

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS**

<p>Roadget Business Pte. Ltd.,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">v.</p> <p>Whaleco, Inc. et al.,</p> <p style="text-align: center;">Defendant.</p>	<p style="text-align: center;">CIVIL ACTION NO. 1:22-cv-07119</p> <p style="text-align: center;">Hon. Franklin U. Valderrama</p>
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**DEFENDANT WHALECO, INC.’S MOTION TO DISMISS
THE FIRST AMENDED COMPLAINT PURSUANT TO FED. R. CIV. P. 12(b)(6)**

Defendant Whaleco, Inc. (d.b.a. “Temu”) moves to dismiss the First Amended Complaint (FAC) of Plaintiff Roadget Business Pte. Ltd. (d.b.a. “Shein”) pursuant to Federal Rules of Civil Procedure 12(b)(6), and in support states:

1. Shein brought an amended complaint for thirteen counts against Temu, alleging, among other claims, federal false advertising, 15 U.S.C. § 1125(a)(1)(B); contributory false advertising, 15 U.S.C. § 1125(a); deceptive trade practices in violation of the Illinois Uniform Deceptive Trade Practices Act (“IUDTPA”), 815 ILCS 510/1 et seq.; deceptive trade practices in violation of the Illinois Consumer Fraud and Deceptive Business Practices Act (“ICFA”), 815 ILCS 505/1 et seq.; and product disparagement and trade libel under Illinois common law.

2. The Court should dismiss these claims because (i) Shein fails to allege conduct that occurs “primarily or substantially in Illinois,” as required under the IUDPTA, the ICFA, and common-law product disparagement, and (ii) the claims stemming from the allegedly false influencer statements are inactionable under the Lanham Act and product disparagement claims.

3. To bring IUDPTA, ICFA, and common-law product disparagement claims, a plaintiff must allege that the transaction at issue occurred “primarily and substantially in Illinois.” *Maui Jim, Inc. v. SmartBuy Guru Enters.*, No. 16 C 9788, 2018 U.S. Dist. LEXIS 10093, at *13-14 (N.D. Ill. Jan. 23, 2018) (IUDPTA and ICFA); *Heim v. Comcast Cable Commc’ns, LLC*, No. 18 C 762, 2020 U.S. Dist. LEXIS 253032, at *8-11 (N.D. Ill. Dec. 8, 2020) (ICFA); *Maui Jim, Inc. v. SmartBuy Guru Enters.*, 386 F. Supp. 3d 926, 939-40 (N.D. Ill. 2019) (common law commercial disparagement). Shein has alleged nationwide conduct that just happened to occur in Illinois, and that cannot be said to relate “primarily and substantially” to Illinois. Shein has failed to state valid IUDPTA, ICFA, or common-law disparagement claims.

4. There is also no merit to the direct and secondary claims for liability under the Lanham Act and common-law product disparagement in connection with the influencer statements. First, the statements that Temu made to influencers over email were not made “in commercial advertising and promotion” and cannot be brought under the Lanham Act. 15 U.S.C. § 1125(a)(1)(B); *Sanderson v. Culligan Int’l Co.*, 415 F.3d 620, 624 (7th Cir. 2005). Second, statements that Temu is “cheaper” and of “better quality” than Shein, without any specific product comparisons or representations, is mere puffery and not actionable under the Lanham Act or common-law product disparagement. *See Hot Wax, Inc. v. Turtle Wax, Inc.*, 191 F.3d 813, 819 (7th Cir. 1999); *Martin v. Wendy Int’l, Inc.*, 183 F. Supp. 925, 934 (N.D. Ill. 2016); *Soderlund Bros. Inc. v. Carrier Corp.*, 663 N.E.2d 1, 10-11 (Ill. App. Ct. 1995); J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 27:109 (5th ed. 2023). Third, the Seventh Circuit does not recognize a claim for contributory false advertising under the Lanham Act. *See Telebrands Corp. v. My Pillow, Inc.*, No 18 C 6318, 2019 U.S. Dist. LEXIS

72832, at *8 (N.D. Ill. Apr. 30, 2019). The FAC has therefore failed to meet the pleading requirements for these claims, and the Court should dismiss them.

WHEREFORE, for the reasons set forth herein and in its accompanying Memorandum of Law, Temu respectfully requests that this Court grant its motion to dismiss Count IV (federal false advertising) as it pertains to influencer statements, and Counts V (contributory false advertising), IX (IUOTPA), X (ICFA), and XII (disparagement) in their entirety.

Dated: March 15, 2023

Respectfully submitted,

By: /s/ Steven P. Mandell

Steven P. Mandell

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Counsel for Defendant WhaleCo, Inc.

CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that a copy of the foregoing document has been served on March 15, 2023 via the Court's CM/ECF system on all counsel of record who have consented to electronic service.

/s/ Steven P. Mandell

Steven P. Mandell