



**Advertising & Marketing Law (Law 712)**  
**Midterm Exercise Sample Answer**  
Professor Eric Goldman  
Spring 2015

1) *Everyone loves Cuties.* This statement is implied from the “who doesn’t love” grammar. The language similarly implies that kids love cuties, an important point given that some kids resist eating anything healthy for them.

I think both statements are puffery because I think “love” isn’t falsifiable. A number of you thought this was a fact claim, which would be a problem. Some of you equated love with “enjoyment” and would survey if consumers “liked” Cuties. Even if that survey was appropriate substantiation, McDonalds couldn’t show 100% of consumers “love,” “enjoy” or “like” Cuties. Some people are allergic to citrus; others simply refuse to eat fruit under any circumstance; yet others idiosyncratically may not like Cuties (hard to believe, I know). What would be the minimum statistical consumer approval rate needed to support the “who doesn’t love” claim?

2) *The fruit depicted is a “Cutie.”* This is an express claim and can be substantiated by confirming that the depicted fruit is actually a Cutie. By representing the availability of “Cuties,” McDonalds may also be claiming that it will not substitute alternative oranges. (This reminded me a little of the Jacobs & Young v. Kent case involving Reading pipes—accept no substitutes!).

The Cuties FAQ (<http://cutiescitrus.com/faq/>) says: “There are two varieties of CUTIES® — clementine and Murcott. Which one you find in the grocery store will depend upon the growing season. Clementines are available from November until February, and Murcotts are available February through April.” The two varieties may not be identical, but the photo only depicts one variety. I’d need to research the differences between the two varieties to determine if this creates a problem.

3) *Cutie’s Appearance.*

*Size.* The photo depicting the Cutie could be an express claim about its size. If so, if the two Cutie varieties differ in size, we’d probably need to show the smaller variant. (For an example of how consumers care about the size of their food, see the Subway “Footlong” lawsuit).

However, the photo doesn’t give consumers enough information to accurately estimate the Cutie’s size. The holder’s hands are the only size referent, and we can’t tell how large those hands are (they appear to be a child’s, but how old is the kid?). Without a reliable scale, any size estimate is speculative. As a result, I think it’s not a fact claim. If you were to decide that the depiction is a fact claim, the ad could include a disclosure like “Cuties vary in size.” However, consumers may already understand that fruits naturally vary in size.

*Appearance.* The photo also might be a representation about the Cuties' appearance. I think most people know that photos don't capture colors perfectly, but the photo could still constitute a claim that the Cutie will be in the orangish range and relatively blemish-free.

Some of you thought that showing the Cutie with a heart cutout represented that the consumer's Cutie would have a similar cutout. I think most consumers would think the cutout simply reinforced the "love" message, so I see that as a very low risk. Still, consumer expectations about the Cutie's presentation could be explored with the focus groups.

4) *Fresh.* We didn't discuss it in class, but the FDA has rules about making "fresh" food claims. 21 C.F.R. 101.95.

"Fresh" fruit is an ambiguous statement capable of several meanings. It could mean: not frozen (or never frozen); not canned; not dehydrated; not rotten; not stale; or lacking preservatives. Some of these meanings are falsifiable, so it could be an express claim. If Cuties satisfied all of the possible meanings, then the claim should be fine. Substantiation could come from reviewing the supply contracts and any handling guidelines. However, if the Cuties meet some but not all of the definitions, some consumers may associate the term with the unmet definition(s).

I'm not even sure the "fresh" word is needed because the ad shows what appears to be a fresh Cutie. Perhaps the ad could strike this word without any real loss of meaning.

*Note:* I apologize that I didn't exclude the FDA angle from the question's scope. It didn't make a difference to the scoring or the analysis.

5) *Cuties are the newest fruit choice for Happy Meals.* "Newest" is an express claim, and there is an implied claim that McDonalds has or had other fruit choices. These claims can be verified by checking past and current menus.

6) *Cuties are available starting December 1.* This is an express claim. The claim can be verified by inspecting the supply contracts. I'd also want to verify that Cuties will make it through the supply chain by December 1.

7) *Cuties are a limited time option.* This is an express claim based on the language "get them while they're here" and "for a limited time." This can be substantiated by checking the supply contracts.

8) *Cuties are available at every McDonalds.* Consumers might receive an implied claim that a widely advertised item will be available at every location in a chain. However, the disclosure "at participating locations" may override the implied claim; and "get them while they're here" already suggests that some locations won't have them. I think many consumers understand that mega-chains don't always carry everything at every location, so the disclosure could work in this case.

*About the disclosures:* The last line of text is hard to read. But is it insufficient? Lawyers almost always want larger and more prominent disclosures. This is a fundamentally irresolute

negotiation with the marketing team because there's no clearly correct answer. I thought the disclosures were tiny, but the information in the disclosures was relatively inconsequential. That's perhaps the best way to think about disclosures. If it's really important, change the claim. If it's belt-and-suspenders, then it's not a crisis if the disclosures fail.

9) *Cuties make it easy to share the love.* This is a nonsense statement. It could mean that giving your kids a Cutie shows you love them; or it could mean that Cuties are easily shared as a food item. Either way, I think the statement is puffery.

10) *Copyright claims for both McDonalds and Maricopa Packers.* These are express claims and easily verified by confirming copyrightability.

11) *I'm Lovin' It.* This is another nonsense statement, and it's puffery.

12) *Cuties are healthy, especially for kids.* The ad never says that Cuties are healthy. However, it apparently relies on widespread consumer perceptions that fruit is typically healthy, in which case consumers would expect Cuties to be healthy as well. The heart cut into the Cutie might reinforce the health claim, and the depiction of a child's hands and the reference to children in the ad text could reinforce that the health claim extends to children.

"Healthy" is a tricky claim to make and substantiate. We didn't discuss this in class, but the FDA provides very detailed specifications for when a "healthy" claim can be made, though it's not clear if those specifications apply to this situation. See 21 C.F.R. 101.65(d)(2).

13) *Happy Meals are healthy because they include Cuties.* This is the real payload of the ad. The ad seeks to make parents feel OK purchase Happy Meals for kids.

The "Happy Meals are healthy" claim is implied, but I'd be curious exactly what message consumers receive. I think it's well known that Happy Meals aren't a "healthy" choice, and claiming they are healthy isn't substantiable. Further, McDonalds almost certainly cannot satisfy the CFR standards. On the other hand, consumers may take away the message that Happy Meals with Cuties are healthier than other Happy Meal configurations, which could be substantiated by comparing the nutritional values of Cuties with the other options.

I think McDonalds could slightly mitigate the risk of an implied healthy claim by eliminating the heart in the Cutie. If they wanted a cutout, perhaps they could write the word "Love"? Otherwise, if consumers think the addition of Cuties makes the Happy Meal "healthy," the implied claim cannot be fixed without a complete restructuring.

Not all of you discussed the implied health claims, but I really wanted you to. I didn't adjust grades on the midterm exercise based on this point, but it would be the kind of thing that would make a difference to the final exercise grade.