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**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

**Christopher M. Wolpert
Clerk of Court**

BIMBO BAKERIES USA, INC.,

Plaintiff - Appellee/Cross-Appellant,

v.

No. 18-4062

LELAND SYCAMORE,

Defendant - Appellant/Cross-Appellee.

BIMBO BAKERIES USA, INC.,

Plaintiff - Appellant,

v.

No. 19-4031

LELAND SYCAMORE; UNITED STATES BAKERY,

Defendants - Appellees.

BIMBO BAKERIES USA, INC.,

Plaintiff - Appellee,

v.

No. 19-4040

LELAND SYCAMORE,

Defendant,

and

UNITED STATES BAKERY,

Defendant - Appellant.

**Appeal from the United States District Court
for the District of Utah
(D.C. No. 2:13-CV-00749-DN)**

Steven Wilker (Christopher Pallanch, Robert Koch, and Jeffrey Bradford, with him on the briefs), Tonkon Torp LLP, Portland, Oregon, for Defendant - Appellant/Cross-Appellee United States Bakery.

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Before **HARTZ, PHILLIPS**, and **EID**, Circuit Judges.

EID, Circuit Judge.

These consolidated appeals concern claims of unfair competition in the bread industry. Bimbo Bakeries USA, Inc. (“Bimbo Bakeries”) owns, bakes, and sells Grandma Sycamore’s Home-Maid Bread (“Grandma Sycamore’s”). Bimbo Bakeries alleges that United States Bakery (“U.S. Bakery”), a competitor, and Leland Sycamore (“Leland”), the baker who developed the Grandma Sycamore’s recipe, misappropriated its trade secret for making Grandma Sycamore’s. Bimbo Bakeries further claims that U.S. Bakery infringed upon Grandma Sycamore’s trade dress

when it sold a comparable bread product, Grandma Emilie’s, and engaged in false advertising when it used the tagline “Fresh. Local. Quality.” The district court granted summary judgment in favor of U.S. Bakery on the trade dress infringement claim. The parties went to trial on the other two claims, and the jury returned a verdict in favor of Bimbo Bakeries on both. After the trial, the district court denied U.S. Bakery’s and Leland’s renewed motions for judgment as a matter of law on the trade secrets misappropriation and false advertising claims. The district court did, however, remit the jury’s damages award.

Bimbo Bakeries, U.S. Bakery, and Leland all appeal. Bimbo Bakeries argues the district court should not have granted U.S. Bakery summary judgment on its trade dress infringement claim and should not have remitted damages for the false advertising claim. U.S. Bakery and Leland argue the district court should have granted their renewed motions for judgment as a matter of law, and Leland makes additional arguments related to his personal liability. Exercising jurisdiction under **28 U.S.C. § 1291**, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion because all Bimbo Bakeries’ claims fail as a matter of law.

I.

a.

In 1979, Leland Sycamore developed the recipe and process for making Grandma Sycamore’s Home-Maid Bread. As the name suggests, Grandma Sycamore’s seeks to emulate bread made at home—for example, the bread is baked

in a special pan so that two loaves can be pulled apart, giving the bread a “breakaway side”—and falls under the commercial category of homemade bread products. *See* U.S. Bakery Aplt. Br. at 4. The bread has been immensely popular in Utah. Leland parted with his interest in Grandma Sycamore’s in 1998 and opened his own bakery, which became Wild Grains Bakery LLC (“Wild Grains Bakery”), with his son Tyler. By 2013, EarthGrains Baking Companies, Inc. (“EarthGrains”) owned the rights to the bread.

Although Grandma Sycamore’s is dominant, it has not been without competitors. One full-line bakery, Hostess, also made and sold a homemade bread product in Utah known as Grandma Emilie’s. But Hostess went bankrupt in late 2012, taking Grandma Emilie’s off the market. Hostess’s bankruptcy, however, created an opportunity for U.S. Bakery, a bread company based in Portland, Oregon, to enter the Utah market and produce a product that could compete with Grandma Sycamore’s.

From the Hostess liquidation, U.S. Bakery acquired various assets, including a Salt Lake City bakery, several warehouses throughout Utah, and Grandma Emilie’s. With its new assets, U.S. Bakery sought to reopen the Salt Lake City bakery and relaunch Grandma Emilie’s. U.S. Bakery hired Wild Grains Bakery—Leland’s bakery—to produce the bread. This relationship soon soured due to quality control problems. At the same time as the arrangement with Wild Grains Bakery went awry, the long-term prospects of the Salt Lake City site looked bleak. U.S. Bakery decided

to make Grandma Emilie's in-house around July 2013 and closed its Salt Lake City bakery in October 2013.

U.S. Bakery's plan was to develop a new formula for Grandma Emilie's and produce it at its bakery in Nampa, Idaho. U.S. Bakery transferred one of its employees, Jeremy Faull, to the Nampa bakery to help with the Grandma Emilie's project. Faull previously worked for Leland. By January 2014, U.S. Bakery was able to develop a recipe for Grandma Emilie's that it thought could compete with Grandma Sycamore's.

In addition to developing the Grandma Emilie's recipe, U.S. Bakery created three iterations of packaging for the bread. In designing the packaging, U.S. Bakery took into consideration the packaging used for Grandma Sycamore's. Because EarthGrains thought the first iteration was too similar to its own packaging, EarthGrains wrote to U.S. Bakery complaining that the packaging infringed on Grandma Sycamore's trade dress.

U.S. Bakery used several taglines to help sell its products. One was "Fresh. Local. Quality." U.S. Bakery displayed the tagline at points of sale and placed the tagline on its trucks. U.S. Bakery started using this tagline in 2012, before it entered the Utah market. In addition to the Salt Lake City location, U.S. Bakery had bakeries in Alaska, Idaho, Montana, Oregon, and Washington. It sold bread products under the "Fresh. Local. Quality." tagline throughout those states regardless of where the products were baked, as well as in California and Wyoming, before moving away from the tagline in mid-2015. U.S. Bakery also adopted an additional tagline after

expanding into Utah, “Freshly Baked in Utah.” It stopped using this tagline when it shut down the Salt Lake City bakery in 2013.

b.

On August 7, 2013, EarthGrains sued Leland, Tyler Sycamore (Leland’s son), Wild Grains Bakery, and U.S. Bakery. In its complaint, EarthGrains alleged three causes of action. First, EarthGrains claimed the defendants misappropriated its production process for Grandma Sycamore’s, a trade secret, when creating the new recipe for Grandma Emilie’s in violation of the Utah Uniform Trade Secrets Act. Second, EarthGrains claimed the defendants infringed on its trade dress when creating the packaging for Grandma Emilie’s in violation of the Lanham Act. Last, EarthGrains claimed the defendants unlawfully diluted its trade dress in violation of the Lanham Act.

In January 2014, EarthGrains transferred almost all its assets, including its interest in Grandma Sycamore’s, to its parent company, Bimbo Bakeries. On December 15, 2014, Bimbo Bakeries filed an amended complaint. In it, Bimbo Bakeries brought a fourth cause of action against U.S. Bakery for false designation of origin, false advertising, and unfair competition in violation of the Lanham Act. According to Bimbo Bakeries, U.S. Bakery’s use of its taglines constituted false or misleading advertising because U.S. Bakery did not actually bake all its bread products within the state of sale.

These appeals involve the trade dress infringement claim against U.S. Bakery, the trade secrets misappropriation claim against U.S. Bakery and Leland, and the

false advertising claim against U.S. Bakery as it relates to U.S. Bakery's use of the tagline "Fresh. Local. Quality." The district court granted U.S. Bakery summary judgment on the trade dress infringement claim. The parties went to trial on the trade secrets misappropriation and false advertising claims, and the jury found in Bimbo Bakeries' favor on both. In a special verdict, the jury found Bimbo Bakeries suffered \$2,105,256 in damages from the misappropriation, allocating \$1,578,942 to U.S. Bakery and the remaining \$526,314 to Leland. Because the jury found by clear and convincing evidence that U.S. Bakery willfully and maliciously misappropriated Bimbo Bakeries' trade secret, the district court increased the damages owed by U.S. Bakery by \$789,471. The district court permanently enjoined U.S. Bakery and Leland from using Bimbo Bakeries' trade secret.

The jury also found Bimbo Bakeries suffered \$8,027,720 in damages as a result of U.S. Bakery's profits from using the tagline "Fresh. Local. Quality." The district court remitted this damages award to \$83,398. Finally, the district court denied renewed motions by U.S. Bakery and Leland for judgment as a matter of law for the trade secrets misappropriation and false advertising claims.

Bimbo Bakeries, U.S. Bakery, and Leland all appeal. In Case No. 19-4031, Bimbo Bakeries argues the district court should not have granted U.S. Bakery summary judgment on its trade dress infringement claim and should not have remitted damages for the false advertising claim. U.S. Bakery, in Case No. 19-4040, and Leland, in Case No. 18-4062, argue the district court should have granted their

renewed motions for judgment as a matter of law. Leland raises additional arguments concerning his personal liability for the misappropriation claim.

II.

We first address the claim that was resolved on summary judgment—Bimbo Bakeries’ claim that U.S. Bakery infringed on its trade dress. According to Bimbo Bakeries, the Grandma Sycamore’s trade dress includes the following elements: “(1) a horizontally-oriented label; (2) a design placed at the top center of the end; (3) the word ‘White’ in red letters; (4) the use of a red, yellow, and white color scheme; and (5) stylized font below the design outlined in white.” U.S. Bakery App’x Vol. IX at 2151; *see also* U.S. Bakery App’x Vol. I at 79 (amended complaint). Based on the packaging for Grandma Sycamore’s and its competitors in the homemade bread products space, the district court found “[t]he combination of [Bimbo Bakeries’] purported trade dress is clearly generic” and concluded it was “not subject to protection” under the Lanham Act. U.S. Bakery App’x Vol. IX at 2152. Bimbo Bakeries’ purported trade dress was generic, according to the district court, because combining those elements was “the custom in the industry.” *Id.*

On appeal, Bimbo Bakeries argues that its trade dress is protectable because consumers associate it with Grandma Sycamore’s, Bimbo Bakeries spent millions of dollars advertising its product, and U.S. Bakery intentionally copied the Grandma Sycamore’s packaging.¹ We disagree.

¹ Bimbo Bakeries asserts in a short footnote in its opening brief that the district court wrongly refused to include in the purported trade dress the element that the

We “review[] the grant of summary judgment *de novo*, employing the same standard applied by the district court.” *Sally Beauty Co., Inc. v. Beautyco, Inc.*, 304 F.3d 964, 971 (10th Cir. 2002). Summary judgment is appropriate “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). “An issue is genuine ‘if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.’” *Sally Beauty*, 304 F.3d at 972 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). “We construe the evidence and the reasonable inferences drawn therefrom in the light most favorable to the nonmovant.” *Id.*

The Lanham Act protects “not just word marks, such as ‘Nike,’ and symbol marks, such as Nike’s ‘swoosh’ symbol, but also ‘trade dress.’” *Forney Indus., Inc. v. Daco of Mo., Inc.*, 835 F.3d 1238, 1244 (10th Cir. 2016) (quoting *Wal-Mart Stores,*

word “Grandma” is in the top center of the label. Bimbo Bakeries did not include this element in its amended complaint. This footnote is inadequate to preserve this issue on appeal, so it is waived. *See, e.g., United States v. Hardman*, 297 F.3d 1116, 1131 (10th Cir. 2002) (“Arguments raised in a perfunctory manner, such as in a footnote, are waived.”). Indeed, Bimbo Bakeries does not even mention what our standard of review would be, or what legal framework would guide our analysis where a plaintiff fails to include an allegation in its complaint that it should have known at the time of filing but raised for the first time in its opposition to a motion for summary judgment. We too will refuse to consider this purported element.

Bimbo Bakeries also assumes in its briefs that the design’s placement on a see-through bag is an element of its purported trade secret. For the same reason it refused to consider the “Grandma” element, however, the district court refused to consider this see-through bag element. Bimbo Bakeries makes no mention of this fact. Although it would not matter because see-through bags were clearly part of industry custom, *see* U.S. Bakery App’x Vol. IX at 2152, we will not consider the see-through bag element as part of Bimbo Bakeries’ purported trade dress.

Inc. v. Samara Bros., Inc., 529 U.S. 205, 209 (2000)). A trade dress is “an object’s total image and overall appearance, which may include features such as size, shape, color or color combinations, texture, graphics, or even particular sales techniques.” *Id.* (brackets omitted) (quoting *Savant Homes, Inc. v. Collins*, 809 F.3d 1133, 1146 (10th Cir. 2016)). Section 43(a) of the Act, codified at 15 U.S.C. § 1125(a), protects unregistered marks and trade dress. *See id.* at 1244.

“To obtain relief under § 43(a), a plaintiff must show: ‘(1) The trade dress is inherently distinctive or has become distinctive through secondary meaning; (2) There is a likelihood of confusion among consumers as to the source of the competing products; and (3) The trade dress is nonfunctional.’” *Savant Homes*, 809 F.3d at 1147 (quoting *Gen. Motors Corp. v. Urban Gorilla, LLC*, 500 F.3d 1222, 1227 (10th Cir. 2007)). “A mark is ‘inherently distinctive if its intrinsic nature serves to identify a particular source.’” *Forney*, 835 F.3d at 1244 (citation omitted). “If the mark is not inherently distinctive, it can gain protection only once ‘it has developed secondary meaning, which occurs when, in the minds of the public, the primary significance of a mark is to identify the source of the product rather than the product itself.’” *Id.* at 1245 (quoting *Wal-Mart*, 529 U.S. at 211).

Taking the framework from the word-mark context, courts use the following categories “to assist in determining whether a [trade dress] is inherently distinctive: (1) fanciful, (2) arbitrary, (3) suggestive, (4) descriptive, or (5) generic.” *Id.* Fanciful, arbitrary, and suggestive marks and trade dress are entitled to protection. *See id.* Descriptive marks and trade dress must have acquired secondary meaning to

be entitled to protection. *See id.* “Generic marks” and trade dress “are not protectable under the Lanham Act.” *Id.*

In determining whether a trade dress is entitled to protection, we also consider “(1) whether it was a common basic shape or design, (2) whether it was unique or unusual in a particular field, and (3) whether it was a mere refinement of a commonly-adopted and well-known form of ornamentation for a particular class of goods viewed by the public as a dress or ornamentation for the goods.” *Id.* at 1246 (citation and internal quotation marks omitted). “Where it is the custom of an industry to package products in a particular manner, a trade dress in that style would be generic and therefore not inherently distinct.” *Paddington Corp. v. Attiki Imps. & Distribs., Inc.*, 996 F.2d 577, 583 (2d Cir. 1993). The Second Circuit has provided a useful example of this: “packaging lime-flavored soda in green twelve-ounce cans is so common in the soft drink industry that such packaging probably is not inherently distinctive, although without the industry practice green cans would be either suggestive or arbitrary and therefore inherently distinctive.” *Id.* at 583–84.

We conclude that the purported trade dress for Grandma Sycamore’s is generic and unprotectable for the same reason the district court did—it is customary for homemade bread products. As a photograph submitted by U.S. Bakery shows, U.S. Bakery App’x Vol. IX at 2152, the homemade bread products that compete with Grandma Sycamore’s all tend to combine the purported trade dress elements: “(1) a horizontally-oriented label; (2) a design placed at the top center of the end; (3) the word ‘White’ in red letters; (4) the use of a red, yellow, and white color scheme; and

(5) stylized font below the design outlined in white.” *Id.* at 2151. The purported trade dress claimed by Bimbo Bakeries is thus defined at a broad enough level of generality to sweep in its competitors. Bimbo Bakeries may well have a protectable Grandma Sycamore’s trade dress, but its claim in this litigation extends far beyond its product’s more specific attributes.

While Bimbo Bakeries contends that people recognize its purported trade dress as Grandma Sycamore’s,² that it spent millions of dollars on advertising, and that U.S. Bakery copied its trade dress, Bimbo Bakeries offers no countervailing evidence regarding what is customary for the trade dress of homemade bread products. *Accord* U.S. Bakery App’x Vol. IX at 2155 (district court noting that “Bimbo [Bakeries] contends that th[e] photograph is not representative” but “fails to offer facts to support its argument”).³ We are left with a case much like the Second Circuit’s

² We doubt the value and reliability of the expert’s survey in this regard. The expert asked consumers whether they thought a picture of Grandma Sycamore’s exact package with just the “Grandma Sycamore’s” name removed (but several other features more specific than the purported trade dress, including the “Home-Maid Bread” marker, still on it) came from a single source, rather than asking about the far more general purported trade dress alleged by Bimbo Bakeries. Recognizing the Grandma Sycamore’s packaging with two words omitted is not the same as associating every iteration of the highly general purported trade dress claimed by Bimbo Bakeries with solely Grandma Sycamore’s.

³ In one sentence in its opening brief, Bimbo Bakeries argues that the photograph was not authenticated, so it was improper evidence on summary judgment. Bimbo Bakeries, however, does not cite to the record for any support and fails to cite to, let alone apply, any legal framework to help us rule on this issue. This argument is therefore also waived. *See, e.g., Thomas v. Gibson*, 218 F.3d 1213, 1224 n.9 (10th Cir. 2000). Bimbo Bakeries does expand somewhat on its argument in reply, but again it fails to cite to or apply any legal principle. In any event, arguments raised for the first time in reply are waived. *See, e.g., United States v. Leffler*, 942 F.3d 1192, 1197 (10th Cir. 2019).

“lime-flavored soda” example. *Paddington*, 996 F.2d at 583. Based on the record before us, we can only conclude that “it is the custom of [the] industry to package products in [the] particular manner” Bimbo Bakeries purports to be its trade dress. *Id.* Bimbo Bakeries’ purported trade dress is generic and not entitled to protection under the Lanham Act. *See Forney*, 835 F.3d at 1246 (stating that this court should consider the uniqueness or unusualness of the trade dress in the “particular field” and what is typical “ornamentation for a particular class of goods”). There is thus “no genuine dispute as to any material fact,” and U.S. Bakery “is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). We affirm the district court’s grant of summary judgment in favor of U.S. Bakery on Bimbo Bakeries’ trade dress infringement claim.

III.

We next turn to Bimbo Bakeries’ claim that U.S. Bakery and Leland misappropriated its trade secret. Before trial, Bimbo Bakeries submitted a statement identifying its trade secret—

[REDACTED]

[REDACTED] In full, the trade secret consists of the following:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] The jury found that this trade secret was protectable and that U.S. Bakery and Leland misappropriated it.

After trial, both U.S. Bakery and Leland renewed their motions for judgment as a matter of law. U.S. Bakery’s theory was that Bimbo Bakeries’ purported trade secret is a compilation that is the skill and knowledge of the trade and hence not protectable as a matter of law. In other words, U.S. Bakery argued Bimbo Bakeries’ “claim fails as a matter of Utah law because no reasonable juror could find that [its]

compilation trade secret is not generally known or readily ascertainable.” U.S. Bakery App’x Vol. X at 2419. The district court rejected this argument because “the jury could reasonably find that Bimbo Bakeries had a protectable trade secret” “[b]ased on the evidence presented at trial.” U.S. Bakery App’x Vol. XI at 2846. Indeed, the district court noted, “[n]one of U.S. Bakery’s witnesses, including its baking expert, testified that the use [REDACTED] of [Bimbo Bakeries’] trade secret to produce a commercial ‘granny-style’ bread was generally known or readily ascertainable to U.S. Bakery.” *Id.* U.S. Bakery reasserts this argument on appeal, urging that “[n]o reasonable juror could find that the compilation is not generally known or readily ascertainable.” U.S. Bakery Aplt. Br. at 27. U.S. Bakery is correct.

“We review de novo a district court’s [denial of a renewed motion for judgment as a matter of law], applying the same standards as the district court.” *Helmer v. Goodyear Tire & Rubber Co.*, 828 F.3d 1195, 1199 (10th Cir. 2016). We may only “render judgment as a matter of law when [the nonmovant] has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for [the nonmovant] on that issue.” *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 149 (2000) (internal quotation marks omitted). “Drawing all reasonable inferences in favor of the nonmoving party, . . . we thus will reverse the district court[] . . . if the evidence points but one way and is susceptible to no reasonable inferences supporting the [nonmovant].” *ClearOne Commc’ns, Inc. v. Bowers*, 643 F.3d 735, 772 (10th Cir. 2011) (citation and internal quotation marks omitted) (first omission in original).

“To establish a claim for misappropriation of trade secrets” under Utah law, Bimbo Bakeries was required to “show (1) the existence of a trade secret, (2) communication of the trade secret to [U.S. Bakery] under an express or implied agreement limiting disclosure of the secret, and (3) [U.S. Bakery’s] use of the secret that injure[d] [Bimbo Bakeries].” *USA Power, LLC v. PacifiCorp*, 372 P.3d 629, 648 (Utah 2016) (“*USA Power II*”) (citation and internal quotation marks omitted). U.S. Bakery’s appeal concerns only the first element.

The Utah Uniform Trade Secrets Act protects a “compilation . . . that . . . derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use” and “is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.” *Utah Code Ann. § 13-24-2(4)*; accord *USA Power, LLC v. PacifiCorp*, 235 P.3d 749, 759 (Utah 2010) (“*USA Power I*”) (“[A] unique combination of generally known elements or steps can qualify as a trade secret, if it represents a valuable contribution attributable to the independent efforts of the one claiming to have conceived it.”). “[A] compilation of information within the public domain may constitute a trade secret,” but, of course, “[t]he compilation . . . must not itself be generally known or readily ascertainable.” *USA Power I*, 235 P.3d at 759–60 (citing *Microbiological Research Corp. v. Muna*, 625 P.3d 690, 696 (Utah 1981)).

Whether a compilation constitutes a trade secret is a fact-intensive inquiry, and the Utah Supreme Court has outlined several factors to consider:

- (1) [T]he extent to which the information is known outside of the business;
- (2) [T]he extent to which it is known by employees and others involved in its business;
- (3) [T]he extent of measures taken by the business to guard the secrecy of its information;
- (4) [T]he value of the information to the business and its competitors;
- (5) [T]he amount of effort or money expended by the business in developing the information;
- (6) [T]he ease or difficulty with which the information could be properly acquired or duplicated by others.

Id. at 760 (quoting Restatement of Torts § 757 cmt. b (1939)). “The ‘generally known or readily ascertainable’ standard ‘cannot be viewed as whether the information is generally known and readily ascertainable to the general public, but, based on the defendant[’s] knowledge and experience, whether the information was known or ascertainable to [the defendant].’” *Id.* at 759 (alterations in original) (quoting *Utah Med. Prods., Inc. v. Clinical Innovations Assocs., Inc.*, 79 F. Supp. 2d 1290, 1312 (D. Utah 1999)).

While the Utah Uniform Trade Secrets Act does not have a “particularity requirement,” “[t]he trade secret at issue . . . must be defined in a manner that allows the fact-finder to determine if a trade secret exists under the statute.” *USA Power II*, 372 P.3d at 649–50. That is, a “plaintiff asserting a compilation trade secret must do more than ‘point to broad areas of technology and assert that something there must have been secret and misappropriated.’” *Id.* (quoting *USA Power I*, 235 P.3d at 760). Rather, it must define its trade secret such that “the fact-finder [can] determine if

information claimed as a trade secret ‘derives independent economic value’ ‘from not being generally known to’ or ‘readily ascertainable by’ those who could ‘obtain economic value from its disclosure.’” *Id.* (quoting Utah Code Ann. § 13-24-2(4)(a)). “The plaintiff bears the burden of proving the existence of a trade secret, and there is no presumption in [its] favor.” *Id.* at 648 (internal quotation marks omitted).

Based on our review of the evidence, we find that no reasonable jury could conclude Bimbo Bakeries’ purported trade secret was not “generally known or readily ascertainable” to U.S. Bakery. *USA Power I*, 235 P.3d at 759. We start with the individual elements of Bimbo Bakeries’ compilation. *See USA Power II*, 372 P.3d at 651 (declining to consider the compilation as a whole because some elements were not generally known or readily ascertainable). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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No reasonable jury could have found for Bimbo Bakeries on its trade secrets misappropriation claim. Because our holding forecloses the claim altogether, we need not address Leland’s various arguments on appeal for why he could not have individually been held liable or responsible for this claim; we deny Leland’s pending motions for judicial notice of pleadings in a related action as moot. We reverse the district court’s denial of U.S. Bakery’s and Leland’s renewed motions for judgment as a matter of law.

IV.

We last turn to Bimbo Bakeries’ claim that U.S. Bakery engaged in false advertising when it used the tagline “Fresh. Local. Quality.” to advertise its products, including Grandma Emilie’s. In addition to the closed Utah bakery, U.S. Bakery’s products were variously baked in Alaska, Idaho, Montana, Oregon, and

Washington, and then sold in those states, as well as in California and Wyoming. Bimbo Bakeries focuses its argument on U.S. Bakery's use of the word "local," which Bimbo Bakeries interprets as asserting that U.S. Bakery's products were baked in-state when many were actually baked out-of-state. The jury agreed. It found U.S. Bakery engaged in willful false advertising by using the tagline and that Bimbo Bakeries suffered \$8,027,720 in damages. U.S. Bakery renewed its motion for judgment as a matter of law, arguing its tagline was not false or misleading and was not likely to cause confusion or mistake over the origin of its products. In addition, U.S. Bakery argued that evidence Bimbo Bakeries used to prove its claim—specifically, testimony from Bimbo Bakeries' expert, Dr. Glenn Christensen, about a survey of Utah consumers he conducted—was inadmissible given Dr. Christensen's lack of credentials and the survey's fundamental flaws. In the alternative, U.S. Bakery argued the district court should remit the jury's damages award.

The district court rejected U.S. Bakery's arguments. According to the district court, "the jury's verdict was sufficiently supported by the evidence and not legal error." U.S. Bakery App'x Vol. XI at 2842. With respect to the expert, the district court found that "Dr. Christensen's education, experience, and qualifications qualified him to testify to quantitative surveys" and "[a]ny flaws in [his] [survey] methodology were not so substantial as to render the survey's conclusions untrustworthy." *Id.* at 2844. The district court did, however, find that "the jury should have limited damages to" U.S. Bakery's use of the tagline in Utah because Dr. Christensen's "survey w[as] limited to Utah" and "consumers in different states

might have different perceptions of what constitutes being ‘local.’” *Id.* at 2848, 2850. The district court remitted the damages award to \$83,398.

Both U.S. Bakery and Bimbo Bakeries appeal. U.S. Bakery again argues that the tagline “Fresh. Local. Quality.” was not false or misleading and was not likely to cause confusion or mistake over the origin of its products. It also argues that Dr. Christensen’s testimony and survey should have been excluded. Bimbo Bakeries contends that the district court was correct to deny U.S. Bakery’s renewed motion for judgment as a matter of law, but that the district court erred in remitting damages. We need not reach either the evidentiary or damages questions, however, because the district court should have granted U.S. Bakery’s motion for judgment as a matter of law. U.S. Bakery’s use of the word “local” in its tagline is not actionable under the Lanham Act because it is not a factual claim that may be deemed false or misleading.

As recounted above, our review of the district court’s denial of U.S. Bakery’s motion for judgment as a matter of law is *de novo*. *See Helmer*, 828 F.3d at 1199. We view the evidence, and all reasonable inferences we can draw from it, in the light most favorable to Bimbo Bakeries. *See ClearOne*, 643 F.3d at 772. We may only reverse the district court’s denial of U.S. Bakery’s motion if there is no legally sufficient evidentiary basis for a reasonable jury to find for Bimbo Bakeries. *See Reeves*, 530 U.S. at 149.

Section 43(a) of the Lanham Act creates a cause of action where a competitor “uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or

false or misleading representation of fact, which . . . in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person’s goods, services, or commercial activities.” 15 U.S.C. § 1125(a); see also *Zoller Labs., LLC v. NBTY, Inc.*, 111 F. App’x 978, 982 (10th Cir. 2004) (unpublished).⁴ To succeed on its false advertising claim, Bimbo Bakeries was required to prove the following:

- (1) U.S. Bakery “made a false or misleading description of fact or representation of fact in a commercial advertisement about [its] own or another’s product”;
- (2) U.S. Bakery’s “misrepresentation [wa]s material, in that it [wa]s likely to influence the purchasing decision”;
- (3) U.S. Bakery’s “misrepresentation actually deceive[d] or ha[d] the tendency to deceive a substantial segment of its audience”;
- (4) U.S. Bakery “placed the false or misleading statement in interstate commerce”; and
- (5) Bimbo Bakeries “has been or is likely to be injured as a result of the misrepresentation, either by direct diversion of sales or by a lessening of goodwill associated with its products.”

Zoller, 111 F. App’x at 982 (citation omitted); accord *Cottrell, Ltd. v. Biotrol Int’l, Inc.*, 191 F.3d 1248, 1252 (10th Cir. 1999). We limit our discussion to U.S. Bakery’s challenge to the first element.

⁴ Although not precedential, we find the discussion in *Zoller* and all other unpublished opinions we rely on herein to be instructive. See 10th Cir. R. 32.1(A) (“Unpublished decisions are not precedential, but may be cited for their persuasive value.”); see also Fed. R. App. P. 32.1.

“To demonstrate falsity within the meaning of the Lanham Act, a plaintiff may show that the statement was literally false, either on its face or by necessary implication, or that the statement was literally true but likely to mislead or confuse consumers.” *Zoller*, 111 F. App’x at 982 (citation omitted). But the foregoing framework only applies if the statement under attack is a statement of fact. Courts have long concluded that only statements of fact are actionable under the Lanham Act. *See Intermountain Stroke Center, Inc. v. Intermountain Health Care, Inc.*, 638 F. App’x 778, 785–86 (10th Cir. 2016) (unpublished); *see also Verisign, Inc. v. XYZ.COM LLC*, 848 F.3d 292, 302 (4th Cir. 2017) (“[I]n order to be ‘false’ in any way cognizable under the Lanham Act, a statement must also be one of fact.”). “A factual claim is a statement that ‘(1) admits of being adjudged true or false in a way that (2) admits of empirical verification.’” *Am. Italian Pasta Co. v. New World Pasta Co.*, 371 F.3d 387, 391 (8th Cir. 2004) (quoting *Pizza Hut, Inc. v. Papa John’s Int’l, Inc.*, 227 F.3d 489, 496 (5th Cir. 2000)). A statement that fails to meet these criteria falls outside the Lanham Act’s purview. Because “local” does not meet the definition of a factual claim, we conclude that it is not actionable under the Lanham Act, either standing alone or as deployed in U.S. Bakery’s “Fresh. Local. Quality.” campaign. *See Pizza Hut*, 227 F.3d at 501 (reviewing allegedly false advertising both in isolation and in marketing context).

The problem for Bimbo Bakeries is that the word “local” cannot be “adjudged true or false in a way that . . . admits of empirical verification.” *Am. Italian Pasta Co.*, 371 F.3d at 391 (quoting *Pizza Hut*, 227 F.3d at 496). The word is not reducible

to the unambiguous factual message that, as Bimbo Bakeries argues, the underlying product is made locally, let alone that “local” refers to “the state of sale.” Bimbo Bakeries Aplt. Br. at 63. For one thing, using the word “local” in a marketing campaign, without anything more, can connote a host of ideas. It might mean that a company hires local workers, that it uses local materials, that it is locally based, that it participates in outreach efforts with local organizations, or that it donates money to local causes. Even assuming that “local” refers to where a product was made, however, the word lacks any specific objective meaning beyond the general concept it conveys. Definitions of “local” and views about whether something is “local” vary wildly, so the word’s usage in marketing can only communicate U.S. Bakery’s position that its products are local. The same ambiguity haunts every rival interpretation of the word. Without more, then, the veracity of a locality claim cannot be judged in an empirically verifiable way. *See Am. Italian Pasta Co.*, 371 F.3d at 391. Locality is fundamentally subjective.

Without any consensus definition of what “local” objectively means, we are unable to conclude that a claim of locality admits of being proven true or false. Dictionary definitions of “local” offered by Bimbo Bakeries focus on a relationship to a particular area or place, but do not explain how large that area or place can be, or how to demarcate it. *See* Bimbo Bakeries App’x Vol. IV at 719 (“relating to or occurring in a particular area, city, or town”); *id.* at 720 (“pertaining to or characterized by place or position in space; spatial”). An entirely reasonable application of such definitions would account for something being local despite being

from just across state borders, but not account for something being local despite being from the opposite end of the state. The same line-drawing problem emerges with international borders. And there is no principled, universal, or intuitive magic number of miles at which something stops being “local.” *See id.* at 831 (academic study explaining “there is no general consensus on a definition [of ‘local’] in terms of the distance between production and consumption”). In the absence of mile markers, literal or figurative, we are unable to assess a locality claim as a factual matter. We are left with the conclusion that “local” is simply a statement of opinion with which others may agree or disagree without generating legal liability. The word “does not contain the kind of detailed or specific factual assertions that are necessary to state a false advertising cause of action.” *See Cook, Perkiss and Liehe, Inc. v. N. Cal. Collection Serv. Inc.*, 911 F.2d 242, 246 (9th Cir. 1990). For these reasons, the word “local,” standing alone, “is not an objectifiable statement of fact upon which consumers would be justified in relying.” *See Pizza Hut*, 227 F.3d at 504; *see also Am. Italian Pasta Co.*, 371 F.3d at 391 (holding tagline “America’s Favorite Pasta” non-actionable under Lanham Act because definition of “favorite” was “entirely subjective and vague,” failing to “convey a quantifiable threshold” or otherwise provide “an empirical benchmark by which the claim [of being ‘America’s Favorite Pasta’] can be measured”); *Renfro v. Champion Petfoods USA, Inc.*, 25 F.4th 1293, 1304–05 (10th Cir. 2022) (holding that, under state law, pet food manufacturer’s “claims that ingredients [we]re ‘fresh’ and ‘regional’ [we]re not subject to measurement” and therefore “not empirically verifiable”).

It is true that “local” evokes meaning, but so do nearly all words. Drawing a particular and verifiable *factual* meaning from as vague a word as “local,” however, requires “a more specific assurance.” *Intermountain Stroke Center*, 638 F. App’x at 788 (emphasis removed) (quoting *Alpine Bank v. Hubbell*, 555 F.3d 1097, 1107 (10th Cir. 2009)). We find no such assurance in this case. In the end, “reasonable consumers would not interpret [the word “local”] as reliably factual.” *La.-Pac. Corp. v. James Hardie Bldg. Prods., Inc.*, 928 F.3d 514, 519 (6th Cir. 2019). “[N]o buyer would reasonably assume that the [word] . . . conveys a quantifiable, objective fact about” a bakery’s location. *Id.* It is an indeterminate and unverifiable adjective, and the consumer survey offered by Bimbo Bakeries does not change this.

Bimbo Bakeries’ survey, which asked consumers about the meaning of “local,” cannot somehow convert the word into a statement of fact. All it can do is juxtapose U.S. Bakery’s own opinion about when something qualifies as “local” with the opinions of its customers. And while they may often differ, it is the very essence of opinions that they differ. *Cf. Presidio Enters., Inc. v. Warner Bros. Distrib. Corp.*, 784 F.2d 674, 679 (5th Cir. 1986). The survey thus illustrates just how unworkable survey evidence is in this context. Under Bimbo Bakeries’ theory of the case, a bakery selling “local” bread in a supermarket one block away from its production line would be liable for false advertising whenever customers interpret “local” as baked in-store, as several survey respondents did here. That is a difference of opinion, not commercial deception, and we share our sister circuits’ concerns with using

consumer surveys to transform non-actionable statements into Lanham Act claims of fact:

To allow a consumer survey to determine a claim’s benchmark would subject any advertisement or promotional statement to numerous variables, often unpredictable, and would introduce even more uncertainty into the market place. A manufacturer or advertiser who expended significant resources to substantiate a statement or forge a puffing statement could be blind-sided by a consumer survey that defines the advertising statement differently, subjecting the advertiser or manufacturer to unintended liability for a wholly unanticipated claim the advertisement’s plain language would not support. The resulting unpredictability could chill commercial speech, eliminating useful claims from packaging and advertisements. . . . [T]he Lanham Act protects against misleading and false statements of fact, not misunderstood statements.

Am. Italian Pasta Co., 371 F.3d at 393–94; see also *Mead Johnson & Co. v. Abbott Labs.*, 201 F.3d 883, 886 (7th Cir. 2000), *opinion amended on denial of reh’g*, 209 F.3d 1032, 1034 (7th Cir. 2000) (“[N]ever before has survey research been used to determine the meaning of words, or to set the standard to which objectively verifiable claims must be held.”). If a statement is not one of fact, it is legally irrelevant whether consumers agree with it. Consumer surveys in Lanham Act cases are properly limited to proving that factual claims that are not literally false nonetheless mislead consumers. See *Cottrell*, 191 F.3d at 1252.

Having concluded that the word “local” is not, by itself, a statement of fact actionable under the Lanham Act, we must also consider whether U.S. Bakery’s placement of the word within its “Fresh. Local. Quality.” tagline altered the context enough to sustain a false advertising claim. See, for example, *Pizza Hut*, 227 F.3d at 501 (holding that “Better Ingredients. Better Pizza.” tagline, which was non-

actionable by itself, was “expanded and given additional meaning” when used in “comparison ads” suggesting a factual claim about competitors’ ingredient quality). After reviewing the tagline and the context in which the word “local” was used, our conclusion that Bimbo Bakeries’ claim fails is unchanged.

The words “fresh” and “quality,” which bookend “local” in U.S. Bakery’s tagline, do not give measurable meaning to the word. The combination of these three words provides no apparent restriction on the otherwise open-ended definition of “local,” as numerous other words might. The tagline fails to narrow the word’s focus to a particular place or proximity, as might a reference to a certain geographic location or to products being baked in-state. In short, the tagline does not transform “local” into a statement of fact.

First, “fresh” merely complements “local.” Although combining “fresh” with “local” may help consumers bridge the gap from “local” to “locally baked,” which aligns with Bimbo Bakeries’ theory of the tagline’s falsity, the word “fresh” does nothing to objectively clarify what locally baked means. Freshness has no explicit or implicit bearing on the bread’s place of origin in a way that admits of empirical verification. The tagline’s third word, “quality,” is quintessential puffery outside the Lanham Act. *See Am. Italian Pasta Co.*, 371 F.3d at 393 (“The term ‘quality’ is vague, entirely subjective, and a bare assertion of product superiority.”). More importantly, like “fresh,” it does nothing to help a consumer understand the word “local.” A product’s quality is not dependent on where it was prepared, and the word

“quality” does not call to mind any particular place of origin or impose any limitation on a product’s range.

If anything, the context provided by the rest of the tagline bolsters our conclusion that the word “local” is not actionable. All three words in the tagline are inchoate buzzwords, “unquantifiable and subject to an individual’s fancy.” *Id.* at 392. Placed in proximity, they water down whatever meaning each might individually possess, reinforcing their own generality and subjectivity. *See Renfro*, 25 F.4th at 1304 (tagline “Fresh and Regional” was not actionable under state law in part because it was “typical and ‘obvious sales talk language’ that one can expect to see on any number of food packages”). Combining “local” with “fresh” and “quality” fails to “suggest a benchmark by which the veracity” of “local” can be assessed. *Am. Italian Pasta Co.*, 371 F.3d at 392. The tagline is no more actionable than the word “local” is alone. It is simply U.S. Bakery’s opinion about its product.

Moreover, we cannot find, nor does Bimbo Bakeries point us toward, any visual or textual indicator in its advertising that suggests “local” may bear a more specific meaning. Bimbo Bakeries fails to identify any feature of U.S. Bakery’s displays that supports the notion that “local” means baked within the state of sale. For example, there is no mention of a certain state or in-state baking in the marketing, no likeness of or allusion to a state on the packaging, no invocation of cities, and no reference to out-of-state brands that may confer a comparative dimension upon the word. We note that U.S. Bakery previously provided a substantial clue to where it baked its bread, and to what “local” means, when it used a

second tagline, “Freshly Baked in Utah.” That tagline included an objectively verifiable statement of fact: if products sold with the tagline were not baked in Utah, a claim would lie under the Lanham Act. But the record is clear that U.S. Bakery ceased using this tagline alongside “Fresh. Local. Quality.” in Utah stores as soon as it closed its Salt Lake City bakery. In sum, U.S. Bakery’s advertising lacked any feature that a customer might reasonably use to decode or verify the word “local.” *See Pizza Hut*, 227 F.3d at 500–01. Our review of the advertising context confirms that nothing about U.S. Bakery’s use of the word “local” added enough meaning to the word to transform it into an actionable statement of fact.

It is possible that, as Bimbo Bakeries argues, some segment of consumers (1) interpreted the “Fresh. Local. Quality.” tagline’s use of the word “local” as an assertion that U.S. Bakery’s products were locally baked, (2) determined that locally baked meant baked within the state of sale, and (3) found that false fact material to the decision to purchase the product. But not every subjective interpretation of ambiguous language is actionable false advertising. When the language in question is incapable of objective verification as to truth or falsity, it is not a statement of fact, and no amount of misunderstanding will give rise to an action under the Lanham Act. U.S. Bakery’s tagline was a mere expression of its opinion—specifically, its position about how fresh, local, and quality its products were—so there was no legally sufficient evidentiary basis for the jury to find in Bimbo Bakeries’ favor. We reverse the district court’s denial of U.S. Bakery’s renewed motion for judgment as a matter of law with respect to the false advertising claim.

V.

We do not doubt that Bimbo Bakeries has both a protectable trade secret and a protectable trade dress in every loaf of Grandma Sycamore’s. But the versions it tried to claim in this litigation are far too broad to be protectable. Similarly, U.S. Bakery’s use of the word “local” in advertising is too broad to convey anything verifiable and is therefore not actionable under the Lanham Act. Bimbo Bakeries’ claims fail as a matter of law because of their breadth.

We AFFIRM the district court’s grant of summary judgment to U.S. Bakery on Bimbo Bakeries’ trade dress infringement claim in Case No. 19-4031. We REVERSE the district court’s denial of U.S. Bakery’s and Leland’s renewed motions for judgment as a matter of law on Bimbo Bakeries’ trade secrets misappropriation claim in Case No. 19-4040 (U.S. Bakery) and Case No. 18-4062 (Leland). In Case No. 19-4040, we also REVERSE the district court’s denial of U.S. Bakery’s renewed motion for judgment as a matter of law on Bimbo Bakeries’ false advertising claim. We REMAND to the district court for further proceedings consistent with this opinion.