2027 SAUL LEFKOWITZ MOOT COURT COMPETITION
OFFICIAL PROBLEM

Please note:

A. The Facts in this Opinion are fictional. The parties' names, their businesses, and their trademarks and registrations are not intended, and should not be understood, to refer to or reference any individual (living or dead) or any institution, extant or defunct. Any resemblance to any real person, organization, product or situation is purely coincidental.

The Opinion below of the U.S. District Court for the Southern District of Utopia is imaginary. Conclusions of law within the Opinion do not represent the opinion of the International Trademark Association ("INTA") or any of its members. No inference should be drawn about any actual person, organization, product, or situation based on any facts or conclusions of law in this Opinion. The Opinion was drafted without knowledge of any person's claims with respect to any trademarks or other claims of rights that are the same as or similar to those mentioned in the Opinion, and INTA takes no position with respect to any person's ownership of, or rights to, such trademarks or other claims of rights.

B. Frequently, issues in a case that could be appealed are not. This Circuit, like most, will not entertain arguments that are not fairly comprehended within the formal "Issues on Appeal," which in this case are:

ISSUE NO. 1:

> Did the Court err in finding fraud on the USPTO based on Frytopia's Class 39 specimen and cancelling Registration No. 9,812,345?

ISSUE NO. 2:

> Did the Court err in finding that Fast Treats infringed Frytopia's trademark rights under Section 43(a) through its use of the FRYTOPIA trademark and statements made by Treatsy?

ISSUE NO. 3:

> Did the Court err in finding that Frytopia's Frytopia Cone is functional and therefore not protectable trade dress?

C. While the parties both filed motions for summary judgment in the district court and each is appealing at least one issue, for purposes of this appeal, Plaintiff, Frytopia, Inc., shall be considered the Appellant, and therefore under our Competition Rules the only party entitled to reserve time for rebuttal when presenting oral arguments. Defendant, Fast Treats, Inc., while also a cross-appellant, shall be considered the Appellee. Frytopia is appealing Issues 1 and 3 and Fast Treats is appealing Issue 2.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF UTOPIA

FRYTOPIA, INC.,	:	
Plaintiff,	:	
vs.	:	*Civ. Dkt.* 26-0314
FAST TREATS, INC.,	:	
Defendant.	:	

Plaintiff Frytopia, Inc. ("Plaintiff" or "Frytopia") filed suit against Defendant Fast Treats, Inc. ("Defendant" or "Fast Treats") for trademark infringement and unfair competition under Sections 32 and 43(a) of the Lanham Act, claiming that Fast Treats' unauthorized listing, promotion, and delivery of Frytopia's french fries is likely to confuse consumers and has damaged Frytopia's reputation, and that Fast Treats' packaging for its own fries infringes Frytopia's unregistered trade dress. Fast Treats denies liability, contending that it merely resells genuine Frytopia products and refers to Frytopia by name only to tell customers what they are buying. Fast Treats also counterclaims for cancellation of Frytopia's federal registration on the ground that Frytopia obtained it through fraud.

The parties now cross-move for summary judgment. In the District of Utopia, a court may grant summary judgment only if it concludes that the moving party has demonstrated that there is no genuine issue of material fact and that, based on the undisputed facts, the moving party is entitled to judgment as a matter of law. All evidence must be viewed in the light most favorable to the non-moving party.

For the reasons set forth hereafter, the Court grants Fast Treats' motion for summary judgment on its counterclaim and cancels Frytopia's registration in its entirety; grants Frytopia

summary judgment on its Section 43(a) claim that Fast Treats' use of the FRYTOPIA mark is infringing; and grants Fast Treats summary judgment on Frytopia's trade dress claim.

FINDINGS OF FACT

THE PARTIES

1. Plaintiff Frytopia, Inc. is organized in the State of Utopia, with a principal place of business in Paradise, Utopia.

2. Defendant Fast Treats, Inc. is organized in the State of Utopia, with a principal place of business in Velocity Heights, Utopia.

PLAINTIFF – FRYTOPIA, INC.

3. Yukon Goldberg ("Goldberg") grew up on his family's potato farm in rural Utopia, where he spent his summers sorting russet potatoes and his evenings developing inventive ways to cook them. After graduating from the Utopia Culinary Institute, Goldberg spent nearly a decade in pursuit of what he called "the perfect fry." He ultimately developed a "Triple-Fried" method in which hand-cut potatoes are blanched, fried, rested, and fried twice more in a blend of oils whose ratio remains a closely guarded trade secret. The result is a fry with a shatteringly crisp shell and a fluffy interior.

4. Goldberg also discovered the method's one weakness—the crispness does not last. As a Triple-Fried fry cools, steam escaping from its interior softens the shell. Goldberg's own kitchen testing showed that the fries remain at their peak for roughly twenty minutes after leaving the fryer, after which they become, in his words, "just another fry." Goldberg often told reporters that "a Frytopia fry has a half-life."

5. In 2012, Goldberg formed Frytopia, Inc. and opened the first FRYTOPIA restaurant in Paradise, Utopia. The menu consisted of Triple-Fried fries and a dozen house-made dipping

sauces, nothing more. (He had tried to apply his method to chicken fingers, but it just didn't work.) Lines stretched around the block and Goldberg got quite the taste for success. Not wanting to be a small fry in the business, Goldberg set out to expand his golden-brown empire. By 2025, Frytopia operated forty-eight company-owned restaurants across Utopia, generated approximately $90 million in annual revenue, and had been voted "Best Fries in Utopia" by readers of *The Utopia Gazette* for nine consecutive years.

6. Frytopia's success rests on a set of written quality standards contained in its forty-page Operations Manual. Among other things, the manual requires that fries be placed in the customer's hands within ninety seconds of leaving the fryer (the "Ninety-Second Rule"). Every serving is sold with a paper sleeve bearing the "Frytopia Promise": "Best enjoyed within 20 minutes. If it's not crispy, it's not Frytopia."

7. Frytopia has never partnered with any third-party delivery service. Goldberg has declined numerous partnership offers from delivery companies, explaining in a widely shared 2019 interview on the *Spudcast* podcast that "a soggy Frytopia fry is a broken promise" and that "if you want Frytopia, come to Frytopia."

8. Early in his career, Goldberg grew frustrated that paper bags and cardboard boats trapped steam and wilted his fries. He designed a container to solve the problem: a tall, five-sided paperboard cone in a signature bright shade Frytopia calls "Sunset Orange," perforated across its upper two-thirds with rows of small triangular vents, with a fold-out "dipping ledge" near the top that holds a sauce cup, and finished with a scalloped rim resembling a crown (the "Frytopia Cone"). Goldberg testified that he chose Sunset Orange because it is "the color of a perfect fry at sunset" and chose the crown rim because "every fry deserves a throne."

9. Frytopia's advertising has long emphasized the Frytopia Cone's performance. Television spots from 2015 through 2023 proclaimed, "Our Cone breathes so your fries don't sweat," and an in-store poster explains that the triangular vents "let the steam out and keep the crunch in." Since 2018, Frytopia has also spent approximately $4 million per year on its "Spot the Cone" campaign, consisting of billboards and social media advertisements that depict only the silhouette of the Sunset Orange Frytopia Cone, without the FRYTOPIA name.

10. In 2024, Frytopia commissioned a survey of 500 fast-casual diners in Utopia. When shown an unbranded image of the Frytopia Cone, 64% of respondents identified it as coming from Frytopia.

11. Frytopia's packaging supplier testified that the Frytopia Cone costs approximately eleven cents per unit to produce, compared to approximately six cents for a standard unvented paperboard fry carton. Fast Treats' marketing expert testified that orange and red are the most used colors in fast-food packaging in Utopia because consumers associate them with warmth and appetite.

12. Frytopia has never applied to register the Frytopia Cone as trade dress.

13. In early 2021, Frytopia was exploring the launch of its own in-house delivery service, tentatively called "Frytopia Express," which would use specially designed vented courier boxes and deliver only within a ten-minute radius of each restaurant to uphold the "Frytopia Promise." On March 2, 2021, Frytopia's trademark counsel, Mark Feldman, filed an application to register the FRYTOPIA word mark in four classes. The application was based on use in commerce under Section 1(a) for goods and services in Classes 29, 30, and 43, and on a bona fide intent to use under Section 1(b) for "food delivery services" in Class 39.

14. In July 2022, Frytopia piloted Frytopia Express at its Paradise flagship location. To determine the fastest and most reliable way to get crispy Frytopia fries to its customers, Goldberg set out to simultaneously test two delivery methods—courier deliveries via e-bikes and unmanned drone deliveries. For the e-bike pilot, a single e-bike courier wearing a tee-shirt displaying FRYTOPIA on the front and a company-issued spud-shaped helmet made thirty-seven deliveries over a three-week period to addresses within six blocks of the restaurant, carrying orders in a plain, unmarked (to prevent roadside theft) insulated box. Goldberg was dissatisfied with the results, and Frytopia discontinued the e-bike delivery pilot in mid-August 2022. For the drone pilot, Frytopia employees loaded orders into a small, unmarked drone carrying an unmarked metal box meant to withstand the elements during delivery. Goldberg was happy with the drone deliveries, particularly because they could circumvent issues like traffic and road closures (and fry thieves) to ensure a timely delivery. Customers complimented the quick delivery time and crispness of the fries they received. Based on this positive feedback, the drone pilot ran through March 2023, when the test drone went out of commission after being struck by a duck. Goldberg intends to bring back drone delivery and is currently working with a vendor to supply ten branded drones for future Frytopia deliveries.

15. As the deadline to file a Statement of Use for Class 39 approached in late August 2022, Mr. Feldman emailed Frytopia's Vice President of Operations, Rusty Fryer ("Fryer"), requesting a specimen showing the FRYTOPIA mark in use with delivery services. Fryer was unsure about the status of the company's delivery service but had seen an e-bike delivery at the Paradise location and did not want to bother her very busy boss with questions. Fryer used ImagineMore, a free, publicly available AI image-generation application, to create a specimen of use depicting her recollection of how a Frytopia Express e-bike delivery looked in practice. Her

prompt read: “Create realistic photo of a bike courier wearing a Frytopia shirt pulling a Frytopia Cone out of an unmarked insulated box and handing it to a customer.” Fryer also provided actual photos of Frytopia fries in a Frytopia Cone, a Frytopia tee-shirt, and the spud-shaped helmets Frytopia bought for its courier to increase the accuracy of the generated image. Fryer was impressed with how closely the AI-generated image matched her memory of the Frytopia Express e-bike pilot and accurately depicted the Frytopia Cone down to the Frytopia sleeve. Content with her handiwork, Fryer signed the Statement of Use on August 26, 2022.

16. The USPTO examining attorney accepted the Statement of Use, and the following registration issued:

Mark:	FRYTOPIA (standard characters)
Owner:	Frytopia, Inc.
Goods/Services:	Class 29: French fries; processed potatoes Class 30: Sauces; dipping sauces Class 39: Food delivery services Class 43: Restaurant services; take-out restaurant services
Registration No.:	9,812,345
Registration Date:	November 15, 2022
Application Date:	March 2, 2021
Date of First Use / First Use in Commerce:	Classes 29, 30, 43: May 1, 2012 Class 39: July 5, 2022 (per Statement of Use)
Register:	Principal

DEFENDANT – FAST TREATS, INC.

17. Zip Hurrington (“Hurrington”) was, by his own account, the fastest pizza courier in Utopia as a teenager. During high school, he made a small fortune as the most sought-out pizza delivery guy in town. He went on to study robotics at the Utopia Institute of Technology, where he

became obsessed with a concept he called “time-to-mouth.” In 2020, he founded Fast Treats, an app-based food delivery service.

18. Fast Treats delivers through a combination of human couriers (called “Treaters”), six-wheeled autonomous sidewalk robots called “TreatBots,” and, in certain neighborhoods, small autonomous drones called “SkyTreats.” TreatBots travel at approximately four miles per hour. At four miles per hour, the TreatBots offered a measured interpretation of “Fast.” To deter tampering, each TreatBot has a sealed, insulated, unvented cargo bay that opens only when the customer enters a unique code. By 2025, Fast Treats had approximately three million users and nine thousand TreatBots operating throughout Utopia.

19. Fast Treats has formal partnership agreements with many restaurants, which pay Fast Treats a commission on each order. As a standard term of the partnership agreement, Fast Treats displays a “Fast Treats Partner” badge on the partner restaurants’ dedicated pages in the FAST TREATS app. Through its “Whole Menu” program, however, Fast Treats also lists restaurants with which it has no relationship. When a customer orders from a non-partner restaurant, a Treater walks into the restaurant, orders and pays at the counter like any other customer, and then either delivers the order personally or loads it into a TreatBot for the trip to the customer. Fast Treats charges the customer the restaurant’s menu price plus a 30% “convenience markup” and a delivery fee.

20. Listings for non-partner restaurants are built automatically by Fast Treats’ proprietary AI assistant, “Treatsy.” Treatsy gathers information from a restaurant’s website and then generates a menu. Treatsy is so efficient and accurate that employees of Fast Treats do not typically review the listings and menus it generates. Treatsy also powers a chat feature that answers customers’ questions within the FAST TREATS app.

21. In March 2024, Treatsy generated and published a listing for Frytopia. The listing displayed the FRYTOPIA name and photos posted by both customers and Fast Treats' "Treaters" of deliveries of FRYTOPIA fries in the Frytopia Cone. The description on the listing read: *"Frytopia's legendary Triple-Fried fries, the official taste of Utopia—delivered hot and crispy to your door with the Frytopia Promise."* The listing did not display a Partner badge and included a small disclaimer at the bottom of the listing that "Fast Treats is not affiliated with Frytopia." An image of this listing is shown in Exhibit 1 hereto.

22. Chat logs produced in discovery reflect 212 conversations in which customers asked Treatsy whether Frytopia delivered through Fast Treats or whether Fast Treats was the "official" Frytopia delivery partner. In many of these conversations, Treatsy responded, "Yes! Frytopia is available on Fast Treats."

23. Frytopia quickly became one of the ten most-ordered listings on Fast Treats. Between March 2024 and December 2025, Fast Treats delivered approximately 410,000 Frytopia orders. Fast Treats did not alter the fries in any way; each order was delivered in the original Frytopia Cone with the Frytopia Promise sleeve. The average time between pickup at Frytopia's counter and delivery to the customer was 52 minutes.

24. Frytopia's food science expert tested Triple-Fried fries in a TreatBot cargo bay and found that, because the sealed bay trapped steam, the fries lost measurable crispness within twelve minutes. He described the cargo bay as "a sauna for fries."

25. Beginning in mid-2024, Frytopia received more than 1,900 emails, telephone calls, and social media messages complaining about soggy, cold fries and high prices. Many were directed at Frytopia itself, such as: "Your delivery is a disgrace," and "Why is Frytopia charging $14 for limp fries?" Some complaints referenced Fast Treats by name; others did not. In the

summer of 2024, the hashtag #SoggyTopia trended on the social media platform Speedgram, with users posting photographs of limp fries in Frytopia Cones, often beside a TreatBot.

26. Frytopia's average rating on the review site Yumper declined from 4.8 to 4.1 stars between 2023 and 2025, and Frytopia's same-store sales were flat in 2025 after a decade of annual growth. Fast Treats attributes the flat sales to other causes, including the opening of a national fry chain in Utopia in 2025 and a sharp increase in potato prices following a poor harvest that year.

27. Fast Treats' data team noticed that fries were among the most-ordered items on its platform and that many customers who searched for "Frytopia" completed an order. In February 2025, Fast Treats launched its own delivery-only fry brand, FAST TREATS STREET FRIES, prepared in Fast Treats' ghost kitchens using a thicker, coated fry from GMO-only potatoes engineered to stay crisp for up to 45 minutes.

28. To develop packaging, Hurrington instructed Treatsy to "design packaging for the most iconic fries in Utopia, something customers will instantly crave." Treatsy produced a tangerine-colored, five-sided paperboard cone with rows of circular vents, a fold-out sauce shelf, a wavy rim, and the words FAST TREATS in white block letters. Hurrington approved the design, in his words, "in under a minute." He admits he was familiar with the Frytopia Cone at the time but was not thinking of it when he approved this packaging. Fast Treats' app displays the FAST TREATS STREET FRIES listing as a "sponsored ad" directly above the "Frytopia" listing when a user searches for "Frytopia."

THE DISPUTE

29. In November 2025, Frytopia's counsel sent Fast Treats a cease-and-desist letter demanding that Fast Treats (1) remove Frytopia from its app, (2) stop using the FRYTOPIA name and any image of the Frytopia Cone—which is protected under the Lanham Act as product

packaging trade dress—and (3) stop using the FAST TREATS STREET FRIES packaging because it constituted trade dress infringement of the Frytopia Cone.

30. Fast Treats refused. It responded that it buys and delivers genuine Frytopia fries, which it is entitled to resell; that it uses the FRYTOPIA name only to tell customers what they are ordering; that it is free to depict photographs and images of the Frytopia Cone; and that the Frytopia Cone is not protected by trade dress law because it is functional. As a gesture of good faith, in December 2025 Fast Treats added a red "Not a Partner" badge at the top of the Frytopia listing and deleted the description about Frytopia's Triple-Fried fries, after which the number of customer complaints received by Frytopia dropped precipitously. Fast Treats continues to display the FRYTOPIA name and photographs of the Frytopia Cone, and continues to deliver its own fries in the FAST TREATS STREET FRIES packaging. An image of the revised listing is shown in Exhibit 2 hereto.

PROCEDURAL HISTORY

31. Feeling salty about Fast Treats' ongoing use of its mark and trade dress and the customer complaints that ensued, Frytopia filed a complaint in the United States District Court for the Southern District of Utopia on January 12, 2026, asserting three claims: (I) infringement of its registered FRYTOPIA mark under Section 32 of the Lanham Act; (II) infringement of its FRYTOPIA word mark and false designation of origin under Section 43(a) of the Lanham Act; and (III) infringement of its unregistered Frytopia Cone trade dress under Section 43(a). Frytopia seeks a permanent injunction. By agreement of the parties, any claim for monetary relief has been bifurcated and is not presently before the Court.

32. Fast Treats filed an Answer denying liability and asserting the defense of nominative fair use. Fast Treats also asserted a counterclaim under Sections 14 and 37 of the

Lanham Act seeking cancellation of Registration No. 9,812,345 in its entirety on the ground that Frytopia procured the registration through fraud.

33. Following discovery, the parties filed cross-motions for summary judgment on all claims and on the counterclaim.

CONCLUSIONS OF LAW

JURISDICTION AND VENUE

34. This action is brought pursuant to 15 U.S.C. §§ 1114, 1119, and 1125(a). Jurisdiction arises under 28 U.S.C. §§ 1331 and 1338(a). Venue is appropriate under 28 U.S.C. § 1391(b)(1).

FRAUD ON THE USPTO

35. Because the validity of Frytopia's registration bears on its Section 32 claim, the Court addresses Fast Treats' counterclaim first.

36. A registration may be cancelled at any time if it was obtained fraudulently. 15 U.S.C. § 1064(3). Fraud in procuring a registration occurs when an applicant knowingly makes a false, material representation of fact with the intent to deceive the USPTO. The party asserting fraud must prove it by clear and convincing evidence. Under Utopian law, the intent element may be satisfied by proof that the applicant acted with reckless disregard for the truth of its statements.

37. There is no dispute that the Class 39 specimen was fabricated. The image was generated by an AI application at the direction of Frytopia's agent. Nor is there any dispute that the representation was material—the USPTO would not have registered the mark without an acceptable specimen showing the mark in use in Class 39. The Court need not decide whether Frytopia's e-bike or drone deliveries constituted use of the mark in commerce because the specimen did not actually depict them.

38. Frytopia argues that it lacked any intent to deceive the USPTO. The Court disagrees. Fryer signed a verified declaration attesting to use of the mark in Class 39. A signatory who swears to facts about which she has made no effort to verify acts with reckless disregard for the truth. Moreover, Fryer acted as Frytopia's agent in preparing the filing containing an AI-generated image, and her knowledge is imputed to Frytopia.

39. Frytopia also argues that, because each class in a multi-class registration is effectively a separate registration, any fraud should result in cancellation of Class 39 alone, leaving Classes 29, 30, and 43 intact. Frytopia emphasizes that its use of the FRYTOPIA trademark for fries, sauces, and restaurant services since 2012 is undisputed. The Court is not persuaded. Frytopia chose to seek a single registration, and the false declaration was made in the course of procuring that registration. A registrant who submits fabricated evidence to the USPTO should not be permitted to retain the benefits of the remainder of the registration.

40. Accordingly, Registration No. 9,812,345 is cancelled in its entirety. Because Frytopia no longer holds a registration, its Section 32 claim (Count I) is dismissed. Cancellation does not, however, affect Frytopia's common law rights in the FRYTOPIA mark, which Frytopia may enforce under Section 43(a).

INFRINGEMENT OF THE FRYTOPIA MARK UNDER SECTION 43(a)

41. The legal test for whether a trademark is infringed is whether Defendant has used or is using in commerce any word, term, name, symbol, or device, or any combination thereof, in connection with goods or services that is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association with another's mark. 15 U.S.C. § 1125(a)(1)(A).

42. *Use by Fast Treats.* As a threshold matter, Fast Treats argues that it did not "use" Frytopia's marks because the listings page and chatbot statements were generated by Treatsy without human involvement. The Court rejects this argument. Fast Treats designed and deployed Treatsy, published its output on Fast Treats' commercial platform, and profited from every resulting order. A company cannot avoid responsibility for the content of its own advertising by delegating its creation to software, any more than it could by delegating it to an employee.

43. *Nominative fair use.* A defendant may use a plaintiff's mark to refer to the plaintiff's own goods or services where (i) the product or service is not readily identifiable without use of the mark; (ii) only so much of the mark is used as is reasonably necessary to identify the product or service; and (iii) the user does nothing that would, in conjunction with the mark, suggest sponsorship or endorsement by the trademark holder. Utopian courts have not definitively resolved whether nominative fair use is an affirmative defense on which the defendant bears the burden or a substitute for the likelihood of confusion analysis. The Court need not resolve that question, because Fast Treats' use fails under either approach.

44. The first element is satisfied—Fast Treats cannot tell customers that it delivers Frytopia's fries without using the name FRYTOPIA. The second element is satisfied as well—Fast Treats only uses the FRYTOPIA mark, not the stylized logo. Fast Treats, however, fails on the third element. Fast Treats' images displayed the Frytopia Cone and it described the product as "the official taste of Utopia" delivered "with the Frytopia Promise." Its chatbot affirmatively suggested sponsorship. The fine-print disclaimer at the bottom of the listing was insufficient to dispel that impression. Neither the December 2025 addition of the "Not a Partner" badge nor removal of the description cures its prior use.

45. *Likelihood of confusion.* For completeness, the Court also considers the likelihood of confusion factors. Under longstanding and precedential Utopian law, the pertinent factors in evaluating whether there is a likelihood of confusion are: (i) the resemblance of the two marks in terms of sight, sound, and meaning; (ii) the relationship between the goods or services of the parties; (iii) the relationship between the parties' trade channels; (iv) the strength, both inherent and acquired, of the Plaintiff's mark; (v) any evidence of actual confusion, or valid surveys indicative of such confusion; (vi) an intent by the newcomer to derive benefit from the original mark's success; and (vii) any other factor recognized by this, or any other Utopian court, as probative of likelihood of confusion. The Court discusses each of these factors in order.

a. *The similarity of the marks:* Fast Treats uses Frytopia's own mark. This factor favors Plaintiff.

b. *The relationship between the goods or services of the parties:* Frytopia offers fries and restaurant services, and Fast Treats offers delivery of restaurant food. Consumers commonly encounter restaurants and delivery services together. This factor favors Plaintiff.

c. *The relationship between the parties' trade channels:* Frytopia sells only in its own restaurants, while Fast Treats operates exclusively through its app. However, both parties ultimately reach the same consumers of Frytopia's fries and Frytopia is working to re-launch its drone delivery service. This factor is neutral.

d. *The strength, both inherent and acquired, of the Plaintiff's mark:* "Frytopia" is a coined term and is well known throughout Utopia. This factor favors Plaintiff.

e. *Any evidence of actual confusion, or valid surveys indicative of such confusion:* Fast Treats argues that the complaints Frytopia received show customer dissatisfaction, not confusion, because customers knew they had ordered through Fast Treats. But many of the complaints were directed to Frytopia and blamed Frytopia for the delivery experience, and the chat logs show customers asking whether Fast Treats was Frytopia's "official" delivery service. This factor favors Plaintiff.

f. *An intent by the newcomer to derive benefit from the original mark's success:* There is no evidence that any Fast Treats employee set out to confuse consumers. The Frytopia listing and the chatbot statements were generated by Treatsy. While Fast Treats' reliance on unreviewed AI output was careless, carelessness is not bad faith. This factor favors Defendant.

g. *Any other factor recognized by this, or any other Utopian court, as probative of likelihood of confusion:* Utopian courts have recognized that a trademark owner's loss of control over its reputation is relevant to the inquiry. Fast Treats' conduct has caused Frytopia's reputation for crispness to be called into question. This factor favors Plaintiff.

46. After a review of all the likelihood of confusion factors, the Court finds that Fast Treats' use of the FRYTOPIA mark and associated behavior is likely to cause confusion. While certain uses of the FRYTOPIA name are nominative fair use, Fast Treats took it too far. The Court grants summary judgment to Frytopia on Count II.

TRADE DRESS – THE FRYTOPIA CONE

47. To prevail on a claim for infringement of unregistered trade dress under Section 43(a), a plaintiff must prove that its trade dress is distinctive, that it is not functional, and that the defendant's trade dress is likely to cause confusion. In an action for infringement of trade dress not registered on the Principal Register, the person who asserts trade dress protection has the burden of proving that the matter sought to be protected is not functional. 15 U.S.C. § 1125(a)(3).

48. *Distinctiveness.* The Court finds that the Frytopia Cone is product packaging, rather than product design, and that, in any event, it has acquired distinctiveness. Frytopia's "Spot the Cone" campaign and its 2024 survey, in which 64% of respondents identified the unbranded Cone with Frytopia, establish secondary meaning.

49. *Functionality.* A product feature is functional if it is essential to the use or purpose of the article or if it affects the cost or quality of the article. A feature may also be aesthetically functional where exclusive use of the feature would put competitors at a significant non-reputation-related disadvantage. For years, Frytopia's own advertising told consumers that the Cone "breathes" and that its vents "let the steam out and keep the crunch in." These features are essential to the use and purpose of the container and are functional.

50. Frytopia argues that it claims not the individual features but the overall combination, including the Sunset Orange color, the triangular shape of the vents, and the crown-shaped rim. It further argues that numerous alternative designs are available to competitors and that the Cone costs nearly twice as much to produce as an ordinary fry carton. The Court is not persuaded. Where the essential features of a design are functional, the addition of arbitrary flourishes such as a decorative rim cannot render the whole protectable. As to color, the undisputed testimony shows that orange is among the most common colors in fast-food packaging because consumers associate it with warmth and appetite. Granting Frytopia exclusive rights in an orange

vented fry cone would place competitors at a significant non-reputation-related disadvantage. The color is therefore aesthetically functional as well.

51. Because the Frytopia Cone is functional, it is not protectable, and the Court need not reach whether the FAST TREATS STREET FRIES packaging is likely to cause confusion. The Court grants summary judgment to Fast Treats on Count III.

WHEREFORE, this Court hereby:

1. Grants Fast Treats' counterclaim for cancellation and orders that Registration No. 9,812,345 be cancelled in its entirety, and dismisses Count I of the Complaint;
2. Grants Frytopia's motion for summary judgment on Count II, finding that Fast Treats' use of the FRYTOPIA mark infringes Frytopia's rights under Section 43(a), hereby enjoins Fast Treats from displaying Frytopia's mark, and from making any statement suggesting that Frytopia sponsors, endorses, or is affiliated with Fast Treats; and
3. Grants Fast Treats' motion for summary judgment on Count III, finding that the Frytopia Cone trade dress is functional and not protectable.

SO ORDERED.

EXHIBITS

Exhibit 1

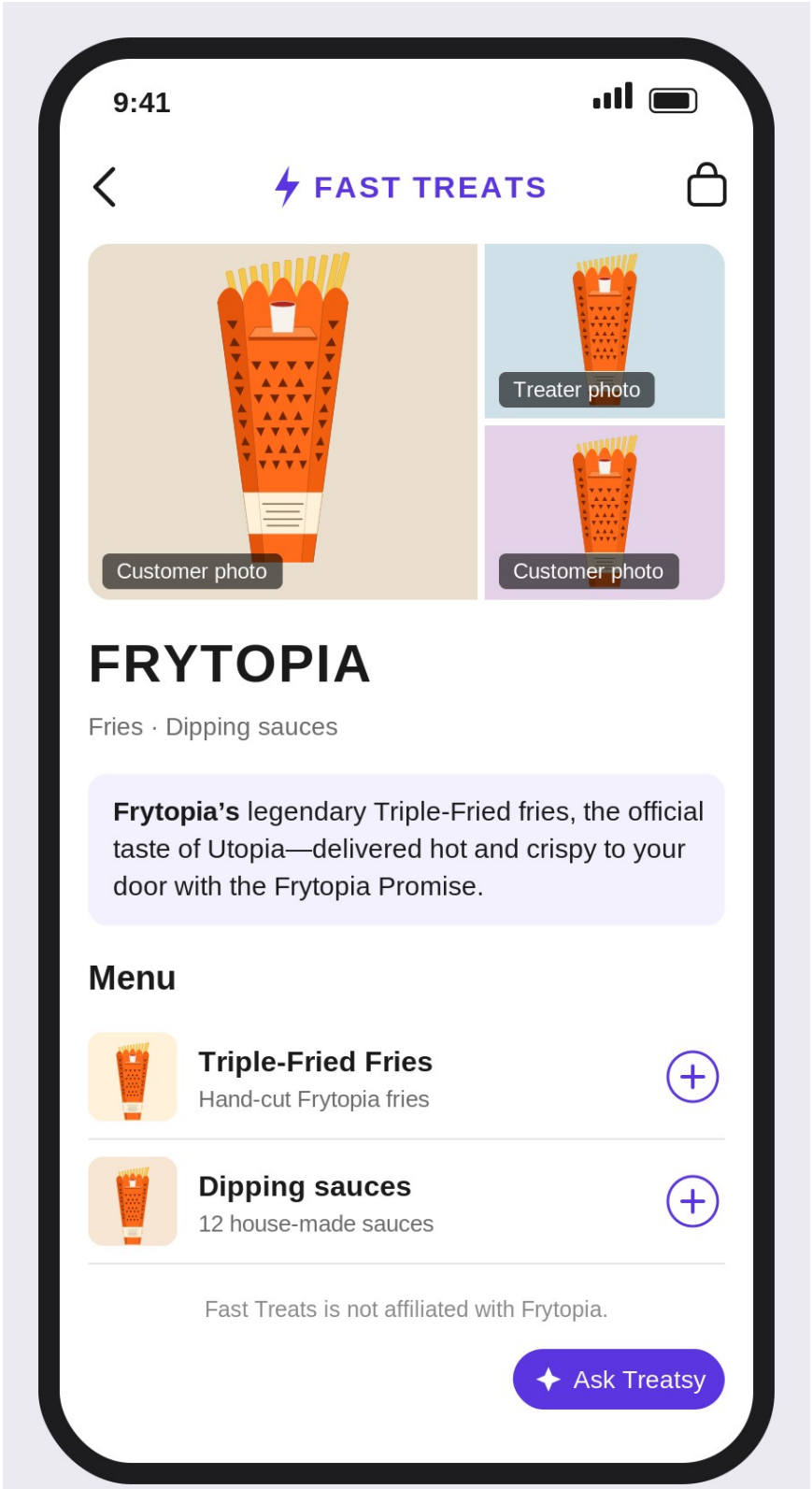
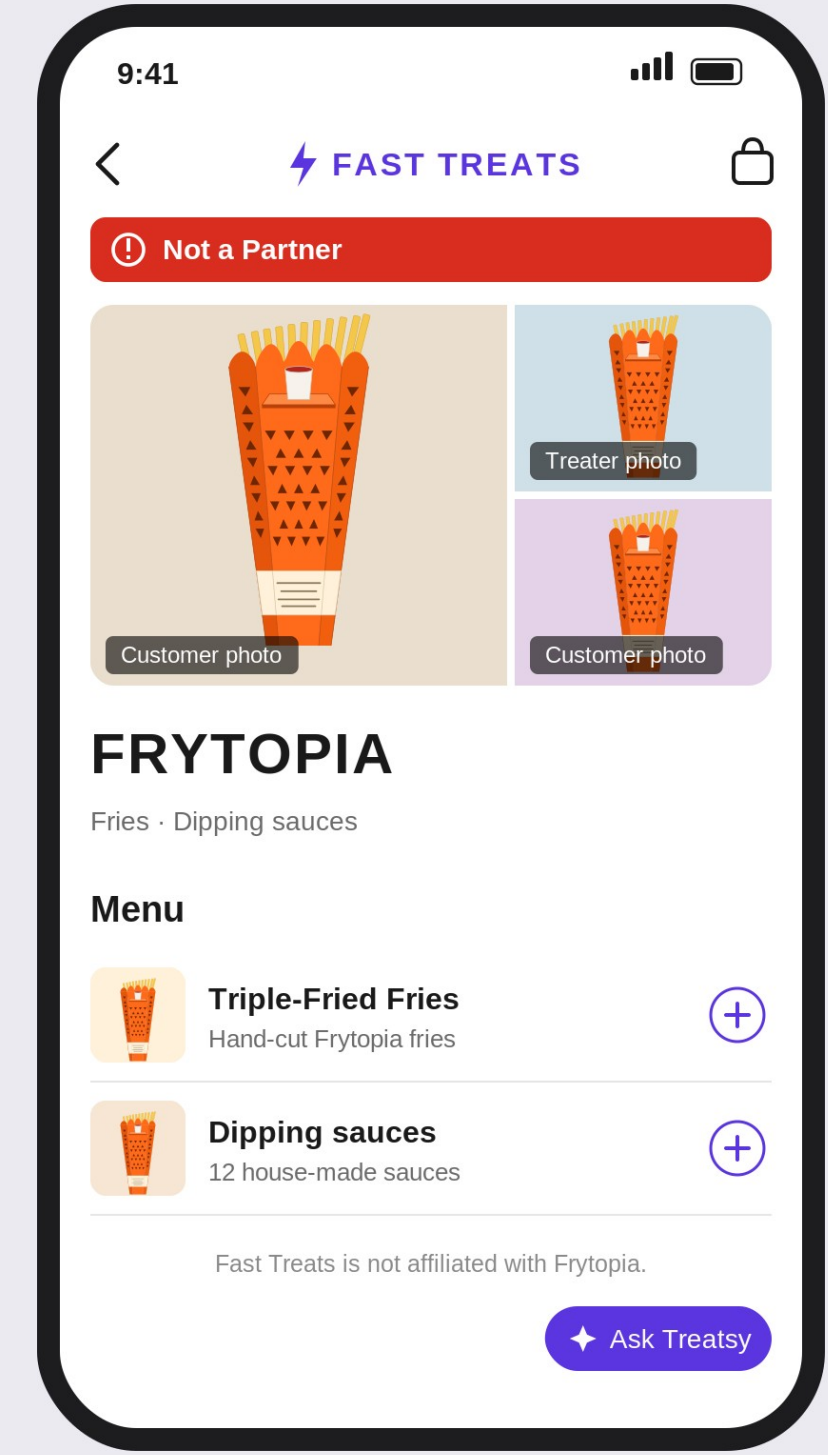

9:41
FAST TREATS
Customer photo
Treater photo
Customer photo
FRYTOPIA
Fries · Dipping sauces
Frytopia's legendary Triple-Fried fries, the official taste of Utopia—delivered hot and crispy to your door with the Frytopia Promise.
Menu
Triple-Fried Fries
Hand-cut Frytopia fries
Dipping sauces
12 house-made sauces
Fast Treats is not affiliated with Frytopia.
Ask Treatsy

Exhibit 2


9:41
FAST TREATS
Not a Partner
Customer photo
Treater photo
Customer photo
FRYTOPIA
Fries · Dipping sauces
Menu
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