a sanctuary that offers quality animal care.[289]

Indeed, misrepresentations concerning a company's ethics and morals are also actionable under the Lanham Act.[290] The Tenth Circuit Court of Appeals analyzed in *Proctor & Gamble Co. v. Haugen* the defendant's claims that Proctor & Gamble (P&G) was affiliated with the Church of Satan and thus engaged in immoral activities.[291] The court recognized that "products are often marketed and purchased not only on the basis of their inherent utility, *but also for the images they project and the values they promote*."[292] Accordingly, by falsely claiming that P&G's president was a Satanist and that the profits from P&G's products support the Church of Satan, the defendant's statements could concern the "nature, characteristics, [or] qualities" of P&G's products.[293] This case might support the assertion that ethical considerations are part of a consumer's expectation when making purchasing decisions. A consumer may choose to donate to a sanctuary because of their ethical or moral beliefs on animal captivity. There is a certain ethical weight attached to being an animal sanctuary as opposed to some other form of animal exhibition. In claiming to be a sanctuary, Tiger Rescue misrepresented the nature and qualities of the facility and satisfied this Lanham Act requirement.

Fourth, proving materiality may be challenging depending on the target consumer in question. The relevant consumer for pseudo-sanctuary accountability is not the general zoo-going public. A Lanham Act suit by a competing sanctuary narrows the target consumer group to those people interested in visiting and supporting *ethical* animal exhibitors. While there are multiple markets that each facility *could*

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housing or veterinary care to animals in obvious distress, and failed to provide sufficient food to animals.").

[289] *Id.* at 451 ("Tiger Rescue has not shown good faith, having falsely portrayed its facility . . . to the public as a 'sanctuary' for abused animals.").

[290] *See* Proctor & Gamble Co. v. Haugen, 222 F.3d 1262, 1272 n.7 (10th Cir. 2000) (quoting Nat'l Artists Mgmt. Co. v. Weaving, 769 F. Supp. 1224, 1229–36 (S.D.N.Y. 1991)) (referring to a New York court's prior holding that "allegations that a competing theater booking agency engaged in improper and unethical practices" are actionable under the Latham Act).

[291] *Id.* at 1267.

[292] *Id.* at 1272 (emphasis added).

[293] *Id.*

appeal to including the general public, Shambala and Tiger Rescue concurrently competed for consumers interested in supporting sanctuaries. For example, this includes consumers who were misled into thinking cub petting was acceptable at Tiger Rescue *because* it was a sanctuary. Those consumers would choose to go to Tiger Rescue because both sanctuary designation and cub-petting opportunities are material to their decisions. Accordingly, the correct consumer group to analyze is people who are specifically interested in visiting sanctuaries *because* they are sanctuaries.

Fifth, consumers that visited or donated to Tiger Rescue *because* it claimed to be a sanctuary were very likely actually deceived. This would satisfy the fifth Lanham Act requirement. Finally, Shambala could likely show that Tiger Rescue's false sanctuary claim diverted donations from Shambala. Shambala was geographically near Tiger Rescue[294]; Tiger Rescue visitors might have chosen to go to Shambala instead of Tiger Rescue if they knew it was not actually a sanctuary. Lost donations are likely a sufficient economic injury to satisfy the Lanham Act's injury requirement.

B. State UDAP Statutes

Drawing on the California and Florida UDAP statutes, this Part argues that California's consumer protection laws could hold a pseudo-sanctuary accountable. On the other hand, Florida's statute is likely drafted and interpreted too narrowly to be a strong candidate for pseudo-sanctuary accountability. This is especially disappointing because of the sheer number of captive animals suffering in Florida and the state's massive exotic pet trade.[295]

First, this Part will consider California's false advertising law (FAL) and CLRA. The FAL prevents any person from disseminating

> "[I]n any newspaper or other publication, or any advertising device, . . . or in any other manner or means whatever, including over the Internet, any

[294] *See* footnote text accompanying Stokely, *supra* note 267.
[295] *See* footnote text accompanying U.S. DEP'T OF AGRIC., LICENSE REPORT, *supra* note 210.

> statement, . . . which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading."[296]

Case law extended the definition of *misleading* to also include statements that are likely to confuse the public.[297] The CLRA requires four elements: (1) the defendant made a material misrepresentation; (2) the complainant actually relied on that misrepresentation; (3) the complainant suffered economic injury from that reliance; and (4) the defendant's misrepresentation was the immediate cause of the injury.[298]

Conceivably, the FAL could address pseudo-sanctuaries. First, the FAL applies to any form of communication, which includes internet communication.[299] Even the smallest operations increasingly rely on social media marketing and online reviews.[300] Internet marketing not only provides consumers with easy access to evaluate a facility prior to visiting but also allows facilities to present a sterilized snapshot of the premises or to purchase positive reviews rather than earning them.[301] Thus, reasonable consumers might arrive to a much different facility than they previewed.

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[296] CAL. BUS. & PRO. CODE § 17500 (West 2022).
[297] Leoni v. State Bar of Cal., 704 P.2d 183, 193–94 (Cal. 1985) (en banc) (finding that the FAL "ha[s] been interpreted broadly to embrace not only advertising which is false, but also advertising which although true, is either actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the public.").
[298] Wilson v. Frito-Lay N. Am., 260 F. Supp. 3d 1202, 1208–09 (N.D. Cal. 2017); Bower v. AT&T Mobility, LLC, 127 Cal. App. 4th 1545, 1556 (Cal. Ct. App. 2011).
[299] CAL. BUS. & PRO. CODE § 17500 (West 2022).
[300] *See, e.g.*, Jacqueline Tabas, *How Nonprofits Can Use Social Media To Increase Donations and Boost Visibility*, FORBES (Mar. 6, 2021), https://www.forbes.com/sites/allbusiness/2021/03/06/how-nonprofits-can-use-social-media-to-increase-donations-and-boost-visibility/?sh=3b1df7f82bb7 (underlining the importance of a social media presence for nonprofits); *see also* Natasha Daly, *Helping Kids Deal with Animal Exploitation on Social Media*, NAT'L GEO. (May 21, 2021), https://www.nationalgeographic.com/family/article/helping-kids-deal-with-animal-exploitation-on-social-media (drawing attention to "covert" animal exploitation popularized on social media).
[301] *See* Daly, *supra* note 300.

While mere puffery is not actionable,[302] statements that would likely mislead a reasonable consumer are.[303] Similar to the Lanham Act, subjective claims are unactionable under the FAL.[304] When determining whether a claim is vague unactionable puffery or an actionable objective claim, the key is whether the statement is "quantifiable" such that it "makes a claim as to the specific or absolute characteristics of a product."[305] I argue that "sanctuary" is such a claim. The term *sanctuary* implies that the facility has specific qualities that make it different from other animal exhibitors.[306] The proposed balancing test draws out these specific quantifiable metrics that separate sanctuaries from other facilities merely claiming to be sanctuaries. This balancing test uses objective qualities to measure the facility in question.

The materiality standard under California law is that of the reasonable consumer.[307]—hat is, whether the reasonable consumer would attach importance to the claim when deciding to donate or visit.[308] A statement may also be material if "the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action."[309] Consumers are attaching increasingly more importance

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[302] Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv., 911 F.2d 242, 245 (9th Cir. 1990).

[303] Lavie v. Procter & Gamble Co., 105 Cal. App. 4th 496, 508 (Cal. Ct. App. 2003) ("'Likely to deceive' implies more than a mere possibility that the advertisement might conceivably be misunderstood by some few consumers viewing it in an unreasonable manner. Rather, the phrase indicates that the ad is such that it is probable that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled.")

[304] Boris v. Wal-Mart Stores, Inc., 35 F. Supp. 3d. 1163, 1170 (C.D. Cal. 2014) (finding that a merchant's liability cannot be determined by features of a product that are "subjective and speculative").

[305] Beyer v. Symantec Corp., 333 F. Supp. 3d 966, 976 (N.D. Cal. 2018).

[306] *See* Hartigan, *supra* note 126 (noting that "[s]anctuaries occupy a 'gray area'").

[307] Freeman v. Time, Inc., 68 F.3d 285, 289 (9th Cir. 1995).

[308] *Id.*

[309] Hinojos v. Kohl's Corp., 718 F.3d 1098, 1107 (9th Cir. 2013), *amended* July 8, 2013.

to the ethical treatment of captive animals.[310] This increased concern is likely one of the greatest motivations for facilities to rebrand themselves as a sanctuary. Therefore, because the speaker knows that the public believes sanctuary qualities are important, claiming to be a sanctuary should be considered material.

The CLRA requires actual reliance on the misrepresentation.[311] However, reliance may be presumed if the misrepresentation is proven material.[312] Accordingly, a consumer that visited a pseudo-sanctuary based on its misrepresentation is well suited to prove this requirement. The consumer need not prove that the facility's sanctuary status was the only, or even most important, factor in their decision to visit.[313] However, they would need to show that they relied upon the facility's claim that it was a sanctuary as an important part of their decision to visit.

Finally, the consumer would need to prove that this reliance caused injury.[314] That the consumer spent money they otherwise would not have spent, either as a donation or as admission price, is likely sufficient to show that the consumer suffered an economic injury.[315]

The FFAL is very similar to the CLRA. However, the FFAL also requires complainants to show the speaker's knowledge of the false statement and intention for consumers to rely on that misrepresentation.[316] In a pseudo-sanctuary context, proving that the

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[310] *See* Press Release, Ass'n of Zoos & Aquariums, According to New Study, Forty Percent of Americans Believe US Government Has Reduced Wildlife and Environmental Protections and Eighty Percent Unhappy with Rollbacks (Apr. 12, 2018) (on file with Ass'n of Zoos & Aquariums), https://www.aza.org/aza-news-releases/posts/new-study-calls-for-conservation?locale=en ("Eighty-seven percent [of Americans] are willing to help save animals from extinction.").

[311] Wilson v. Frito Lay N. Am., Inc., 260 F. Supp. 3d 1202, 1208 (N.D. Cal. 2017).

[312] *Id.*

[313] *Id.*

[314] Hansen v. Newegg.com Ams., Inc., 236 Cal. Rptr. 3d 61, 74 (Cal. App. Dep't Super. Ct. 2018).

[315] *Id.* (holding a consumer has an "economic injury" required for standing if they can "allege that he or she relied on a misrepresentation when purchasing the product, and that he or she would not have purchased the product but for the representation.").

[316] Smith v. Mellon Bank, 957 F.2d 856, 857–58 (11th Cir. 1992) (ruling that "blind reliance" on a statement describing insurance coverage alone was not reasonable and not intentionally misleading).

defendant knew, or should have known, their statement was false may prove to be quite challenging though. It is possible that the defendant could argue that, despite not adhering to sanctuary principals or lack of accreditation as a sanctuary, they nonetheless honestly regarded themselves as a sanctuary. Yet, certain facts may show that the pseudo-sanctuary operator had the requisite knowledge. For example, numerous severe AWA violations would tend to show that the facility is not a sanctuary. A facility that routinely cannot meet the legal minimum welfare requirements cannot, in good faith, hold itself out as a place where animals are protected from unscrupulous exhibitors—they themselves are the unscrupulous exhibitors from which the animals should be protected. Another telling piece of evidence would be if the sanctuary has changed its name. If the facility previously did not claim to be a sanctuary but rebranded to incorporate "sanctuary" in their name, did the facility also change its animal care practices? If a facility had a long-standing history as a zoo and did not have sanctuary qualities, but then changed its name to include "sanctuary" without incorporating sanctuary practices, this could be evidence that the owner knew the facility was not a sanctuary. Further, this could be evidence that the owner intended to deceive the public. Thus, if the facility only changed names for marketing reasons, that could show that the owner intended to induce more consumers to visit or donate.

C. Potential Defenses

This Part addresses some of the most prominent defenses in consumer protection claims: puffery, literal truth, and First Amendment protections.

Puffery is a popular defense to consumer protection claims. *Puffing* is making an exaggerated, hyperbolic, or fanciful statement that no reasonable consumer would ever rely on.[317] Puff statements are often opinion statements with no factual value or exaggerations that are not taken seriously. Similarly, vague statements can be considered puffing.[318] For example, when determining whether a statement is mere "puffing," the FTC considers whether the claim has actually misled

[317] PRIDGEN ET AL., *supra* note 127, § 10:9.
[318] CARTER & SHELDON, *supra* note 186, at 255–56.

consumers, excluding subjective statements or correctly articulated opinions.[319] The defendant would need to show that, when viewed in context, the claim is harmless and has no capacity to deceive a reasonable viewer.[320]

Puffery is an effective defense because, in effect, puffery negates the materiality requirement necessary to prove an actionable claim. If a statement is just puffing, it is a statement that cannot be reasonably relied on because the consumer should know it is ridiculous or hyperbolic. If the consumer could not reasonably rely on the statement, it could not be considered material to their purchasing decisions. Similarly, if a puff statement is expressing a subjective opinion without any truth value, it could not be considered false. Or if a statement is vague, it is unlikely to mislead the consumer because the statement would not be expressing any particular fact or opinion the consumer could rely upon.

The puffing defense goes hand-in-hand with claims that terms like *sanctuary* are too subjective to be actionable. Opponents to pseudo-sanctuary accountability may argue that claiming to be a rescue or sanctuary is just puffing because of how subjective the terms can be. However, I argue, that the term *sanctuary* is an objective term that consumers understand to mean certain base-line standards of operation. Though each sanctuary is different, they all share fundamental attributes of quality animal care, animal-first principles, and charitable purpose. Any subjectivity of sanctuary principles is in the details—the details many consumers would not find material to their decision.

The puffing defense is particularly vulnerable to the claims from consumers that choose to visit sanctuaries *because* they are sanctuaries. Claiming to be a sanctuary may be the most material aspect to this group's decision process. However, inspection records, a comprehensive list of all practices that the facility engages in, and IRS 990 forms are practically unavailable to the average consumer. These consumers, though interested in a very specific kind of animal exhibition, should not be expected to become private investigators. Rather, they should be able to rely on the statements made in advertisements, websites, and titles. If the facility calls itself a

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[319] PRIDGEN ET AL., *supra* note 127.
[320] CARTER & SHELDON, *supra* note 186, at 255.

sanctuary, that term in and of itself carries weight and expectations for consumers.

The strongest defense to a consumer protection claim may be that the speech is actually true and not misleading. If the statement is true and has no capacity to mislead, the consumer has enough information to decide under fair circumstances. Further, the First Amendment protects accurate, honest, and truthful commercial speech.

The First Amendment prohibits the government from "abridging the freedom of speech."[321] This protection applies to natural people and corporations alike.[322] When a corporation engages in speech regarding a commercial transaction, this is commercial speech.[323] Commercial speech includes advertisements,[324] political contributions,[325] label claims,[326] and other expressive conduct that is intended to influence, persuade, or induce some commercial activity.[327] Commercial speech is not an absolute right, and it is often subject to more regulation than speech by natural persons because of its commercial nature.[328] The *Central Hudson* case established a four-part test for analyzing whether government regulation of commercial speech is constitutional.[329] Under the *Central Hudson* analysis, the court must first determine whether the speech is protected.[330] Next, the government must prove that it has a substantial interest in controlling the speech.[331] Third, the government must show that the restriction

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[321] U.S. CONST. amend. I.
[322] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 562 (1980).
[323] *Id.* at 561.
[324] *Id.* at 563.
[325] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 356 (2010) (reaffirming that the federal government's interest in preventing corruption and the appearance of corruption justifies limits on political campaign contributions).
[326] Mackenzie Battle & Cydnee Bence, *How Does the First Amendment Apply to Food and Supplement Labels?*, LABELS UNWRAPPED: ISSUE BRIEF (Ctr. for Agric. & Food Sys., South Roylaton, Vt.), 2021, 1, 1, https://labelsunwrapped.org/wp-content/uploads/2021/06/First-Amendment-Food-Labeling-Issue-r5.pdf.
[327] *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 561.
[328] *Id.* at 563.
[329] *Id.* at 566.
[330] *Id.*
[331] *Id.*

actually advances that substantial interest.[332] Finally, the government must show that the restriction is necessary to serve that substantial interest.[333]

The First Amendment is not a defense to a consumer protection action, because consumer protection laws target false and misleading speech. Corporations do not have a right to false or misleading speech or speech related to unlawful activities.[334] This is the basis of most consumer protection laws: corporations can be held liable for false or misleading speech because such speech is not protected by the Constitution.[335] Non-profit corporations are open to similar liability.[336] While the Constitution protects charitable solicitation, it does not protect fraudulent or deceptive solicitation.[337] For instance, where a charity misled donors by misrepresenting the percentage of donations that went to actual charitable activities, the Court found that those misrepresentations were not protected speech.[338] While a government cannot prohibit certain forms of charitable solicitation, it may enforce consumer protection laws against false or misleading commercial speech, even when the speech is not for profit.[339]

Therefore, speech that is actionable under a consumer protection claim fails the first prong of the *Central Hudson* test. Whether the speech is false or misleading is a different question than whether the government can prohibit or regulate that speech. In a consumer protection action, it may very well be the case that the speech at issue is *not* false or misleading. But in that case the law does not infringe on the corporation's right to make that statement.[340]

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[332] *Id.*
[333] *Id.*
[334] *Id.* at 563.
[335] *See Truth in Advertising*, FED. TRADE COMM'N, https://www.ftc.gov/news-events/media-resources/truth-advertising (last visited May 15, 2022).
[336] Illinois *ex rel.* Madigan v. Telemarketing Assocs., Inc., 538 U.S. 600, 612 (2003).
[337] *Id*.
[338] *Id.* at 624.
[339] *Id.* at 623–24.
[340] If, however, the government decided to regulate the term *sanctuary*, that government action would be subject to *Central Hudson* analysis. This Article does not go into this hypothetical, as the scope of this Article is on private litigation under the current state of the law. *See generally Central Hudson Gas & Elec. Corp.*, 447 U.S. at 557.

If a pseudo-sanctuary is not actually a sanctuary, claiming to be a sanctuary is not a protected activity under the First Amendment. As a commercial entity, including non-profits, an animal exhibition does not have the full suite of First Amendment protections afforded to natural persons. Accordingly, claiming to be a sanctuary is only protected under the First Amendment if that statement is actually true. For this reason, the First Amendment provides no shelter to pseudo-sanctuaries.

CONCLUSION

Consumer protection as a means of pseudo-sanctuary accountability seems initially promising. However, consumer protection is an incredibly broad area, and this Article can only scratch the surface. There are many more avenues within consumer protection that deserve exploration. Beyond applicability, there are larger questions of whether consumer protection can actually yield the best outcome.

There are other kinds of potentially actionable statements, such as those that falsely imply greater credibility. These statements deserve further attention because they can clearly be proven true or false. For example, using terms like *Animal Welfare Act Certified* or *USDA Certified* implies that the facility has a higher standard of care endorsed by the U.S. government. However, nearly all animal exhibitors are required to be licensed by the USDA under the AWA.[341] There is no separate certification to become AWA- or USDA-"certified." Yet the general public may believe that these facilities have a higher standard of care because they are "certified." There are also claims made by facilities that are plainly false, such as claiming on their ticket-purchasing webpage to prohibit cub-petting while promoting their cub-petting opportunities on social media.

This Article only explored a small segment of actions available to private individuals or sanctuaries. Nonetheless, charitable-funding claims also deserve more attention. Though these claims would rest on government actors, these claims are likely appealing to state actors. Even those that may have no ethical qualms with animal captivity—

[341] Animal Welfare Act, 7 U.S.C. § 2133.

pseudo-sanctuary or otherwise—recognize the immorality of charitable fraud. When people give money to a captive animal facility, they very likely expect the money will not be used for private gain, or for instance, wedding expenses and personal bankruptcy judgements.[342] These sorts of actions are more likely to have traction from state governments than those purely based on falsely claiming to be a sanctuary.

Finally, this Article did not sufficiently consider whether a consumer protection claim can actually yield a desirable outcome. While consumer protection laws have a range of remedies available and are partial to settlement, these remedies are mostly limited to dollars and cents. Certainly these judgements are valuable for restoring diverted donations to a genuine sanctuary. And, financial pressure may encourage pseudo-sanctuaries to surrender some animals to reputable sanctuaries or change their business name as part of a settlement. However, the effects of financial pressure may land on the animals the complainants sought to help—potentially endangering these animals further. Alternatively, if a plea for injunctive relief is successful, the facility would no longer be able to call itself a sanctuary. That is a success, but the name change may do very little for the animals kept captive. This does not even begin to account for the potential negative impacts of an unsuccessful claim. Though, with these considerations in mind, there is value in continuing to explore the role consumer protection can play in pseudo-sanctuary accountability.

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[342] Complaint for Temporary and Permanent Injunction, Civil Penalties, and Other Statutory Relief at 22–23, Florida v. Stearns Zoological Rescue & Rehab Ctr. Inc., No. 2017-CA-003015 (Fla. Cir. Ct. 2017), https://www.peta.org/wp-content/uploads/2021/06/FL-Ag-v-DCWT-fraud-complaint.pdf (alleging exhibitor used $9,681.96 in donations to finance a family wedding and tens of thousands of dollars used for personal bankruptcy payments).