

# Liability for Commercial Speech:

A Guide to False Advertising, Commercial  
Disparagement, and Related Claims

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*This volume summarizes related bodies of law – false advertising, commercial disparagement, and defamation – that govern the conduct of business communications. It sets forth elements, damages, and related defenses for each of these causes of action and suggests ways to reduce the risk of liability in business communications, advertising, and marketing. Related claims, such as trademark infringement, copyright infringement, and interference with contractual relations, are also addressed. Risk management procedures, a checklist for compliance training, and a sample complaint, answer and jury instructions are provided.*

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*“The very first law in advertising is to avoid the concrete promise and cultivate the delightfully vague.”*  
**- Stuart Chase (1888-1985)**

*“Never write an advertisement which you wouldn’t want your family to read. You wouldn’t tell lies to your own wife. Don’t tell them to mine.”*  
**- David Ogilvy (1911-1999)**

*“False words are not only evil in themselves, but they infect the soul with evil.”*  
**- Socrates**

## I. Introduction to Claims Based on Commercial Speech

The loosely related causes of action of false advertising, defamation, and commercial disparagement together have a significant impact on business communications.

False advertising is advertising that is either literally false or is likely to mislead and confuse consumers.

- *Time Warner Cable, Inc. v. DIRECTV, Inc.*, 497 F.3d 144, 153 (2d Cir. 2007).
- *Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 272-73 (4th Cir. 2002).
- *Cashmere & Camel Hair Mfg. Inst. v. Saks Fifth Avenue*, 284 F.3d 302, 311 (1st Cir. 2002), *cert. denied*, 537 U.S. 1001 (2002).

Defamation encompasses the torts of libel (written defamation) and slander (spoken defamation).

- *Keohane v. Stewart*, 882 P.2d 1293, 1297 n.5 (Colo. 1994).
- *Draghetti v. Chmielewski*, 626 N.E.2d 862, 866 n.4 (Mass. 1994).

Commercial disparagement, which is closely related to defamation, concerns false statements made with the intent to call into question the quality of a competitor's goods or services and to inflict pecuniary harm.

- *Forbes Inc. v. Granada Biosciences, Inc.*, 124 S.W.3d 167, 170 (Tex. 2003) ("A business disparagement claim is similar in many respects to a defamation claim. The two torts differ in that defamation actions chiefly serve to protect the personal reputation of an injured party, while a business disparagement claim protects economic interests.").
- *Allcare, Inc. v. Bork*, 531 N.E.2d 1033, 1037 (Ill. App. Ct. 1988) ("Defamation and commercial disparagement are two distinct causes of action. Defamation lies when a person's integrity in his business or profession is attacked while commercial disparagement lies when the quality of his goods or services is attacked.").

A sample complaint and sample answer for these causes of action are attached as Exhibit 6 and Exhibit 7. Sample jury instructions are attached as Exhibit 8. Other causes of action that may arise from false or misleading statements in commercial speech, such as trademark infringement and copyright infringement, are set forth in Section IV.

## II. False Advertising

False advertising is prohibited by federal statute. The Lanham Act § 43(a), as amended in 1989, provides:

(1) Any person who, on or in connection with any goods or services, or any container for goods, 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 . . . (B) 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*,... shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

15 U.S.C. § 1125(a) (emphasis added).

Claims for false advertising under the Lanham Act § 43(a) may be brought in either federal or state court. 28 U.S.C. § 1338(a). Because the vast majority of false advertising cases are brought in federal court, state courts generally look to federal case law for guidance regarding the interpretation of Lanham Act § 43(a).

False advertising may also be actionable under state law to the extent that it violates a specific state statute or amounts to fraud or unfair competition. Note that some states have statutes and regulations prohibiting untrue, deceptive or misleading advertising, which are enforced by the Attorney General and do not provide a private right of action for damages. In order to assert a false advertising claim under some state statutes for unfair competition, in addition to proving the elements of false advertising under Lanham Act § 43(a), a plaintiff may also have to prove that the defendant knew or should have known that its statement was false or misleading.

- *People ex. rel. Bill Lockyer v. Fremont Life Ins. Co.*, 128 Cal. Rptr. 2d 463, 467-68 (Cal. Ct. App. 2002) (addressing claims for deceptive marketing techniques under California Bus. and Prof. Code 17500).
- *Gillette Co. v. Norelco Consumer Prods. Co.*, 946 F. Supp. 115, 120 n. 3 (D. Mass. 1996) (addressing claims for false advertising under Mass. Gen. Laws c. 93A).

*“...the vast majority of false advertising cases are brought in federal court, state courts generally look to federal case law for guidance...”*



## A. Elements of False Advertising

In order to prevail on a false advertising claim under the Lanham Act, a plaintiff must prove:

1. The defendant made a false or misleading statement in a commercial advertisement about its own or the plaintiff's product;
  2. The deception is material (*i.e.*, it is likely to influence the purchasing decision);
  3. The statement actually deceives or has the tendency to deceive a substantial segment of its audience;
  4. The defendant placed the statement into interstate commerce; and
  5. The plaintiff has been or is likely to be injured as a result of the statement, either by direct diversion of sales to the defendant or by a lessening of goodwill associated with the plaintiff's products.
- *Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 272 (4th Cir. 2002).
  - *Cashmere & Camel Hair Mfg. Inst. v. Saks Fifth Avenue*, 284 F.3d 302, 310-11 (1st Cir. 2002), *cert. denied*, 537 U.S. 1001 (2002).

In some circuits, the order of the second and third elements are reversed, but the test is otherwise identical.

- *Osmose, Inc. v. Viance, LLC*, 612 F.3d 1298, 1308 (11th Cir. 2010).
- *Am. Italian Pasta Co. v. New World Pasta Co.*, 371 F.3d 387, 390 (8th Cir. 2004).
- *Pizza Hut, Inc. v. Papa John's Int'l, Inc.*, 227 F.3d 489, 495 (5th Cir. 2000).
- *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1139 (9th Cir. 1997).
- *Johnson & Johnson-Merck Consumer Pharm. Co. v. Rhone-Poulenc Rorer Pharm., Inc.*, 19 F.3d 125, 129 (3rd Cir. 1994).

## 1. False or misleading statements

In order to prevail on the first prong of the false advertising test, a plaintiff must demonstrate that the defendant's statement was either literally false, literally true or ambiguous but likely to mislead or confuse consumers.

- *Innovation Ventures, LLC v. N.V.E., Inc.*, 694 F.3d 723, 735 (6th Cir. 2012).
- *Tiffany (NJ) Inc. v. eBay, Inc.*, 600 F.3d 93, 112 (2d Cir. 2010) (citing *Time Warner Cable, Inc. v. DIRECTV, Inc.*, 497 F.3d 144, 153 (2d Cir. 2007)).
- *Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 272-73 (4th Cir. 2002).
- *Cashmere & Camel Hair Mfg. Inst. v. Saks Fifth Avenue*, 284 F.3d 302, 311 (1st Cir. 2002), cert. denied, 537 U.S. 1001 (2002).
- *Pizza Hut, Inc. v. Papa John's Int'l, Inc.*, 227 F.3d 489, 495 (5th Cir. 2000).
- *United Indus. Corp. v. Clorox Co.*, 140 F.3d 1175, 1180 (8th Cir. 1998).
- *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1139 (9th Cir. 1997).
- *BASF Corp. v. Old World Trading Co.*, 41 F.3d 1081, 1088-89 (7th Cir. 1994).
- *Johnson & Johnson-Merck Consumer Pharm. Co. v. Rhone-Poulenc Rorer Pharm., Inc.*, 19 F.3d 125, 129 (3rd Cir. 1994).

A statement can be literally false either on its face or by necessary implication. A statement is false by necessary implication if, when considered in the context in which it is presented, it implies a false message which would be recognized by the audience as readily as if it had been explicitly stated.

- *Innovation Ventures, LLC v. N.V.E., Inc.*, 694 F.3d 723, 735-36 (6th Cir. 2012).
- *Tiffany (NJ) Inc. v. eBay, Inc.*, 600 F.3d 93, 112 n.19 (2d Cir. 2010) (citing *Time Warner Cable, Inc. v. DIRECTV, Inc.*, 497 F.3d 144, 153, 158 (2d Cir. 2007)).

- *Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 274 (4th Cir. 2002).
- *Cashmere & Camel Hair Mfg. Inst. v. Saks Fifth Avenue*, 284 F.3d 302, 315 (1st Cir. 2002), *cert. denied*, 537 U.S. 1001 (2002).
- *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1139 (9th Cir. 1997).

Some courts refer to statements that are literally true but likely to mislead and confuse consumers as “impliedly false” or “implicitly false.” Despite the closeness of the terminology, such statements must be distinguished from statements that are literally false by necessary implication.

- *Cashmere & Camel Hair Mfg. Inst. v. Saks Fifth Avenue*, 284 F.3d 302, 315 (1st Cir. 2002), *cert. denied*, 537 U.S. 1001 (2002) (explaining distinction).
- *Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 274 (4th Cir. 2002).

If the statement can reasonably be interpreted in more than one way, and one of those ways is not literally false, then the statement cannot be literally false.

- *Time Warner Cable, Inc. v. DIRECTV, Inc.*, 497 F.3d 144, 158 (2d Cir. 2007).
- *Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 275-76 (4th Cir. 2002).
- *Clorox Co. Puerto Rico v. Procter & Gamble Commercial Co.*, 228 F.3d 24, 35 (1st Cir. 2000).

Although a statement may be found false or misleading by implication, the greater the degree to which the consumer is required to integrate the components of the advertisement in order to draw the false conclusion, the less likely it is that falsity will be found.

- *Innovation Ventures, LLC v. N.V.E., Inc.*, 694 F.3d 723, 736 (6th Cir. 2012).
- *Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 274 (4th Cir. 2002).
- *Clorox Co. Puerto Rico v. Procter & Gamble Commercial Co.*, 228 F.3d 24, 35 (1st Cir. 2000).
- *United Indus. Corp. v. Clorox Co.*, 140 F.3d 1175, 1181 (8th Cir. 1998).

Visual images as well as words can be false or misleading under Lanham Act § 43(a).

- *Hall v. Bed, Bath & Beyond, Inc.*, 705 F.3d 1357, 1367 (Fed. Cir. 2013).
- *Time Warner Cable, Inc. v. DIRECTV, Inc.*, 497 F.3d 144, 159 (2d Cir. 2007).
- *United Indus. Corp. v. Clorox Co.*, 140 F.3d 1175, 1180-81 (8th Cir. 1998).

## 2. Proof of consumer reaction

If the statement is literally false, courts will grant relief without requiring evidence of consumer reaction.

- *Tiffany (NJ) Inc. v. eBay, Inc.*, 600 F.3d 93, 112 (2d Cir. 2010).
- *Schering-Plough Healthcare Prods. v. Schwarz Pharma, Inc.*, 586 F.3d 500, 512 (7th Cir. 2009).
- *Cashmere & Camel Hair Mfg. Inst. v. Saks Fifth Avenue*, 284 F.3d 302, 314-15 (1st Cir. 2002), *cert. denied*, 537 U.S. 1001 (2002) (summarizing cases and applying rule in damages context).
- *Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 273 (4th Cir. 2002).
- *Pizza Hut, Inc. v. Papa John's Int'l, Inc.*, 227 F.3d 489, 497 (5th Cir. 2000).
- *American Council of Certified Podiatric Physicians and Surgeons v. American Board of Podiatric Surgery, Inc.*, 185 F.3d 606, 614 (6th Cir. 1999).
- *United Indus. Corp. v. Clorox Co.*, 140 F.3d 1175, 1180 (8th Cir. 1998).

*“If the statement is literally true or ambiguous but likely to mislead and confuse consumers, the plaintiff must present evidence that consumers were actually misled or confused.”*

If the statement is literally true or ambiguous but likely to mislead and confuse consumers, the plaintiff must present evidence that consumers were actually misled or confused.

- *Hall v. Bed, Bath & Beyond, Inc.*, 705 F.3d 1357, 1367 (Fed. Cir. 2013).
- *PBM Prods., LLC v. Mead Johnson & Co.*, 639 F.3d 111, 120 (4th Cir. 2011).
- *Tiffany (NJ) Inc. v. eBay, Inc.*, 600 F.3d 93, 112-13 (2d Cir. 2010) (citing *Time Warner Cable, Inc. v. DIRECTV, Inc.*, 497 F.3d 144, 153 (2d Cir. 2007)).
- *Cashmere & Camel Hair Mfg. Inst. v. Saks Fifth Avenue*, 284 F.3d 302, 311 (1st Cir. 2002), *cert. denied*, 537 U.S. 1001 (2002).
- *Pizza Hut, Inc. v. Papa John's Int'l, Inc.*, 227 F.3d 489, 497 (5th Cir. 2000).
- *American Council of Certified Podiatric Physicians and Surgeons v. American Board of Podiatric Surgery, Inc.*, 185 F.3d 606, 614 (6th Cir. 1999).

As a general rule, the plaintiff must show how consumers actually reacted, as opposed to how they could have reacted, to the statement. Evidence of consumer reaction is most often presented through consumer surveys.

- *Innovation Ventures, LLC v. N.V.E., Inc.*, 694 F.3d 723, 735 (6th Cir. 2012).
- *Fair Isaac Corp. v. Experian Info. Solutions, Inc.*, 650 F.3d 1139, 1151-52 (8th Cir. 2011).
- *Clorox Co. Puerto Rico v. Procter & Gamble Commercial Co.*, 228 F.3d 24, 33, 36 (1st Cir. 2000).
- *Johnson & Johnson-Merck Consumer Pharm. Co. v. Rhone-Poulenc Rorer Pharm., Inc.*, 19 F.3d 125, 129-30 (3rd Cir. 1994).

If the defendant made the accused statements in bad faith or with intent to harm the plaintiff, many courts will not require evidence of consumer reaction and will instead apply a presumption that consumers have been misled.

- *Cashmere & Camel Hair Mfg. Inst. v. Saks Fifth Avenue*, 284 F.3d 302, 316 (1st Cir. 2002), *cert. denied*, 537 U.S. 1001 (2002).

- *Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 281 (4th Cir. 2002).
- *United Indus. Corp. v. Clorox Co.*, 140 F.3d 1175, 1183 (8th Cir. 1998).

Courts often do not require survey evidence at the preliminary injunction stage, if there is other evidence that consumers have been misled.

- *Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 276 (4th Cir. 2002).
- *United Indus. Corp. v. Clorox Co.*, 140 F.3d 1175, 1183 (8th Cir. 1998).

### 3. Commercial advertising or promotion

By its express terms, Lanham Act § 43(a)(1)(B) applies only to “commercial advertising or promotion.” When confronted with statements that appear in forms other than traditional advertisements, some courts have applied a four-part test to determine whether a statement constitutes commercial advertising or promotion. The statement must be:

1. Commercial speech;
2. By a defendant who is in commercial competition with plaintiff;
3. For the purpose of influencing consumers to buy defendant’s goods or services; and
4. Disseminated sufficiently to the relevant purchasing public to constitute “advertising” or “promotion” within the industry, regardless of whether the representations are made in a “classic advertising campaign” or more informal types of “promotion.”

- *Podiatrist Assoc., Inc. v. La Cruz Azul de Puerto Rico, Inc.*, 332 F.3d 6, 19 (1st Cir. 2003) (noting that “this test bears the imprimatur of several respected circuits”).
- *Seven-Up Co. v. Coca-Cola Co.*, 86 F.3d 1379, 1384 (5th Cir. 1996) (finding sales presentations to constitute commercial advertising or promotion).
- *But see First Health Group Corp. v. BCE Emergis Corp.*, 269 F.3d 800, 803 (7th Cir. 2001) (expressing doubts as to test).

If the statement is not conveyed to the purchaser prior to the actual purchase, it will not constitute “advertising or promotion” within the meaning of the statute.

- *Brown v. Armstrong*, 957 F. Supp. 1293, 1302 (D. Mass. 1997), aff’d, 129 F.3d 1252 (1st Cir. 1997) (statements contained in videotape products were not advertising or promotion).
- *Gillette Co. v. Norelco Consumer Prods., Co.*, 946 F. Supp. 115, 134-35 (D. Mass. 1996) (statements contained in product package inserts were not advertising or promotion).
- *Marcy v. Nissen Corp.*, 578 F. Supp. 485, 506-07 (N.D. Ind. 1982) (user manual did not constitute advertising).

#### 4. Establishment claims

An “establishment” claim is a statement claiming that tests or studies prove a certain fact. In order to prove that an establishment claim is false or likely to mislead, the plaintiff may show that either (1) the defendant’s tests were not sufficiently reliable to conclude with reasonable certainty that they support the claim; or (2) the defendant’s tests, even if reliable, did not support the proposition asserted by the defendant.

- *United Indus. Corp. v. Clorox Co.*, 140 F.3d 1175, 1181-82 (8th Cir. 1998).
- *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1139 (9th Cir. 1997).
- *BASF Corp. v. Old World Trading Co.*, 41 F.3d 1081, 1090 (7th Cir. 1994).

#### B. Damages and Remedies for False Advertising

In order to obtain an injunction against false advertising in violation of Lanham Act § 43(a), the plaintiff must demonstrate that he or she “believes that he or she is likely to be damaged by such [advertising].” 15 U.S.C. § 1125(a)(1). Thus, evidence of specific harm is not necessary to obtain an injunction.

*“...the plaintiff must demonstrate that he or she believes that he or she is likely to be damaged by such [advertising].” ... Thus, evidence of specific harm is not necessary to obtain an injunction.”*

- *Cashmere & Camel Hair Mfg. Inst. v. Saks Fifth Avenue*, 284 F.3d 302, 311 (1st Cir. 2002), cert. denied, 537 U.S. 1001 (2002).
- *Pizza Hut, Inc. v. Papa John's Int'l, Inc.*, 227 F.3d 489, 497 (5th Cir. 2000).
- *American Council of Certified Podiatric Physicians and Surgeons v. American Board of Podiatric Surgery, Inc.*, 185 F.3d 606, 618 (6th Cir. 1999).
- *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1145-46 (9th Cir. 1997).

In order to recover damages, unless a presumption applies, a plaintiff must show that customers were actually deceived by the false advertising and that the plaintiff was harmed as a result. Some courts presume harm where liability is based on literally false statements, false comparative advertising, or statements made in bad faith or with an intent to harm the plaintiff.

- *Cashmere & Camel Hair Mfg. Inst. v. Saks Fifth Avenue*, 284 F.3d 302, 314-17 (1st Cir. 2002), cert. denied, 537 U.S. 1001 (2002).
- *Pizza Hut, Inc. v. Papa John's Int'l, Inc.*, 227 F.3d 489, 497 (5th Cir. 2000).
- *American Council of Certified Podiatric Physicians and Surgeons v. American Board of Podiatric Surgery, Inc.*, 185 F.3d 606, 618 (6th Cir. 1999).
- *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1146 (9th Cir. 1997).

The types of damages available for false advertising include recovery of lost profits, disgorgement of the defendant's wrongful profits, compensation for injury to the plaintiff's reputation, and compensation for any corrective advertising necessary to counter the false statements in the marketplace.

- *Skydive Ariz., Inc. v. Quattrocchi*, 673 F.3d 1105, 1116 (9th Cir. 2012) (affirming jury award of \$1 million for willful false advertising).
- *BASF Corp. v. Old World Trading Co. Inc.*, 41 F.3d 1081, 1092-95 (7th Cir. 1994) (affirming district court's award of \$2.5 million in lost profits based on market share analysis).



- *U-Haul Int'l Inc. v. Jartran, Inc.*, 793 F.2d 1034, 1041 (9th Cir. 1986) (upholding district court's award for plaintiff's corrective advertising expenses).
- *Castrol, Inc. v. Pennzoil Quaker State Co.*, 169 F. Supp. 2d 332, 343 (D.N.J. 2001) (finding that disgorgement of profits would be a permissible remedy for false advertising when defendant's conduct was intentional and willful).

### C. Defenses to False Advertising

In addition to any general defenses that may be applicable, the following specific defenses are available to a defendant in a false advertising case under Lanham Act § 43(a).

#### 1. Opinion

A statement in an advertisement cannot be false or misleading in violation of Lanham Act § 43(a)(1)(B) if it expresses an opinion rather than a fact. In distinguishing between opinion and fact, courts in false advertising cases turn to defamation jurisprudence. See Section III(G)(3), below. Generally speaking, a claim that is not capable of being verified is likely to be protected as a non-actionable opinion. A statement predicting a future event is generally a non-actionable opinion, but it may be actionable if the speaker has knowledge of facts not warranting the opinion, *i.e.*, that it knew at the time the statement was made that it was false or did not have a good faith belief in the truth of what was said.

- *Groden v. Random House, Inc.*, 61 F.3d 1045, 1051-52 (2d Cir. 1995) (finding statement “guilty of misleading the American public” to be non-actionable opinion that could not be reasonably interpreted as stating provable facts).

*“Generally speaking, a claim that is not capable of being verified is likely to be protected as a non-actionable opinion.”*

- *Gillette Co. v. Norelco Consumer Prods., Co.*, 946 F. Supp. 115, 136-37 (D. Mass. 1996) (finding statement by razor blade manufacturer that “anything closer could be too close for comfort” constitutes opinion rather than statement of fact).

## 2. Puffery

A statement will not constitute false advertising if a court finds that it is mere “puffery.” Courts have recognized two kinds of puffery: (1) a general statement about a product’s superiority that is so vague as to be perceived as a mere expression of opinion; and (2) an exaggerated statement, often made in a blustering or boasting manner, upon which no reasonable buyer would rely. Note, however, that a claim of product superiority which is specific and measurable is not puffery.

- *Hall v. Bed, Bath & Beyond, Inc.*, 705 F.3d 1357, 1367, 1368 (Fed. Cir. 2013) (finding statement “performance that lasts the useful lifetime of the towel” not mere puffery).
- *Clorox Co. Puerto Rico v. Procter & Gamble Commercial Co.*, 228 F.3d 24, 38-39 (1st Cir. 2000) (finding statement “Compare with your detergent . . . Whiter is not possible” capable of measurement, and therefore not puffery).
- *Pizza Hut, Inc. v. Papa John’s Int’l, Inc.*, 227 F.3d 489, 498-99 (5th Cir. 2000) (finding statement “Better Ingredients. Better Pizza.”, standing alone, to be puffery).
- *United Indus. Corp. v. Clorox Co.*, 140 F.3d 1175, 1180 (8th Cir. 1998) (finding statements about operation of roach killer product to be insufficiently explicit or unambiguous to be actionable).
- *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1145 (9th Cir. 1997) (finding “Less is More” in relation to crabgrass control product to be puffery, but “50% Less Mowing” to be too specific and measurable to constitute puffery).
- See also *Schering-Plough Healthcare Prods. v. Schwarz Pharma, Inc.*, 586 F.3d 500, 512 (7th Cir. 2009) (collecting cases and explaining well-known examples of puffery).

The concept of puffery has been applied to negative comments made about the products of a competitor. Such negative puffery is not actionable where no reasonable consumer would rely upon the exaggerated claims.

- *Time Warner Cable, Inc. v. DIRECTV, Inc.*, 497 F.3d 144, 160 (2d Cir. 2007) (finding grossly exaggerated images of competitor’s television service as “unwatchably blurry, distorted, and pixelated” to be puffery).
- *Gillette Co. v. Norelco Consumer Prods., Co.*, 946 F. Supp. 115, 131 D. Mass. 1996) (finding visual images exaggerating the pain and danger of shaving with a regular razor blade, including a swarm of bees stinging a face and animated razors that spit out flames and turn into sharp-toothed animals, to be puffery).

### III. Defamation and Commercial Disparagement

#### A. Elements of a Defamation Claim

A party may have a claim for defamation if he or she can demonstrate that the prospective defendant has made a defamatory statement of fact, of or concerning the complaining party, that is false and causes economic harm.

- *Smith v. Maldonado*, 85 Cal. Rptr. 2d 397, 402 (Cal. Ct. App. 1999) (“Defamation is an invasion of the interest in reputation. The tort involves the intentional publication of a statement of fact that is false, unprivileged, and has a natural tendency to injure or which causes special damage.”).
- *Dillon v. City of New York*, 704 N.Y.S. 2d 1, 5 (N.Y. App. Div. 1999) (“The elements [of defamation] are a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and, it must either cause special harm or constitute defamation *per se*.”).

In most states, certain statements are considered defamatory on their face. Such statements constitute defamation *per se* if they impute: (1) criminal conduct; (2) a loathsome disease; (3) misconduct in a person’s trade, profession, office, or occupation; or (4) sexual misconduct. If a statement is defamatory *per se*, harm will be presumed.

- *Dugan v. Mittal Steel USA Inc.*, 929 N.E.2d 184, 187 (Ind. 2010) (statement made by plaintiff employee’s supervisor that employee was “stealing time” and working on a “scheme with her boss... allegedly an attempt to defraud the Company” constituted defamation *per se*).
- *Baker v. Tremco Inc.*, 917 N.E.2d 650, 657-58 (Ind. 2009) (statement that former employee had engaged in “inappropriate sales practices” did not constitute defamation *per se* because it

was too vague to conclude that it was so obviously and naturally harmful that proof of its injurious character was unnecessary).

Showing a defamatory statement to just one person is sufficient to prove publication.

- *Dube v. Likins*, 167 P.3d 93, 104-105 (Ariz. Ct. App. 2007) (two letters sent internally from university president only to post-graduate student's advisor were "published" for defamation purposes).
- *Hecht v. Levin*, 613 N.E.2d 585, 587 (Ohio 1993) ("It is sufficient that the defamatory matter is communicated to one person only, even though that person is enjoined to secrecy.").

Note that the plaintiff must also prove "fault," as described in Section III(D), below.

Even where the plaintiff is not mentioned by name, a statement is deemed to be about the plaintiff if it could reasonably be understood to refer to him or her.

- *Eyal v. Helen Broad. Corp.*, 583 N.E.2d 228, 230-31 (Mass. 1991) (plaintiff stated a claim for defamation, even though he was not expressly named in the offending news reports, because the statement that a Brookline deli owner was involved in an "Israeli mafia" cocaine operation could reasonably be understood to refer to him).

The First Amendment defines the boundaries of defamation law. Therefore, the applicable law for a defamation claim filed in a state court may include federal court decisions as well as state court decisions and statutes.

## B. Defamation Defined

It is well established that a statement is "defamatory" if it tends to injure a person's reputation in the community and exposes that person to hatred, ridicule, or contempt.

- *Mercer v. Cosley*, 955 A.2d 550, 561 (Conn. App. Ct. 2008) ("A defamatory statement is defined as a communication that tends to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.").
- *Manfredonia v. Weiss*, 829 N.Y.S.2d 508, 509 (N.Y. App. Div. 2007) ("Defamation is the making of a false statement that 'tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society.'") (quoting *Sydney v. MacFadden Newspaper Publ. Corp.*, 151 N.E. 209 (N.Y. 1926)).

Some courts note that the statement must discredit the plaintiff in the minds of any considerable, respectable class of the community.

- *Jews for Jesus, Inc. v. Rapp*, 997 So.2d 1098, 1114 (Fla. 2008) (“[A] communication is defamatory if it prejudices the plaintiff in the eyes of a ‘substantial and respectable minority of the community.’”).
- *Tonnessen v. Denver Publishing Co.*, 5 P.3d 959, 963 (Colo. App. 2000) (“To be defamatory, a statement need only prejudice the plaintiff in the eyes of a substantial and respectable minority of the community.”).
- *Touma v. St. Mary’s Bank*, 712 A.2d 619, 621 (N.H. 1998) (“To be defamatory, language must tend to lower the plaintiff in the esteem of any substantial and respectable group, even though it may be quite a small minority.”).

### C. Examples of Defamatory Statements

The following are examples of statements that plaintiffs have alleged defamed them:

#### 1. Dishonesty or fraud

- *Swengler v. ITT Corp. Electro-Optical Prod. Div.*, 993 F.2d 1063, 1070- 71 (4th Cir. 1993) (applying Virginia law) (statements by terminated employee that government contractor was defrauding the government and mismanaging government funds constituted defamation).
- *Ricciardi v. Latif*, 323 N.E.2d 913, 914 (Mass. 1975) (letters sent by defendants to plaintiff’s customers falsely stating that plaintiff had refused to pay for defendant’s product were found defamatory).

#### 2. Mental disorder

- *Kryeski v. Schott Glass Tech., Inc.*, 626 A.2d 595, 601 (Pa. Super. Ct. 1993) (statements that employee was “crazy” did not rise to the level of defamation, consistent with other cases where words such as “paranoid,” “schizophrenic,” “crazy,” and “nuts” did not rise to the level of defamation).
- *Bratt v. Int’l Bus. Mach. Corp.*, 467 N.E.2d 126, 133 Mass. (1984) (statements made by employer that plaintiff has a specified mental disorder may be defamatory).

### 3. Crime or immorality

- *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 769 (1986) (plaintiff businessman sued newspaper for defamation for publishing article alleging links to organized crime).
- *Prozeralik v. Capital Cities Communications, Inc.*, 626 N.E. 2d 34, 36-37 (N.Y. 1993) (prominent businessman brought suit against radio station for falsely reporting that he had been abducted and beaten due to unpaid debts to organized crime boss).

### 4. Injurious to business reputation

- *Costello v. Hardy*, 864 So.2d 129, 142 (La. 2004) (attorney filed defamation claim against client's mother for accusing him of legal malpractice).
- *Atlantic Mutual Ins. Co. v. J. Lamb. Inc.*, 123 Cal. Rptr. 2d 256, 270 (Cal. App. Ct. 2002) (finding that company's statements to competitor's customers that competitor's products infringed its patents were defamatory).

### 5. Potential for bad behavior

- *Smith v. Suburban Rests., Inc.*, 373 N.E.2d 215, 217 (Mass. 1978) (letter sent by defendant's lawyer to plaintiff – and also to the police – advising plaintiff that she was no longer permitted to enter defendant's restaurant was defamatory because the potential for bad behavior on the part of plaintiff could be inferred from the letter).

### 6. Careless omission of a significant fact or name in a publication

- *Mohr v. Grant*, 108 P.3d 768, 773-77 (Wash. 2005) (recognizing that omission of material facts can rise to the level of defamation, but refusing to find defamation where inclusion of material facts would not have changed the overall impression from television report that shopkeeper had caused a mentally handicapped customer to be arrested).
- *Scripps Texas Newspapers, L.P. v. Belalcazar*, 99 S.W.3d 829, 835-837 (Ct. App. Tex. 2003) (denying defendant's motion for summary judgment on defamation claim when newspaper published stories regarding medical malpractice claims and omitted the fact that earlier lawsuits against surgeon had been voluntarily dismissed).

## D. Proving Fault Within a Free Speech Framework

U.S. Supreme Court jurisprudence defines the contours of defamation law within the protections of the First Amendment. To balance the right of free speech with the right to recover damages for defamation, the Supreme Court has held that a plaintiff must prove “fault” on the part of the defendant in addition to proving each of the elements described above. The burden of proof varies depending on the status of the plaintiff. If the plaintiff is a public official or public figure, he or she must prove that the defendant acted with “actual malice.”

A “public official” is generally a government employee who has substantial responsibility or control over the conduct of government affairs. *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966). A “public figure” is an individual who has assumed a role of prominence in the affairs of society. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974).

A corporation can also be a public figure under certain circumstances. *Flotech, Inc. v. E.I. Du Pont de Nemours Co.*, 627 F. Supp. 358, 365 (D. Mass. 1985), *aff’d*, 814 F.2d 775 (1st Cir. 1987) (collecting cases).

A statement is published with “actual malice” if it is published with knowledge that it is false or with “reckless disregard” as to whether it is false. *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964). A statement is made with “reckless disregard” if it is published with serious doubts as to its truth. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

Malice must be proved by clear and convincing evidence. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 15 (1990) (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974)).

Practitioners representing clients in a defamation action should be acquainted with the following Supreme Court cases:

- *New York Times Co. v. Sullivan*, 376 U.S. 254, 267 (1964). The Court held that a plaintiff must prove “actual malice” to prevail in a defamation action against a public official or public figure.
- *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 133-34 (1967). The Court affirmed the actual malice standard for defamation actions brought by public figures against news organizations.

*“A statement is published with ‘actual malice’ if it is published with knowledge that it is false or with ‘reckless disregard’ as to whether it is false.”*

- *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974). The Court held that private plaintiffs need not make the *New York Times* malice showing in actions involving media defendants; states may not impose liability without requiring some showing of fault; and a private plaintiff must prove malice to obtain presumed or punitive damages.
- *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985). The issue before the Court was whether the holding of *Gertz* applied to a private plaintiff with respect to a statement that is not a matter of public concern. The Court held that *Gertz* does not apply; thus, a private plaintiff does not have to prove malice with respect to such statements to obtain presumed and punitive damages.
- *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 774 (1986). The Court held that a statement on a matter of public concern must be provable as false before there can be liability under state defamation law, at least where a media defendant is involved.
- *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19-20 (1990). The Court held that an “opinion” may be actionable if it implies a false assertion of fact. An excellent discussion of *Milkovich* appears in *Phantom Touring, Inc. v. Affiliated Publ’n*, 953 F.2d 724, 727-28 (1st Cir. 1992).

The Supreme Court has held that private figures are afforded greater protection than public figures under the First Amendment. State law establishes the burden of proof for a private figure plaintiff. In a majority of states, a private figure need prove only that the defendant acted with negligence. J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 27:108 at 27-249 (4th ed. 2010); see, e.g., *Schrottman v. Barnicle*, 437 N.E.2d 205, 208 (Mass. 1982); *Stone v. Essex County Newspapers, Inc.* 330 N.E.2d 161, 164 (Mass. 1974).

Similarly, if the statement relates to a matter of public concern, a private plaintiff may need to prove malice to obtain presumed damages. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985).



In jurisdictions where private figures or matters of private concern are subject to a negligence standard, which is a majority of states, the following table shows how the burden of proof applies:

STATUS OF PLAINTIFF	BURDEN OF PROOF
Private figure	Negligence
Pervasive public figure (such as a nationally known celebrity)	Clear and convincing evidence of actual malice for almost all statements concerning the plaintiff, including statements relating to his or her personal life (sex life, drug use, etc.)
	In very limited circumstances, such as when the defendant falsely fictionalizes the plaintiff's life and presents it as the truth, negligence may apply
Limited purpose public figure (one who has thrust himself or herself into the forefront of a public controversy to influence the outcome of the issues involved)	Clear and convincing evidence of actual malice for statements concerning the plaintiff's public activities
	For other defamatory statements, negligence
Public official (but note that not all government employees are considered "public officials" for the purpose of defamation law)	Clear and convincing evidence of actual malice for statements relating to plaintiff's status as a public official, including plaintiff's fitness for public office
	For other defamatory statements, negligence

**E. Elements of a Commercial Disparagement Claim**

Commercial disparagement is a common law tort closely related to defamation. It has been defined as a false statement intended to call into question the quality of a competitor's goods or services in order to inflict pecuniary harm. The states have several designations for what is essentially the same tort:

**"Commercial disparagement"**

- *Hipsaver, Inc. v. Kiel*, 464 Mass. 517, 523 (2013) ("[I]n order to prevail on a claim alleging commercial disparagement, a plaintiff must prove that a defendant: (1) published a false statement to a person other than the plaintiff; (2) 'of and concerning' the plaintiff's products or services; (3) with knowledge of the statement's falsity or with reckless disregard of its truth or falsity; (4) where pecuniary harm to the plaintiff's interests was intended or foreseeable; and (5) such publication resulted in special damages in the form of pecuniary loss.").

- *Pro Golf Mfg. Inc. v. Tribune Review Newspaper Co.*, 809 A.2d 243,246 (Pa. 2002) (commercial disparagement is shown where “(1) the statement is false; (2) the publisher either intends the publication to cause pecuniary loss or reasonably should recognize that publication will result in pecuniary loss; (3) pecuniary loss does in fact result; and (4) the publisher either knows that the statement is false or acts in reckless disregard of its truth or falsity”) (quoting Restatement (Second) of Torts § 623(A) (1977)).
- *First Act Inc. v. Brook Mays Music Co.*, 429 F. Supp. 2d 429, 432 n.1 (D. Mass. 2006) (“The tort of ‘commercial disparagement’ goes by various names, including ‘injurious falsehood,’ ‘disparagement of property,’ ‘slander of goods,’ and ‘trade libel.’”).

### “Business disparagement”

- *Forbes Inc. v. Granada Biosciences, Inc.*, 124 S.W.2d 167, 170 (Tex. 2003) (“To prevail on a business disparagement claim, a plaintiff must establish that (1) the defendant published false and disparaging information about it, (2) with malice, (3) without privilege, (4) that resulted in special damages to the plaintiff.”).

### “Product disparagement”

- *Teilhaber Manu. Co. v. Unarco Materials Storage*, 791 P.2d 1164 (Colo. App. 1989) (“The tort of product disparagement requires proof of the following elements: (1) a false statement; (2) published to a third party; (3) derogatory to the plaintiff’s business in general; (4) through which the defendant intended to cause harm to the plaintiff’s pecuniary interest, or either recognized or should have recognized that it was likely to do so; (5) with malice; (6) thus, causing special damages.”).

### “Trade libel”

- *Border Collie Rescue, Inc. v. Ryan*, 418 F. Supp. 2d 1330, 1348 (M.D. Fla. 2006) (applying Florida law) (“To state a valid claim of trade libel, plaintiffs must allege: (1) a falsehood; (2) has been published, or communicated to a third person; (3) when the defendant-publisher knows or reasonably should know that it will likely result in inducing others not to deal with the plaintiff; (4) in fact, the falsehood does play a material and substantial part in inducing others not to deal with the plaintiff; and (5) special damages are proximately caused as a result of the published falsehood.”).

Not every jurisdiction recognizes this tort, whatever name it may take. The courts in Illinois, in particular, raise uncertainty whether commercial disparagement is a viable cause of action.

- *Becker v. Zellner*, 684 N.E.2d 1378, 1388 (Ill. App. Ct. 1997) (finding that commercial disparagement is not a viable cause of action in the Second District of Illinois).
- *Schivarelli v. CBS, Inc.*, 776 N.E.2d 693, 702-703 (Ill. App. Ct. 2002) (noting that “it is disputed as to whether a cause of action for commercial disparagement remains viable in Illinois,” and holding that even if commercial disparagement is a viable cause of action, plaintiff hot dog stand owner failed to show that defendant’s television program made false and demeaning statements regarding the quality of plaintiff’s hot dogs).

Tennessee is another state that casts doubt on the availability of this count.

- *Kansas Bankers Surety Co. v. Bahr Consultants, Inc.*, 69 F. Supp. 2d 1004, 1014-15 (E.D. Tenn. 1999) (“To date, disparagement of quality or trade libel has not been recognized in Tennessee as a separate cause of action.”).

It is useful to distinguish corporate defamation from commercial (or product) disparagement. Defamation of a corporation injures the reputation of the corporation itself, while commercial disparagement injures the reputation of the corporation’s products or services.

- *Hipsaver, Inc. v. Kiel*, 464 Mass. 517, 522 (2013) (“A defamation action ... affords a remedy for damages to the reputation of the injured party. By comparison, an action for commercial disparagement affords a remedy for harm to the economic interests of the injured party that results in pecuniary loss. A plaintiff asserting such a claim seeks to recover damages for false disparaging statements about plaintiff’s property, often a product or service being sold.” (internal citations omitted)).
- *Forbes Inc. v. Granada Biosciences, Inc.*, 124 S.W.2d 167, 170 (Tex. 2003) (“A business disparagement claim is similar in many respects to a defamation action. The two torts differ in that defamation actions chiefly serve to protect the personal reputation of an injured party, while a business disparagement claim protects economic interests.”).

- *Allcare, Inc. v. Bork*, 531 N.E.2d 1033, 1037-38 (Ill. App. Ct. 1988) (defendant’s statements that medical supply company’s president was paying bribes and that medical supply company was under investigation for fraud might constitute corporate defamation but did not constitute commercial disparagement because the quality of the company’s goods and services was not attacked).

This tort shares the elements of defamation, with the notable exception that, as reflected in the cases described above, the commercial disparagement plaintiff must also prove special damages (economic loss). See Section III (F)(2), below. Normally, to establish special damages for commercial disparagement the plaintiff must show a specific loss of sales to identifiable customers. However, under the “widespread dissemination” exception that has been adopted by many courts, a plaintiff can instead show that disparaging statements were made to multiple customers, the plaintiff suffered pecuniary loss, and the loss was not attributable to other causes.

- *Hipsaver, Inc. v. Kiel*, 464 Mass. 517, 539 (2013) (recognizing “the ‘widespread dissemination’ exception to the general rule that a plaintiff in a commercial disparagement action must prove a specific loss of sales to identifiable customers before the plaintiff can recover for pecuniary loss”).
- *Charles Atlas, Ltd. v. Time-Life Books, Inc.*, 570 F. Supp. 150, 155-56 (S.D.N.Y. 1983) (applying New York law) (plaintiff not required to identify specific lost customers because the “plaintiff sells only through mail orders” and it would be “virtually impossible” to identify those customers that did not order because of the disparaging article).
- Restatement (Second) of Torts § 633(2) (“[P]ecuniary loss may be established by proof of the conduct of specific persons or proof that the loss has resulted from the conduct of a number of persons whom it is impossible to identify.”).

### 1. Privileged statements

Statements that would otherwise constitute commercial disparagement are often protected as conditionally privileged.

- *KBT Corp., Inc. v. Ceridian Corp.*, 966 F. Supp. 369, 374 (E.D. Pa. 1997) (applying Pennsylvania law) (“A conditional privilege attaches to a commercially disparaging statement when the statement

involves some interest of the person who publishes it, some interest of the person to whom it is published or some other third person, or a recognized interest of the public.”).

- *Picker Int'l, Inc. v. Leavitt*, 865 F. Supp. 951, 964 (D. Mass. 1994) (as a public policy matter, courts acknowledge that “[m]any buyers ... recognize disparagement [of a rival] as non-objective and highly biased”) (quoting 3 Philip Areeda & Donald F. Turner, *Antitrust Law* § 738c, at 281 (Little, Brown 1978)); see also Restatement (Second) of Torts §§ 623A, 626 (1979)).

## 2. Corporations as public figures

A corporation may be deemed a public figure under certain circumstances. In that event, the corporation must establish actual malice on the part of the defendant to prevail in a commercial disparagement case.

- *Forbes Inc. v. Granada Biosciences, Inc.*, 124 S.W.2d 167 (Tex. 2003) (Granada failed to establish actual malice arising from a Forbes magazine article discussing financial problems at several corporate subsidiaries that contained multiple misstatements and failed to distinguish among the corporations).

## F. Damages and Remedies for Defamation and Commercial Disparagement

### 1. Damages

A plaintiff prevailing at trial in a defamation or commercial disparagement case is entitled to actual or compensatory damages.

- *Weller v. American Broadcasting Cos., Inc.*, 283 Cal. Rptr. 644, 658-659 (Cal. Ct. App. 1991) (upholding jury damages for actual injury to business and to antique dealer’s reputation when television broadcast suggested that antiques dealer had knowingly sold stolen property).

*“... in cases of slander (spoken defamation) or commercial disparagement, the plaintiff must prove special damages (economic loss) to recover a monetary award.”*

- *GN Danavox, Inc. v. Starkey Labs., Inc.*, 476 N.W.2d 172 (Minn. Ct. App. 1991) (affirming compensatory damages for business defamation when competitor circulated advertisements falsely stating that plaintiff was going out of business).

According to one legal resource, over the past decade there has been “an alarming trend towards high jury verdicts in defamation cases,” including a record \$222.7 million verdict against Dow Jones in 1997 based on a *Wall Street Journal* article (the verdict was later reduced to \$22.7 million and was never paid due to subsequent case developments). E. Gabriel Perle, John Taylor Williams & Mark A. Fischer, *Perle, Williams & Fischer on Publishing Law* § 5.13, at 5-75–76 (4th ed. 2013) (discussing damages). In 2010 and 2011, the average damages award against media defendants involving defamation, privacy, and related claims was \$3.2 million. *Id.*

Actual damages may include (1) the value of the plaintiff’s reputation; (2) lost business opportunities; and (3) medical expenses and other costs related to remedying emotional injuries such as mental anguish, embarrassment, and humiliation.

- *Weller v. American Broadcasting Cos., Inc.*, 283 Cal. Rptr. 644, 658-659 (Cal. Ct. App. 1991) (affirming \$2.3 million in damages for injury to reputation, lost potential business, and emotional distress when television station broadcast report suggesting that antiques dealer had knowingly sold stolen property).
- *GN Danavox, Inc. v. Starkey Labs., Inc.*, 476 N.W.2d 172 (Minn. Ct. App. 1991) (upholding compensatory damages of \$517,752 for loss in sales, reputation, opportunity, and business).

## 2. Special damages

In cases involving libel (written defamation), proof of general damages is sufficient because damages are presumed. However, in cases of slander (spoken defamation) or commercial disparagement, the plaintiff must prove special damages (economic loss) to recover a monetary award.

- *Hipsaver, Inc. v. Kiel*, 464 Mass. 517, 537 (2013) (“[T]o establish special damages in a commercial disparagement action, a plaintiff must show, where feasible, a specific loss of sales to identifiable customers. ... An exception to the requirement of specific lost sales has been recognized in circumstances where a false statement has been ‘widely disseminated,’ and it would be impossible to identify particular customers who chose not to purchase a plaintiff’s goods or services.”).

- *Astoria Indus. of Iowa, Inc. v. SNF, Inc.*, 223 S.W.3d 616, 628 (Tex. App. 2007) (“To prove special damages, the plaintiff must prove that the disparaging communications played a substantial part in inducing third parties not to deal with the plaintiff, resulting in a direct pecuniary loss that has been realized or liquidated, such as specific lost sales, loss of trade, or loss of other dealings.”).
- *Atlantic Mutual Insurance Co. v. J. Lamb, Inc.*, 123 Cal. Rptr. 2d 256, 270 (Cal. Ct. App. 2002) (“The plaintiff must prove in all cases that the publication has played a material and substantial part inducing others not to deal with him, and that as a result he has suffered special damages ... Usually, the damages claimed have consisted of loss of prospective contracts with the plaintiff’s customers.”).

### 3. Presumed damages

In cases involving defamation *per se*, the plaintiff is entitled to presumed damages as a natural and probable consequence of the *per se* defamation. The plaintiff must prove the amount of those damages, however.

- *Baker v. Tremco Inc.*, 917 N.E.2d 650, 657 (Ind. 2009).

### 4. Retraction

Generally, retraction statutes require that the defendant be given an opportunity to retract, but do not specify timing.

- Ariz. Rev. Stat. Ann. § 12-653.02 (“The plaintiff shall serve upon the publisher at the place of publication, or broadcaster at the place of broadcast, a written notice specifying the statements claimed to be libelous and demanding that the same be corrected.”).
- Cal. Civ. Code § 48a(1) (“Plaintiff shall serve upon the publisher, at the place of publication or broadcast, a written notice specifying the statements claimed to be libelous and demanding that the same be corrected.”).
- Mass. Gen. Laws c. 231, § 93 (“Where the defendant in an action for libel, at any time after the publication of the libel hereinafter referred to, either before or after such action is brought, but before the answer is required to be filed therein gives written notice to the plaintiff or to his attorney of his intention to publish a retraction of the libel, accompanied by a copy of the retraction which he

intends to publish, and the retraction is published, he may prove such publication, and, if the plaintiff does not accept the offer of retraction, the defendant may prove such non-acceptance in mitigation of damage.”).

## 5. Punitive damages

Plaintiffs must cross a high threshold to recover punitive damages.

- *Swengler v. ITT Corp. Electro-Optical Prod. Div.*, 993 F.2d 1063, 1072 (4th Cir. 1993) (applying Virginia law) (“We note that Virginia law presumes actual damages under a claim for defamation per se, but that a plaintiff must establish that the defendant made the statements with ‘actual malice’ before punitive damages can be recovered.”).
- *GN Danavox, Inc. v. Starkey Labs., Inc.*, 476 N.W.2d 172, 176-177 (Minn. Ct. App. 1991) (upholding award of punitive damages when defendant knew that false statements in flyers suggesting that plaintiff was going out of business “created a high probability of injury to [plaintiff’s] business, and yet [defendant] acted with disregard for [plaintiff’s] probable injury,” and noting the standard for punitive damages in Minnesota as “clear and convincing evidence that the acts of the defendant show deliberate disregard for the rights or safety of others”).
- *Galarneau v. Merrill Lynch*, 504 F.3d 189, 205 (1st Cir. 2007) (applying Maine law) (even if defendant employer knew that defamatory statements would injure terminated employee, “Maine requires more where punitive damages are concerned: [Defendant’s] knowledge must have motivated its statement, or its actions must have been so outrageous as to imply malice.”).

*“The prior restraint doctrine can make it more difficult to obtain preliminary injunctive relief against commercial statements that are allegedly false.”*



Several states do not allow punitive damages.

- *Wheeler v. Green*, 593 P.2d 777, 788-89 (Or. 1979) (holding that punitive damages in defamation cases violate the Oregon constitution).
- *Spokane Truck & Dray Co. v. Hoefler*, 25 P. 1072, 1074 (Wash. 1891) (abolishing punitive damages in Washington State civil cases).
- Mass. Gen. Laws c. 231, § 93 (“In no action of slander or libel shall... punitive damages be allowed.”).

## 6. Prior restraint

While injunctions are available in defamation and commercial disparagement cases, the willingness of courts to enter injunctions depends on the type of speech at issue. It is easier to obtain an injunction against commercial statements than against political and other types of speech.

As a rule, commercial speech garners a lower level of constitutional protection, and is accordingly subject to greater restriction, than non-commercial speech.

- *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980) (“there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it”). *But see Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2664 (2011) (“The First Amendment requires heightened scrutiny whenever the government creates a regulation of speech because of disagreement with the message it conveys. . . . Commercial speech is no exception.” (internal quotation marks and citations omitted)).

Bans on commercial statements usually take the form of permanent injunctive relief issued against statements found libelous after trial. The prior restraint doctrine can make it more difficult to obtain preliminary injunctive relief against commercial statements that are allegedly false.

- *New.Net, Inc. v. Lavasoft*, 356 F. Supp. 2d 1071, 1084 (C.D. Cal. 2003) (“the question of the actual truth or falsity is not appropriate on this motion for preliminary injunctive relief,” because “making predictions ex ante as to what restrictions on speech will ultimately be found permissible is hazardous and may chill protected speech”) (citing *Latino Officers Ass’n, New York, Inc. v. City of New York*, 196 F.3d 458, 465 (2d Cir. 1999)).

- *Castrol v. Pennzoil Co.*, 987 F.2d 939, 949 (3d Cir. 1993) (even in context of permanent injunction, defendant is barred from publishing only statements that were found “literally false” at trial and therefore unprotected by the First Amendment).
- *Cornwell v. Sachs*, 99 F. Supp.2d 695, 708-709 (E.D. Va. 2000) (preliminary injunction is available against statements shown at evidentiary hearing to be false, because “the Lanham Act’s prohibition of false and misleading advertising does not arouse concerns under the free speech clause of the First Amendment”).

In the non-commercial sphere, by contrast, it is more difficult to obtain an injunction preventing the publication of potentially defamatory statements.

- *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (“Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.”) (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)).
- *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539 (1976) (holding that prior restraint was not justified to guarantee a criminal defendant a fair trial, even in a highly sensationalized and publicized case).
- *Near v. State of Minnesota*, 283 U.S. 697, 716 (1931) (recognizing that injunction may be appropriate where national security is at stake).
- *Stone v. Essex County Newspapers, Inc.*, 311 N.E.2d 52, 63 (Mass. 1974) (a court will grant prior restraint only in extraordinary circumstances, such as where publication will implicate national security or the right to a fair trial.).

## G. Defenses to Defamation and Commercial Disparagement

### 1. Overview

With certain statutory limitations, truth is an absolute defense to a defamation or commercial disparagement action. Other common defenses include the following:

- The statement is an opinion and therefore not actionable,
- The plaintiff is “libel proof,” or
- The defendant has a conditional or absolute privilege.

## 2. Truth

If the plaintiff states a claim for defamation, the defendant will likely argue that the statement at issue is true.

- *Cyprien v. Bd. of Sup'rs for the Univ. of La. Sys.*, 5 So.3d 862, 867 (La. 2009) (plaintiff employee failed to establish defamation where defendant employer's statement that employee misrepresented his qualifications in his resume was true).
- *Dillon v. City of New York*, 704 N.Y.S.2d 1, 6 (N.Y. App. Div. 1999) (plaintiffs failed to establish defamation when employer stated that they had been "terminated," because the statement was true).
- *Mercer v. Cosley*, 955 A.2d 550, 562-563 (Conn. App. Ct. 2008) (plaintiff failed to prove defamation when defendant's statements were true, based on plaintiff's own admissions).

Even if a statement is true, it may be defamatory by implication if it gives a false impression.

- *Jews for Jesus, Inc. v. Rapp*, 997 So.2d 1098, 1106 (Fla. 2008) (recognizing a cause of action for defamation by implication).

The plaintiff has the burden of proving falsity if he or she is a public official or public figure, or the defamatory statement involves a matter of public concern.

- *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986) (plaintiff has burden of proving falsity if defamatory speech at issue is a matter of public concern).
- *Prozeralik v. Capital Cities Communications, Inc.*, 626 N.E.2d 34, 38 (N.Y. 1993) (well-known businessman had burden of proving that radio broadcast reporting that he had been kidnapped was false).

In most states, truth is an absolute bar to recovery.

- *Commonwealth Motor Parts Ltd. v. Bank of Nova Scotia*, 355 N.Y.S.2d 138, 141 (N.Y. App. Div. 1974) ("Truth is an absolute, unqualified defense to a civil defamation action.").
- *Stuempges v. Parke, Davis, & Co.*, 297 N.W.2d 252, 255 (Minn. 1980) ("Truth, however, is a complete defense [to defamation], and true statements, however disparaging, are not actionable.").

- *Campanelli v. Regents of the Univ. of Cal.*, 51 Cal. Rptr. 2d 891, 897 (Cal. App. Ct. 1996) (“Truth, of course, is an absolute defense to any libel action.”).

In other states, truth is a bar to recovery for defamation only if the communication is published with “good motives” and “without malice.”

- *Noonan v. Staples, Inc.*, 556 F.3d 20 (1st Cir. 2009) (holding that executive’s email sent to 1500 employees truthfully stating plaintiff employee was fired could have been made with actual malice sufficient to show defamation) (applying Massachusetts law and citing Mass. Gen. Laws c. 231, § 92).
- Del. Code Ann. Tit. 10, § 3919 (“In actions for damages for the writing or publishing of a libel, where the truth is pleaded and given in evidence, if it is found that the same was written or published properly for public information, and with no malicious or mischievous motives, the court may find for the defendant.”).
- *LRX, Inc. v. Horizon Assoc. Joint Venture*, 842 So. 2d 881, 886-87 (Fla. Dist. Ct. App. 2003) (“Under Florida law, truth ‘is only a defense to defamation when the truth has been coupled with a good motive.’”) (quoting *Lipsig v. Ramlawi*, 760 So.2d 170, 183 (Fla. Dist. Ct. App. 2000)).
- *Young v. First United Bank of Bellevue*, 516 N.W.2d 256 (Neb. 1994) (“The truth in itself and alone shall be a complete defense [to libel] unless it shall be proved by the plaintiff that the publication was made with actual malice. Actual malice shall not be inferred or presumed from publication.”).

*“Simply couching such statements in terms of opinion does not dispel these implications” . . . “the statement, ‘In my opinion Jones is a liar,’ can cause as much damage to reputation as the statement, ‘Jones is a liar.’”*

Truth is always an absolute defense to defamation if the plaintiff is a public figure or the matter is an issue of public concern.

- *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 489-490 (1974) (“The defense of truth is constitutionally required where the subject of the publication is a public official or public figure.”).
- *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986) (plaintiff bears burden of proving falsity when plaintiff is a private figure but publication is of public concern).

### 3. Opinion

An opinion is constitutionally protected speech and therefore not actionable as defamation.

- *Teilhaber Mfg. Co. v. Unarco Materials Storage*, 791 P.2d 1164, 1167 (Colo. 1989) (“The constitutional protections afforded a defendant in a defamation action are applicable to a defendant in a product disparagement action ... In general, a statement of opinion, as opposed to a statement of fact, will be protected expression under the First Amendment.”).
- *Campanelli v. Regents of the Univ. of Cal.*, 51 Cal. Rptr. 2d 891, 894 (Cal. App. Ct. 1996) (“Even if they are objectively unjustified or made in bad faith, publications which are statements of opinion rather than fact cannot form the basis for a libel action.”).

The form of the language used is not controlling, however, because writers and speakers often use the word “opinion” as a preface when asserting a factual untruth. Thus, a statement couched as an opinion may be defamatory if it conveys facts that are untrue.

- *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18-19 (1990) (“If a speaker says, ‘In my opinion John Jones is a liar,’ he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications; and the statement, ‘In my opinion Jones is a liar,’ can cause as much damage to reputation as the statement, ‘Jones is a liar.’”).

The relevant question is not whether the statement is an opinion, but rather whether it would reasonably be understood to declare or imply provable assertions of fact.

- *Franklin v. Dynamic Details, Inc.*, 10 Cal. Rptr. 3d 429, 441 (Cal. Ct. App. 2004) (“Statements of opinion that imply a false assertion of fact are actionable ... The question is not strictly whether the published statement is fact or opinion. Rather, the dispositive question is whether a reasonable fact finder could conclude the published statement declares or implies a provably false assertion of fact.”).
- *Swengler v. ITT Corp. Electro-Optical Prod. Div.*, 993 F.2d 1063, 1071 (4th Cir. 1993) (applying Virginia law) (“Statements clearly implying the existence of facts are actionable as defamation.”).

In determining whether a statement is one of fact or opinion, the statement must be considered as a whole. Factual portions of an allegedly defamatory statement may not be evaluated for their truth or falsity in isolation; they must be considered in the context of any accompanying opinion and other stated facts.

- *Hyland v. Raytheon Tech. Servs. Co.*, 670 S.E.2d 746, 751-52 (2009) (defamation analysis requires not just analyzing factual portions of defendant’s allegedly defamatory statement, but also considering the statement as a whole, including any implications that one could reasonably draw from the statement).

The Constitution protects the following types of statements as opinion:

Statements that cannot be proven false.

- *Schmalenberg v. Tacoma News, Inc.*, 943 P.2d 350, 357 (Wash. Ct. App. 1997) (“A defamation claim must be based on a statement that is provably false. A statement meets this test to the extent it falsely expresses or implies provable facts, regardless of whether the statement is, in form, a statement of fact or a statement of opinion. A statement does not meet this test to the extent it does not express or imply provable facts; necessarily, such a statement communicates only ideas or opinions.”).
- *Aviation Charter, Inc. v. Aviation Research Group*, 416 F.3d 864, 868 (8th Cir. 2005) (applying Minnesota law) (“Statements about matters of public concern that are not capable of being proven true or false and statements that cannot be reasonably interpreted as stating facts are protected from defamation actions by the First Amendment.”).

Statements that cannot be reasonably interpreted as stating actual facts about an individual.

- *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21 (1990) (“loose, figurative or hyperbolic language” weighs against concluding that a defamatory assertion of fact was made).
- *Schmalenberg v. Tacoma News, Inc.*, 943 P.2d 350, 357 (Wash. Ct. App. 1997) (“A defamation claim must be based on a statement that is provably false. A statement meets this test to the extent it falsely expresses or implies provable facts, regardless of whether the statement is, in form, a statement of fact or a statement of opinion. A statement does not meet this test to the extent it does not express or imply provable facts; necessarily, such a statement communicates only ideas or opinions.”).
- *Aviation Charter, Inc. v. Aviation Research Group*, 416 F.3d 864, 868 (8th Cir. 2005) (applying Minnesota law) (“Statements about matters of public concern that are not capable of being proven true or false and statements that cannot be reasonably interpreted as stating facts are protected from defamation actions by the First Amendment.”).
- *Phantom Touring, Inc. v. Affiliated Publ’n*, 953 F.2d 724, 727 (1st Cir. 1992) (theater critic who wrote that “the producer who decided to charge admission for that show is committing highway robbery” would be immune from liability because no reasonable reader would understand the critic to be accusing the producer of an actual crime).

Statements that, from their context, negate the impression that they are factual.

- *Jewell v. NYP Holdings*, 23 F. Supp. 2d 348, 385 (S.D.N.Y. 1998) (cartoon not actionable as defamation because “a reasonable reader would not view such a cartoon as a statement of fact; rather, given the inherent nature of a cartoon, a reasonable reader would view it as a statement of pure opinion not based on undisclosed facts”).
- *Garvelink v. Detroit News*, 522 N.W.2d 883, 886-87 (Mich. App. 1994) (context of satirical editorial column about local school superintendent means that editorial “cannot reasonably be interpreted as stating actual facts about plaintiff”).

Courts may state pragmatically that all circumstances are considered in determining whether a statement is an opinion.

- *Campanelli v. Regents of the Univ. of Cal.*, 51 Cal. Rptr. 2d 891, 895 (Cal. Ct. App. 1996) (“California courts have developed a totality of

the circumstances test . . . The court must put itself in the place of an average reader and decide the natural and probable effect of the statement . . . The court must look at the nature and full content of the communication and to the knowledge and understanding of the audience to whom the publication was directed.”).

- *Phantom Touring, Inc. v. Affiliated Publ’n*, 953 F.2d 724, 727 (1st Cir. 1992) (court undertakes an independent examination of all constitutionally required factors to guard against “a forbidden intrusion on the field of free expression”).

#### 4. The libel-proof plaintiff

Even where the challenged statement is found to be false, a plaintiff may be deemed “libel-proof” and therefore unable to prevail. Defendants frequently assert this defense against plaintiffs whose reputations are already so tarnished that they cannot be defamed. For example, a mass murderer cannot be defamed by being falsely described as a tax evader. Defendants can also assert this defense in noncriminal contexts where the defamatory statement cannot harm the plaintiff’s reputation beyond the harm already caused by disclosure of the truth.

- *Simmons Ford, Inc. v. Consumers Union of the United States, Inc.*, 516 F. Supp. 742, 750-5 1 (S.D.N.Y. 1981) (electric-car maker has no libel claim against Consumer Reports for an article that truthfully reported the car’s abysmal performance ratings and poor safety record but mistakenly claimed that the car failed to meet federal safety regulations; the plaintiff was libel-proof because the car’s poor performance and safety record had already dented its reputation).
- *Lamb v. Rizzo*, 242 F. Supp. 2d 1032, 1037-38 (D.Kan. 2003) (applying Kansas law) (prisoner serving three consecutive life terms for kidnapping and murder was libel-proof because his criminal activity had destroyed his reputation).
- *Kevorkian v. American Medical Ass’n*, 602 N.W.2d 233, 239 (Mich. App. 1999) (well-known proponent of physician-assisted suicide was libel-proof with respect to implications of being a murderer).

#### 5. Absolute privileges

In certain circumstances, an absolute privilege may operate as a defense and protect the maker of an otherwise defamatory statement from liability. Absolute privileges apply to certain statements made in connection with litigation or the legislative process.



### a. Litigation privilege

Attorneys, parties, and witnesses participating in a judicial proceeding have an absolute privilege – sometimes referred to as the litigation privilege – to publish statements that are related to the proceeding, so long as the proceeding is contemplated in good faith.

- *Oparaugo v. Watts*, 884 A.2d 63, 79 (D.C. 2005) (“This jurisdiction, like the majority of other jurisdictions, has long recognized an absolute privilege for statements made preliminary to, or in the course of, a judicial proceeding, so long as the statements bear some relationship to the proceeding.”) (quoting *Finkelstein, Thompson & Loughran v. Hemispherx Biopharma, Inc.*, 774 A.2d 332, 338 (D.C. 2001)).
- *Collins v. Red Roof Inns, Inc.*, 566 S.E.2d 595, 603 (W.Va. 2002) (“Prior to the filing of a prospective judicial proceeding, a party to a dispute is absolutely privileged to publish defamatory matter about a third person who is not a party to the dispute only when (1) the prospective judicial action is contemplated in good faith and is under serious consideration; (2) the defamatory statement is related to the prospective judicial proceeding; and (3) the defamatory matter is published only to persons with an interest in the prospective judicial proceeding.”).
- *Abromats v. Wood*, 213 P.3d 966, 971 (Wyo. 2009) (statements made by crime victim to crime victim service provider for submission to court were absolutely privileged because they were made in the course of a judicial proceeding).

Statements made in a quasi-judicial proceeding are also privileged.

- *Kocontes v. McQuaid*, 778 N.W.2d 410, 424 (Neb. 2010) (statement made in letter to Board of Pardons absolutely privileged).
- *But see Hill v. Ky. Lottery Corp.*, — S.W.3d —, Nos. 2006-SC-000748-DG, 2008-SC-000380-DG, 2010 WL 1636870, at \*10-

*“...the defendant is generally found not liable for statements that would otherwise be defamatory, so long as the defendant reasonably believed that the statements were true and acted in good faith.”*

11 (Ky. 2010) (statement not absolutely privileged where it was not made by the head of an agency exercising quasi-judicial and regulatory authority and was made maliciously).

The litigation privilege – although “absolute” and broad in scope – is not without limits, particularly with regard to activities preceding litigation or outside the scope of litigation.

- *Medical Informatics Eng’g, Inc. v. Orthopaedics Ne, P.C.*, 458 F. Supp. 2d 716, 728 (N.D. Ind. 2006) (applying Indiana law) (“Although Indiana Courts recognize the litigation privilege in regards to communications made in the course of judicial proceedings, they have not extended the privilege to communications made preliminary to a proposed judicial proceeding.”).
- *Thompson v. Frank*, 730 N.E.2d 143, 146 (Ill. App. 2000) (absolute privilege does not apply to statements made by attorney to third parties outside the litigation).
- *Lindeman v. Lesnick*, 604 S.E.2d 55, 58-59 (Va. 2004) (absolute privilege does not apply when litigation was merely contemplated but was not pending).
- *But see Clark Co. Sch. Dist. v. Virtual Educ. Software, Inc.*, 213 P.3d 496, 503 (Nev. 2009) (extending absolute privilege to allegedly defamatory statement made by potential party in response to threatened litigation).

#### b. Legislative privilege

Most states have provisions that grant absolute immunity to statements that would otherwise be defamatory made during a legislative proceeding.

- *Cooper v. Glaser*, 228 P.3d 443, 444-45 (Mont. 2010) (statement made by state legislator during session of state House of Representatives absolutely privileged).
- *Voigt v. State*, 759 N.W.2d 530, 533 (N.D. 2008) (statement made by special assistant attorney general before a legislative worker’s compensation review committee was absolutely privileged because it was made during a legislative proceeding).

## 6. Conditional privileges

Courts have recognized a number of conditional privileges, as described below. If one of these privileges applies, the defendant is generally found not liable for statements that

would otherwise be defamatory, so long as the defendant reasonably believed that the statements were true and acted in good faith. To overcome a defense involving such a privilege, the plaintiff must show an abuse of the privilege or that the statements were made with malice.

- *Kennedy v. Children's Service Soc. of Wisc.*, 17 F.3d 980, 985 (7th Cir. 1994) (applying Wisconsin law) ("A conditional privilege is abused if: (1) the defendant knows or recklessly disregards the truth; (2) the defamatory matter is published for a purpose other than that for which the privilege is given; (3) the publication is made to some person not reasonably believed to be necessary for the accomplishment of the purpose of the privilege; (4) the defamatory statements are not reasonably believed to be necessary to accomplish the purpose for which the publication is privileged; or (5) the publication includes unprivileged matter.").
- *Weldy v. Piedmont Airlines, Inc.*, 985 F.2d 57, 62 (2nd Cir. 1993) (applying New York law) ("A plaintiff may demonstrate abuse of the privilege by proving that defendant acted (1) with common law malice, or (2) outside the scope of the privilege, or (3) with knowledge that the statement was false or with a reckless disregard as to its truth.").

Simple negligence, lack of sound judgment, or hasty action will not cause the loss of the privilege in these circumstances.

- *Jacron Sales Co., Inc. v. Sindorf*, 350 A.3d 688, 699-700 (Md. 1976) (holding that actual malice or reckless disregard of the truth is enough to defeat a conditional privilege, but not mere negligence).

However, some states require that the speaker have at least a reasonable basis for believing the truth of the defamatory statement in order to maintain the privilege.

- *Stockstill v. Shell Oil Co.*, 3 F.3d 868, 872 (5th Cir. 1993) (applying Louisiana law) (qualified privilege requires good faith and lack of malice, meaning that "the person making the statement must have reasonable grounds for believing that it is true and he must honestly believe that it is a correct statement.").
- *But see Ferguson v. Williams & Hunt, Inc.*, 221 P.3d 205 (Utah 2009) (abandoning lack-of-reasonable grounds threshold and stating that plaintiff can only show abuse of conditional privilege where statement made knowing it to be false, or acting in reckless disregard as to its falsity).

### a. Employer privilege

Conditional privilege often arises in the employment context, because the courts recognize the legitimate need of employers to determine their employees' capacity to perform their duties.

- *Dillon v. City of New York*, 704 N.Y.S.2d 1, 6-7 (N.Y. App. Div. 1999) (“To the extent that memoranda are prepared for internal use in connection with an employee review, or are placed in a personnel file, or statements are made about an employee in an employment context, they are qualifiedly privileged as having been made by one person to another upon a subject in which they have a common interest.”).
- *Schrader v. Eli Lilly and Co.*, 639 N.E.2d 258, 262-63 (Ind. 1994) (finding that statements by management to 1500 employees explaining why six employees were terminated were privileged).

Similarly, statements made by an employer to an employee's supervisor or coworkers are conditionally privileged if the statements were reasonably necessary to serve the employer's legitimate interest in the fitness of an employee to perform his or her job.

- *Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910 (Minn. 2009) (statement made in course of investigating harassment complaint conditionally privileged because it concerned investigation of an employee's misconduct).
- *Nodar v. Galbreath*, 462 So.2d 803, 809-810 (Fla. 1984) (statements by student's father at school board meeting regarding teacher's performance were privileged, as “[u]nder the common law of Florida, a communication to an employer regarding his employee's performance is conditionally privileged”).

A conditional privilege may also apply to statements about an employee's performance made by former employers to prospective employers, for example, in an employment reference.

- *Delloma v. Consol. Coal Co.*, 996 F.2d 168, 171-72 (7th Cir. 1993) (applying Illinois law) (“Generally, a former employer who gives a negative reference to a prospective employer holds some qualified privilege against defamation suits ... An employer may invoke a conditional privilege to respond to direct inquires by prospective employers.”).

- *Trail v. Boys and Girls Clubs of Northwest Indiana*, 845 N.E. 2d 130, 136-37 (Ind. 2006) (“Indiana recognizes a qualified privilege for communications between former and prospective employers. Like privilege afforded intracompany communications, that privilege protects human resource needs by permitting former employers ‘to give sincere yet critical responses to requests for an appraisal of a prospective employee’s qualifications without fear of a defamation action.’”).

As a practical matter, however, employers often provide only basic factual information to prospective employers (such as hire and termination dates) to reduce the risk of litigation.

With regard to the publication element, courts are split on whether intra-corporate communications can constitute publication. In some states, it is a defense to publication if the statement is made between employees of a corporation, since it is considered a corporation merely “talking to itself.” A growing number of states hold otherwise, however.

- *Thornton v. Holdenville Gen. Hosp.*, 36 P.3d 456, 460 (Okla. Civ. App. 2001) (“Communication inside a corporation, between its officers, employees, and agents, is never a publication for the purposes of actions for defamation.”).
- *Popko v. Cont’l Cas. Co.*, 823 N.E.2d 184, 189 (Ill. App. Ct. 2005) (recognizing that a communication between employees of a corporation can constitute publication).

#### b. Fair reporting privilege

A report or article must be full, fair, and accurate, and made without malice to be subject to a fair reporting privilege. Statements that contain minor inaccuracies but are substantially true are privileged.

- *Howell v. Enterprise Publ’g Co., LLC*, 920 N.E.2d 1, 13 (Mass. 2010) (newspaper reports must be full, fair, and accurate to enjoy the fair report privilege, but the privilege may be vitiated by misconduct amounting to more than negligence on the newspaper’s part).
- *Nichols v. Moore*, 477 F.3d 396, 399 (6th Cir. 2007) (applying Michigan law) (“If the gist, the sting, of the article is substantially true, the defendant is not liable...”).
- *Pritt v. Republican Nat. Committee*, 557 S.E.2d 853, 861-62 (W.Va. 2001), *cert. denied*, 537 U.S. 812 (2002) (“The law of libel... overlooks minor inaccuracies and concentrates upon substantial

truth. Minor inaccuracies do not amount to falsity so long as the substance, the gist, the sting, of the libelous charge be justified. A statement is not considered false unless it would have a different effect on the mind of the reader from that which the pleaded truth would have produced.”).

With regard to reporting on the contents of complaints filed in court, the modern trend among courts is that such reports are absolutely privileged, regardless of malice, so long as the report is a full, fair, and accurate account of the contents of the complaint.

- *Salzano v. N. Jersey Media Group Inc.*, 993 A.2d 778 (N.J. 2010) (newspaper publisher not liable for defamation for article containing full, fair, and accurate account of a filed complaint) (collecting cases and discussing trend among courts).

#### c. Common interest privilege

Overlapping some of the other privileges described here, the so-called common interest privilege may apply where the publisher and the recipient have a common interest, and the communication is reasonably intended to promote it.

- *Dugan v. Mittal Steel USA Inc.*, 929 N.E.2d 184, 189 (Ind. 2010) (statement from plaintiff employee’s supervisor to company’s security chief was privileged because it was made in good faith and without abuse, as it concerned the theft of company property, a subject on which they shared a common interest and duty).
- *Nodar v. Galbreath*, 462 So.2d 803, 809-810 (Fla. 1984) (statements by student’s father at school board meeting regarding teacher’s performance were privileged, as “[t]he remarks of the defendant, addressed in person to a school board at a school board meeting concerning the curriculum and instruction in an English class at a public high school in which his son was enrolled and his son’s difficulties with the class clearly came within the scope of the privilege based on mutuality of interest of speaker and listener”).

#### d. Public interest privilege

A legal duty imposed for the protection of a particular class of persons carries with it an absolute or conditional privilege to make statements of a kind that are reasonably necessary to the performance of the legal duty.

- *Becker v. Kroll*, 494 F.3d 904, 927-28 (10th Cir. 2007) (applying Utah law) (statements by members of state investigatory body were privileged under Utah law concerning the making of reports required

by state or federal law, and therefore would have provided immunity from suits for libel or slander, except that plaintiffs provided sufficient evidence of malice to overcome privilege).

- *Butler v. Town of Argo*, 871 So.2d 1, 23-24 (Ala. 2003) (statements made by city council member during city council meeting were privileged, stating, “In order to promote the public welfare, Alabama law has conferred upon members of legislative bodies an absolute privilege from certain causes of action stemming from performance of their legislative functions.”).
- *Dexter’s Hearthside Rest., Inc. v. Whitehall Co.*, 508 N.E.2d 113, 117 (Mass. App. Ct. 1987) (where the defendant was under a legal duty to report delinquent accounts to the Alcoholic Beverages Control Commission, its erroneous report regarding one of its customers was found to be conditionally privileged).

e. Credit report privilege

- *Morris v. Equivax Info. Services, LLC*, 457 F.3d 460, 471 (5th Cir. 2006) (applying Texas law) (“Reports of mercantile or other credit-reporting agencies, furnished in good faith to one having a legitimate interest in the information, are privileged.”).
- *County Vanlines, Inc. v. Experian Info. Solutions, Inc.*, 317 F. Supp. 2d 383 (S.D.N.Y. 2004) (applying New York law) (“Credit investigation and reporting agencies enjoy this qualified privilege and are ‘not liable for defamation unless the defamatory matter was uttered with malice or such a wanton and reckless disregard of the rights of another as is ill will’s equivalent.’”).

*“Trademark claims may be asserted under both federal and state laws. It is not necessary for a trademark to be registered by the Patent and Trademark Office in order to be infringed or diluted.”*

## f. Law enforcement privilege

- *Williams v. Tharp*, 914 N.E.2d 756 (Ind. 2009) (statement made to law enforcement officer that a customer had “pulled a gun” inside a store was protected by qualified privilege).
- *Richmond v. Nodland*, 552 N.W.2d 586, 589 (N.D. 1996) (“Important public policy supports recognizing a qualified privilege for communications between citizens and law enforcement. In order for an investigation to be effective, there must be an open channel of communication between citizens and public officials.”).
- *Fridovich v. Fridovich*, 598 So.2d 65, 69 (Fla. 1992) (holding “as a majority of the other states have held in this context, that defamatory statements voluntarily made by private individuals to the police or the state’s attorney prior to the institution of criminal charges are presumptively qualifiedly privileged”).

## g. Competitive privilege

- *U.S. Healthcare, Inc. v. Blue Cross of Greater Phila.*, 898 F.2d 914, 924 (3rd Cir. 1990) (applying Pennsylvania law) (“Where the publication on its face is directed against the goods or product of a corporate vendor or manufacturer, it will not be held libelous per se as to the corporation, unless by fair construction and without the aid of extrinsic evidence it imputes to the corporation fraud, deceit, dishonesty, or reprehensible conduct in its business in relation to said goods or product.”)
- *Picker Int’l, Inc. v. Leavit*, 865 F. Supp. 951, 964 (D. Mass. 1994) (“Generally, where the discussion involves a rival’s services or product, it is not considered libelous unless it ‘imputes to the corporation fraud, deceit, dishonesty, or reprehensible conduct.’ . . . many buyers . . . recognize disparagement [of a rival] as non-objective and highly biased.”) (quoting 3 Philip Areeda & Donald F. Turner, *Antitrust Law* § 738c, at 281 (Little, Brown 1978)); see also Restatement (Second) of Torts §§ 623A, 626 (1979)).
- *Polygram Records, Inc. v. Sup. Ct.*, 216 Cal. Rptr. 252 (Cal. App. Ct. 1985) (comedian’s statements indicating that wine producers goods were of poor quality were not defamatory because the statements did not accuse the producer of “dishonesty, lack of integrity or incompetence nor even imply any reprehensible personal characteristic”).



## IV. Other Claims

### A. Trademark Infringement

The use of a trademark (such as a brand name or logo) in an advertisement or other commercial speech may give rise to a claim for trademark infringement or dilution by the trademark owner. Trademark claims may be asserted under both federal and state laws. It is not necessary for a trademark to be registered by the Patent and Trademark Office in order to be infringed or diluted.

In order to prove trademark infringement, a trademark owner must prove that there is likely to be confusion, mistake or deception as between the parties or their respective goods and services. That is, consumers must be likely to believe that the accused goods and services are coming from the trademark owner, or are affiliated with, endorsed by, or sponsored by the trademark owner.

- 15 U.S.C. § 1125(a).
- *Audi AG v. D'Amato*, 469 F.3d 534 (6th Cir. 2006) (automobile manufacturer sued website operator for trademark infringement and dilution for use of manufacturer's trademark and logo on website to sell goods).
- *Scott Fetzer Co. v. House of Vacuums Inc.*, 381 F.3d 477 (5th Cir. 2004) (vacuum cleaner manufacturer sued independent vacuum cleaner sales and repair shop for trademark infringement, dilution, and unfair competition for use of trademark in advertisement).

In evaluating whether there is a trademark infringement, most courts employ a multi-factor balancing test which considers the similarity of the marks, similarity of the goods and services, overlap in consumers, overlap in channels of trade, the existence of any actual confusion, the strength of the plaintiff's trademark, the intent of the defendant in adopting the mark, and other factors.

- *Starbucks Corp. v. Wolfe's Borough Coffee, Inc.*, 588 F.3d 97, 115 (2d Cir. 2009) (applying eight-factor test).
- *Boston Duck Tours, LP v. Super Duck Tours, LLC*, 531 F.3d 1, 10 n.6 (1st Cir. 2008) (applying eight-factor test).
- *Playboy Enters., Inc. v. Netscape Commc'ns Corp.*, 354 F.3d 1020,1026 (9th Cir. 2004) (applying eight-factor test).

The use of another party's trademark constitutes fair use if the challenged use is not actually a trademark use as such, but is instead use of a descriptive word or phrase,

provided that the designation is being used to fairly and accurately describe some aspect of the goods and services. Use of a party's individual name in his or her own business is also fair use, provided that the name is not being used as a trademark.

- 15 U.S.C. § 1115(b)(4).
- *Hensley Mfg., Inc. v. ProPride, Inc.*, 579 F.3d 603, 612 (6th Cir. 2009) (applying fair use defense to use of HENSLEY, last name of trailer hitch designer, in advertising for purposes of identifying designer of products being sold).

In addition, the doctrine of nominative fair use provides that a party may use a trademark owner's mark to identify the trademark owner itself or the trademark owner's own goods and services. In determining whether nominative fair use applies, many courts consider whether there is a legitimate need to use the trademark (as opposed to some more descriptive word or phrase), whether the party used more of the trademark than was necessary to identify the trademark owner of its products (such as a logo), and whether the defendant has engaged in any other acts that would falsely suggest sponsorship or endorsement by the trademark owner.

- *New Kids on the Block v. News Am. Publ'g, Inc.*, 971 F.2d 302 (9th Cir. 1992) (articulating oft-cited three-part test for nominative fair use).
- *Century 21 Real Estate Corp. v. Lendingtree, Inc.*, 425 F.3d 211 (3rd Cir. 2005) (employing variation of *New Kids* test for nominative fair use in the context of an affirmative defense to trademark infringement).
- *Bd. of Supervisors for La. State Univ. Agric. & Mech. Coll. v. Smack Apparel Co.*, 550 F.3d 465, 489 (5th Cir. 2008) (finding no nominative fair use where sportswear manufacturer sold t-shirts using universities' color schemes and logos in a way that improperly suggested affiliation, sponsorship, or endorsement).

Trademark dilution, in contrast to trademark infringement, requires the unauthorized use of a famous mark in a manner that is likely to blur or tarnish the famous mark in the eyes of consumers even in the absence of any likely confusion. The federal dilution statute, as amended in 2006, expressly provides that it shall be a defense to a claim of trademark dilution if the accused use is "fair use . . . , including use in connection with advertising or promotion that permits consumers to compare goods or services; or identifying, parodying, criticizing, or commenting upon the famous mark owner or the goods or services of the famous mark owner." 15 U.S.C. § 1125(c)(3)(A). In order to qualify for the statutory defense, the accused use of the mark must not be used as a designation for the party's own goods or services.

- 15 U.S.C. § 1125(c)(3)(A).
- *Starbucks Corp. v. Wolfe's Borough Coffee, Inc.*, 588 F.3d 97 (2d Cir. 2009) (finding CHARBUCKS name not protected as parody under federal statute where it was used as a brand for the defendant's own coffee).

The use of another's trademark for purposes of parody may be protected, even if the requirements for the statutory defense of parody are not met (because, for example, the accused mark is being used as a designation for the party's own goods or services and not just to identify the famous trademark owner).

- *Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC*, 507 F.3d 252 (4th Cir. 2009) (affirming finding that CHEWY VUITON as a brand for dog toys did not dilute LOUIS VUITTON for designer goods despite inapplicability of statutory parody defense).

## B. Copyright Infringement

The use of another's copyrighted material in one's own advertisement or commercial communication may give rise to a claim for copyright infringement. Copyright protects original, creative works, and may extend to corporate logos and characters as well as text and images. Copyright does not extend to any idea or method of operation, but only to the original and creative expressions of such ideas or methods. Copyright infringement occurs when a copyrighted work is copied (which may be inferred based on access to the copyrighted work plus probative similarity) and the two works are substantially similar in the eyes of an ordinary observer once the protectable elements are filtered out.

- 17 U.S.C. §§ 101, *et seq.*
- *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 361-64 (1991) (publication of information copied from phone book did not constitute copyright infringement because compilation of factual data in phone book did not meet standard for obtaining copyright protection).
- Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 2.12 (2007) (discussing extension of copyright protection to characters).

Fair use is a defense to copyright infringement. Generally speaking, the use of a copyrighted work for purposes of criticizing, commenting upon, or parodying the work itself is likely to constitute fair use. Each case must be decided on its own facts, however, taking into account (1) the purpose and character of the use, including whether for commercial or nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the

effect of the use on the market value of the copyrighted work, including whether the copyright owner is likely to experience any diverted sales or other monetary losses.

- 17 U.S.C. § 107.
- *Davis v. Gap, Inc.*, 246 F.3d 152, 173-76 (2d Cir. 2001) (use of photo showing individual wearing copyrighted eyewear in advertising campaign constituted copyright infringement that was not protected as a fair use).
- *Sony Computer Entm't Am., Inc. v. Bleem, LLC*, 214 F.3d 1022, 1030 (9th Cir. 2000) (use of screen shots from a video game in comparative advertising constituted fair use).

### **C. Interference with Contractual Rights**

False or misleading statements in commercial speech may give rise to claims for interference with existing or prospective contractual relations pursuant to state law.

- *Dube v. Likins*, 167 P.3d 93, 97-103 (Ariz. Ct. App. 2007) (graduate student filed defamation and tortious interference with business expectancy claims against advisor for reporting incorrect information to the INS).
- *Franklin v. Dynamic Details, Inc.*, 10 Cal. Rptr. 3d 429, 441 (Cal. Ct. App. 2004) (plaintiff alleged trade libel and interference with contractual and prospective economic relationships when defendant suggested in a series of emails that plaintiff had stolen copyrighted materials).

### **D. Intentional Infliction of Emotional Distress**

In some circumstances, a party believed to be harmed by false or misleading statements may bring a claim for intentional infliction of emotional distress under state law.

- *Oman v. Davis School District*, 194 P.3d 956 (Utah 2008) (terminated worker sued school district for defamation and intentional infliction of emotional distress for school district's actions surrounding his termination).
- *Gunn v. Mariners Church, Inc.*, 84 Cal. Rptr. 3d 1 (Cal. Ct. App. 2008) (former church member and worship director filed defamation and intentional infliction of emotional distress suit against church when he was fired for being homosexual).

## E. Breach of Contract

Depending upon the relationship between the parties, false or misleading statements may give rise to claims for breach of contract.

- *Pandian v. New York Health and Hospitals Corp.*, 863 N.Y.S.2d 668 (N.Y. App. Div. 2008) (anesthesiology resident sued medical school for breach of contract and defamation when medical school submitted negative evaluation of resident to American Board of Anesthesiologists).
- *Kamaka v. Goodsill Anderson Quinn & Stifel*, 176 P.3d 91 (Haw. 2008) (terminated attorney sued former law firm for breach of contract and defamation when she was fired after being on a leave of absence due to pregnancy and childbirth).

## F. Unfair or Deceptive Practices in Violation of State Law

Claims may often be brought under state statutes prohibiting unfair and deceptive trade practices. Many states also recognize common law claims for unfair competition, misappropriation, and similar torts.

- *Border Collie Rescue, Inc. v. Ryan*, 418 F. Supp. 2d 1330, 1338-39 (M.D. Fla. 2006) (defendant dog trainer and military contractor brought counterclaim against former employee for, inter alia, defamation, trade libel, and misappropriation of trade secrets in violation of Florida law).

## G. Violation of Federal Trade Commission Statutes and Regulations

The Federal Trade Commission (FTC) prohibits “unfair or deceptive acts or practices in or affecting commerce” and specifically prohibits “any false advertisement... for the purpose of inducing, or which is likely to induce, directly or indirectly the purchase of foods, drugs, devices, services, or cosmetics.” 15 U.S.C. §§ 45(a)(1) & 52(a); 16 C.F.R. §§ 1.1, *et seq.* While enforcement actions may be brought by the FTC, either at its own initiative or at the request of a competitor or another aggrieved party, there is no private right of action under the statute.

From time to time, the FTC releases guidelines as to specific advertising issues, including the following:

- **.com Disclosures: How to Make Effective Disclosures in Digital Advertising** (“Dot Com Disclosures”). The Dot Com Disclosures are intended to provide guidance for mobile and other online advertisers and explain how to make disclosures clear and conspicuous to avoid deception. The Dot Com Disclosures emphasize that consumer protection laws apply equally to marketers across all mediums, whether delivered on

a desktop computer, a mobile device, or more traditional media such as television, radio, or print, and provide examples that take into account the expanding use of smartphones with small screens and the rise of social media marketing.

- **Guides Concerning the Use of Endorsements and Testimonials in Advertising** (“Endorsement Guides”), 16 CFR Part 255. The Endorsement Guides set forth the general principles that the FTC uses in evaluating endorsements and testimonials, together with examples illustrating the application of those principles. For example, advertisers are advised that using unrepresentative testimonials may be misleading if they are not accompanied by information describing what consumers can generally expect from use of the product or service. In addition, the Endorsement Guides let endorsers know that they shouldn’t talk about their experience with a product if they haven’t tried it, or make claims about a product that would require proof they don’t have. The Endorsement Guides further state that if there is a connection between the endorser and the marketer of a product that would affect how people evaluate the endorsement, it should be disclosed.
- **Guides for the Use of Environmental Marketing Claims** (“Environmental Guides” or “Green Guides”), 16 CFR Part 260. The Green Guides were issued to help marketers ensure that the environmental claims they are making are true and substantiated. The guidance they provide includes general principles that apply to all environmental marketing claims, how consumers are likely to interpret particular claims, how marketers can substantiate these claims, and how marketers can qualify their claims to avoid deceiving consumers.

## H. Violation of Industry Statutes and Regulations

Parties may also be subject to liability for false or misleading statements that violate industry regulations. For example, the Food, Drug, and Cosmetic Act (FDCA) prohibits false or misleading statements on labels for food, drugs, and certain medical devices and other products. 21 U.S.C. §§ 301, *et seq.* There is no private right of action under the FDCA. 21 U.S.C. § 337(a). However, the Supreme Court has held that parties can bring false advertising claims under the Lanham Act for false or misleading labels even if the labels satisfy FDCA regulations. *POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228, 2241 (2014).

## V. Forums for the Enforcement of False Advertising Claims

A company that is aggrieved by the allegedly false or misleading advertisement of a competitor has a number of options available to it, some of which are not widely known.

### A. Civil Lawsuit in Federal or State Court

A lawsuit for false advertising under the Lanham Act may be brought in either federal or state court. 28 U.S.C. §§ 1331, 1338. There is a right to a jury trial, and an injunction and monetary damages are available.

### B. Enforcement Action by Federal Trade Commission or State Attorney General

As an alternative to a civil lawsuit, a company may inform the Federal Trade Commission (FTC) or a state Attorney General (AG) of an allegedly false advertisement. The FTC or AG may take action against the advertiser, in which case a formal proceeding will be commenced. The FTC or AG has the discretion to commence proceedings against more than one advertiser, such as all companies within an industry that are engaged in similar advertising practices.

In an FTC enforcement proceeding, the FTC determines whether the advertisement constitutes an “unfair or deceptive acts or practices in or affecting commerce” or is “any false advertisement . . . for the purpose of inducing, or which is likely to induce, directly or indirectly the purchase of foods, drugs, devices, services, or cosmetics.” 15 U.S.C. §§ 45(a)(1) & 52(a); 16 C.F.R. §§ 1.1, *et seq.*

The FTC or AG is likely to take action if it appears that consumers, as opposed to competitors, are being harmed by the advertisement in question. The FTC is principally concerned with advertisements that are national in nature or otherwise widespread. A competitor who brings a matter to the attention of the FTC or AG is not normally entitled to participate in any resulting proceeding against a third party or receive any monetary damages.

Detailed information about enforcement proceedings by the FTC is set forth in the applicable regulations (16 C.F.R. §§ 1.1, *et seq.*) and at [www.ftc.gov](http://www.ftc.gov).

### C. Enforcement Through the National Advertising Division of the Council of Better Business Bureaus

The Council of Better Business Bureaus operates several self-regulating programs relating to nationwide advertisements, principally through the National Advertising Division (NAD). The policies and procedures for NAD are established by the National Advertising Review Council (NARC). NARC also governs the Children’s Advertising Review Unit (CARU), which addresses advertisements directed towards children, and the Electronic Retailing Self-Regulation Program (ERSP), which addresses direct response marketing.

Any party may file a complaint with NAD, alleging that a national advertisement is not truthful or accurate. NAD will investigate the claim and, provided that the complaint meets certain basic criteria, commence a case against the advertiser. The advertiser and challenger each have an opportunity to make up to two submissions, which may include confidential material. If the advertiser declines to participate in the NAD process, NAD will refer the matter to the appropriate federal or state authorities (such as the Federal Trade Commission), and publicize the fact that it has done so.

NAD adheres to detailed procedures with strict deadlines, and ordinarily delivers a written decision within 60 business days of the filing date of the complaint. This accelerated procedure often allows for a case to be resolved while the accused ad campaign is still running.

At the conclusion of the case, the challenger's and advertiser's positions, NAD's decision, and a statement by the advertiser are made public. NAD decisions may be appealed to the National Advertising Review Board (NARB). The reviewing NARB panel consists of one public member, one advertising agency member, and three advertiser members. If an advertiser fails to comply with a decision of NAD or NARB, this fact will ordinarily be reported to the appropriate federal or state authorities.

Detailed information about NAD is available at [www.nadreview.org](http://www.nadreview.org).

## VI. Minimizing the Risk of Liability

Advising clients on how to minimize risks associated with business communications, advertising, and public relations involves understanding the elements of each cause of action and implementing procedures to minimize the risk of unanticipated claims. This risk management process may be especially important if your client is of a type that is susceptible to liability for defamation (e.g., publishers, news organizations or other media clients, advertising or public relations firms, or Internet service providers), or engages in extensive advertising activities.

However, even "low risk" clients have business groups that engage in activities that could expose their company to liability. Such activities include human resources, sales and marketing, public communications (such as advertising, press releases or newsletters), and hosting a website. Therefore, you may want to advise these clients that they should provide basic procedures and compliance training for representatives from the business groups that engage in such activities. Risk management procedures are suggested in Exhibit 1, and checklists for compliance training are provided in Exhibits 2 through 5.



## VII. Treatises and Other Sources of Information

This publication is intended to provide only a brief summary of the law relating to the claims of false advertising, defamation, and commercial disparagement. The following treatises may be useful for providing a more in-depth analysis in these areas of law, and for providing further information and resources that may be useful in a particular case.

- J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 27:24 *et seq.* (4th ed. 2013) (concerning false advertisement).
- Gabriel Perle, John Taylor Williams & Mark A. Fischer, *Perle, Williams & Fischer on Publishing Law* § 5.01 *et seq.* (4th ed. 2013).
- Robert D. Sack, *Sack on Defamation: Libel, Slander, and Related Problems* (4th ed. 2013).
- Steven G. Brody and Bruce E.H. Johnson, *Advertising and Commercial Speech: A First Amendment Guide* (2nd ed. 2013).
- Restatement (Second) of Torts, §§ 558 *et seq.* (concerning defamation), and §§ 623A, 626 (concerning commercial disparagement).

## VIII. Appendices

### Exhibit 1: Checklist for Risk Management Procedures

Training high-risk clients is the single most important procedure for minimizing risk. Basic training should include teaching your clients the elements of the business communications and advertising torts described in this chapter. Other procedures for minimizing risk are suggested below. Obviously, each client should develop its own procedures that take into account its business philosophy, budget and tolerance for risk.

1. Develop and implement a training program for your client, as described in Exhibits 1 through 5, to train management and high-risk departments to identify and prevent the disclosure of potentially defamatory statements.
2. Assign one person to review all public communications that contain statements about competitors. Limit the number of people who are authorized as spokespersons for the client. Make sure that they are all well-trained.
3. Send questionable material to outside counsel for review before release.
4. Include a corporate communications policy in the employee handbook.
5. Develop a policy regarding communications on the company's website, particularly if employees, customers, or the public are able to post messages on the website. Such policy should include requirements for posting content, and provide notice that the company does not review content posted on the site by third parties and reserves the right to remove any content for any reason at its sole discretion. The policy should also disclaim all liability for posting.
6. Maintain corroborating information for statements made about third parties or competitors that may be actionable (or that may result in legal action).
7. If an action for false advertising, defamation, or commercial disparagement is threatened or filed, consider publishing a retraction of the statement at issue.
8. Require all employees to sign a nondisclosure agreement prohibiting the improper disclosure of confidential information. A nondisclosure agreement safeguards a client's proprietary information generally. In addition, a nondisclosure agreement that expressly prohibits employees from improperly disclosing personnel and other sensitive information could reduce the risk of a defamation suit.
9. Obtain appropriate insurance coverage for business communications and advertising liability. Promptly report any claims to the insurer.

## Exhibit 2: Checklist for Compliance Training

Basic compliance training should include teaching your clients the elements of the business communications torts described herein. The following concepts should also be part of a training program:

1. Clients should be informed that false or misleading communications may result in liability whether spoken, printed in correspondence, posted on the Internet, or published in advertising or editorial content.
2. Clients should be informed that, under certain circumstances, even truthful statements can result in liability if made with the malicious intent of injuring another party.
3. Your client's website administrator should be trained to identify suspect statements before they are published on the Internet. You may want to suggest an audit if you suspect that a client's website contains false advertising or potentially defamatory or disparaging content.
4. Clients should remind their human resources departments that even internal dissemination of potentially defamatory information about an employee may result in liability. Confidentiality is crucial to minimizing risk.
5. Clients should scrutinize statements they plan to make about competitors that could injure their competitors' contractual relations with existing customers, or cause financial loss. Sales and marketing groups in particular should be trained to identify such statements, and to request a legal evaluation if there is any question about whether the statement could constitute defamation, commercial disparagement or false advertising.
6. With respect to recognizing actionable statements made by third parties about your clients, you should remind your clients that the U.S. Constitution protects "free expression." Therefore, opinions, hyperbole, and name-calling (e.g., your client is a "silly, stupid, senile bum") may be upsetting, but such statements are generally not actionable. Further, unflattering statements about your client's products or services will likely not be actionable unless the statements are literally false, are likely to mislead or confuse consumers, or allege "fraud, deceit, dishonesty, or reprehensible conduct" on the part of your client, and are likely to cause direct economic loss.

### Exhibit 3: Checklist for False Advertising

1. Is the statement literally false?
2. If the statement is literally true, is it nonetheless likely to mislead and confuse a substantial number of consumers? If so, is there evidence that consumers were actually misled or confused? What would a consumer survey be likely to show?
3. Is the statement material, in that it is likely to influence purchasing decisions?
4. Will the statement be placed in interstate commerce?
5. Will the statement be sufficiently disseminated to the purchasing public for the purpose of influencing purchasing decisions (as opposed to, for example, a statement in a product insert that would only be discovered after the purchase was complete)?
6. Could a party in commercial competition with the client be injured by the statement?
7. Is the statement “puffery” (*i.e.*, an exaggeration or boast about the client’s products upon which no reasonable consumer would rely, rather than a measurable claim of product superiority)?
8. Is the statement “reverse puffery” (*i.e.*, an exaggeration of the qualities of the products of the client’s competitor, which is so unrealistic or playful that no reasonable consumer would take it seriously)?
9. Is the statement one of opinion rather than fact? If opinion, did the speaker have knowledge of facts not warranting the opinion?

## Exhibit 4: Checklist for Defamation

1. Does the statement imply or contain any fact concerning a living individual or an existing company that is substantially false? Will the statement be “published” to one or more people, either orally or in writing?
2. Would a reasonable member of the community form a lower opinion of the individual or company as a direct result of the statement? Will the statement cause the public to avoid the individual or company? If an individual, will the statement injure his or her professional status?
3. Does the statement accuse an individual or company of dishonesty or fraud, mental disease, crime or immorality, or potential for bad behavior? Or does a statement delete important facts about an individual or company in such a way as to injure them?
4. If the statement is true but potentially damaging, what is the client’s reason for publishing the statement?
5. Does the statement concern a public official or figure? Is it about a matter of public concern?
6. Is the statement an opinion? One way to tell the difference between an opinion and a fact is that an opinion cannot be proven false.
7. Does the statement accurately and fairly portray the facts of the matter? Are corroborating sources available?
8. Was the statement made in connection with a judicial or legislative proceeding?
9. If the statement was made in connection with an employment matter or a matter of public interest, was the statement made in good faith and reasonably believed to be true?

## **Exhibit 5: Checklist for Commercial Disparagement**

1. In addition to the questions set forth on the checklist for defamation, Exhibit 4, could the publication of a statement regarding a competitor's product or service interfere with a contractual relationship with an existing customer?
2. Could the statement directly cause financial damages to a competitor?
3. Does the statement impute any of the following to a rival company: fraud, deceit, dishonesty, or reprehensible conduct?

## Exhibit 6: Sample Complaint

### COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT  
DEPARTMENT OF THE  
TRIAL COURT

\_\_\_\_\_  
ZEPHYR SECURITY SOFTWARE, INC., )  
and JOHN ANDERSON, )

Plaintiffs, )

v. )

SECUR-SPACE, INC., )  
and DOUGLAS BALMY )

Defendants. )

Civil Action No. 10-0000

### COMPLAINT AND JURY DEMAND

#### PARTIES

1. Plaintiff Zephyr Security Software, Inc. (“Zephyr”) is a Delaware corporation with a principal place of business at 123 Dove Street, Boston, Massachusetts.
2. Plaintiff John Anderson is the founder and president of Zephyr, residing at 17 Reindeer Way, Brookline, Massachusetts.
3. Defendant Douglas Balmy is an individual residing at 89 Hedgehog Lane, Providence, Road Island. On information and belief, Balmy has also uses the alias “Code \_\_Kid” when publishing information concerning Zephyr and Anderson.
4. Defendant Secur-Space, Inc. (“Secur-Space”), is a Delaware corporation owned by Balmy with a principal place of business at 2000 Birds Nest Street, Boston, Massachusetts.

#### JURISDICTION AND VENUE

5. The Massachusetts Superior Court has jurisdiction over this action pursuant to M.G.L. c. 223A, § 3 and G.L. c. 214, § 1. The amount in controversy exceeds twenty-five thousand dollars (\$25,000), exclusive of interest and costs. Venue in this forum is proper pursuant to G.L. c. 223, § 1.
6. [If filed in federal court: The United States District Court for the District of Massachusetts has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1332 and 1338, and has jurisdiction over state law and common law claims pursuant to the doctrine of pendant jurisdiction. [If diversity: The amount in controversy exceeds seventy-five thousand dollars (\$75,000), exclusive of interest and costs. Venue in the United States District Court for the District of Massachusetts is proper under 28 U.S.C. § 1391.]]

## FACTS

7. Zephyr is a local company that has been developing software for corporate security applications for over 15 years. Its premier software application is ZephyrSoft. Zephyr has developed a blue chip clientele over the years, and has won industry awards for innovation in the security services sector. Zephyr has also advised the city of Boston on matters relating to security of government offices and other public properties. Zephyr has established itself as a well-respected corporate citizen of Boston.

8. Balmy was hired by Zephyr as a computer engineer in June 2006. Zephyr terminated Balmy's employment on July 31, 2007.

9. When Anderson advised Balmy that his employment was being terminated, Balmy was visibly angry.

10. Balmy founded his own company, Secur-Space, on or about August 1, 2001.

11. On information and belief, Secur-Space develops custom security software for corporate clients. Accordingly, Secur-Space competes for the same clients as Zephyr.

12. An Internet site called Yippee! operates and maintains "message boards" concerning various topics. Users can post messages for the public to view on the Internet.

13. One Yippee! message board concerns Technology.

14. On or about September 20, 2008, a person using the alias Code\_Kid published the following message on the Technology message board: "I know that John Anderson, the president of Zephyr Security Software, has a criminal past."

15. On information and belief, Balmy is the person who used the alias Code\_Kid to publish said message on the Yippee! message board.

16. The statement that Anderson has a criminal past is wholly untrue.

17. On or about October 20, 2008, Balmy and Secur-Space published a full-page advertisement in the Boston Business Bee. The advertisement featured a photograph of Anderson and a headline that read: "Can You Entrust Your Building's Security to This Man?" The text below the headline read: "Zephyr's president has a criminal past. No wonder he considers himself an expert on security." The advertisement went on to compare the Secur-Space software product with Zephyr's: "Independent tests show that Secur-Space's software is three times more effective than ZephyrSoft in preventing security breaches. Doesn't your business deserve the security and peace of mind that only Secur-Space provides?"

18. The statement that Anderson, and by affiliation Zephyr, cannot be trusted to provide security products or services is wholly untrue.

19. The statement that Secur-Space's security software is three times more effective than Zephyr's software in preventing security breaches is also wholly untrue.

20. On or about November 20, 2008, Balmy, as a representative of Secur-Space, called one of Zephyr's long-term clients, Gizmo, Inc. ("Gizmo"), and informed Megan Charles, Gizmo's security advisor that, "ZephyrSoft has secret files embedded in it that make it possible for Zephyr to spy on your company."



21. The statement that ZephyrSoft has secret files embedded in it is wholly untrue.
22. The statement that Zephyr spies on Gizmo, or on any company, is also wholly untrue.
23. Three days later, Gizmo sent a registered letter informing Zephyr that it was terminating its security services contract and destroying Zephyr's software. The contract was for the use of Zephyr's software and support services, for which Gizmo paid Zephyr in excess of \$100,000 annually.

### **COUNT I**

#### **(Defamation of John Anderson by Balmy and Secur-Space)**

24. Zephyr incorporates by reference the allegations set forth in paragraphs 1 through 23, above.
25. Defendants' statements that the president of Zephyr, John Anderson, has a criminal past and cannot be trusted, are false and untrue, and defamed Anderson.
26. By publishing the statements on the Technology message board of Yippee! and in the advertisement placed in the Boston Business Bee, Defendants published defamatory statements to a wide range of persons in the public.
27. Defendants negligently published the false and defamatory statements about Anderson, causing him to suffer damages, including emotional distress and injury to his reputation.
28. Defendants published the false and defamatory statements with the knowledge that the statements were false, or with reckless disregard as to the falsity of the statements.
29. Defendants' defamatory statements injured the reputation of Anderson.

### **COUNT II**

#### **(Defamation of Zephyr by Balmy and Secur-Space)**

30. Zephyr incorporates by reference the allegations set forth in paragraphs 1 through 29, above.
31. Defendants' statements that the president of Zephyr, John Anderson, has a criminal past and cannot be trusted, are false and untrue, and defamed Zephyr.
32. By publishing the statements on the message board of Yippee! and in the Boston Business Bee, Defendants published defamatory statements to a wide range of persons in the public via the Internet.
33. Defendants' statements that Zephyr's software has secret files embedded in it, and that Zephyr uses the files to spy on its clients, are false and untrue and defamed Zephyr.
34. By telling the statement to the security advisor at Gizmo, Megan Charles, Defendants published the defamatory statement to at least one other person.
35. Defendants negligently published the false and defamatory statements about Zephyr, causing Zephyr to suffer damages, including the monetary loss of an important and valuable client, Gizmo, and injury to Zephyr's reputation.

36. Defendants published the false and defamatory statements with the knowledge that the statements were false, or with reckless disregard as to the falsity of the statements.

37. Defendants' defamatory statements injured the reputation of Zephyr.

### COUNT III

#### (Commercial Disparagement)

38. Zephyr incorporates by reference the allegations set forth in paragraphs 1 through 37, above.

39. Defendants' statement that Zephyr's software has secret files imbedded in it is false and untrue, and disparaged Zephyr's software product, ZephyrSoft.

40. By telling the statement to the security advisor at Gizmo, Megan Charles, Defendants published the disparaging statement to one or more people.

41. Defendants negligently published the false and disparaging statement concerning ZephyrSoft, causing a customer to regard ZephyrSoft as dangerous, and imputing deceit, dishonesty and reprehensible conduct to Zephyr.

42. Defendants' statement that Zephyr's president has a criminal past is false and untrue, and disparaged Zephyr's software product, ZephyrSoft.

43. By publishing the false and disparaging statement in the Boston Business Bee, Defendants published the disparaging statements to a wide range of persons in the public.

44. Defendants published the false and disparaging statements about ZephyrSoft, causing Zephyr to suffer special and general damages, including the monetary loss of an important and valuable client, Gizmo, and injury to the reputation of ZephyrSoft and Zephyr.

45. Defendants published the false and disparaging statement with the knowledge that the statement was false, or with reckless disregard as to the falsity of the statements.

### COUNT IV

#### (False Advertising — Section 43(a) of the Lanham Act)

46. Zephyr incorporates by reference the allegations set forth in paragraphs 1 through 45, above.

47. The statements in Defendants' advertisement that, "Independent tests show that Secur-Space's software is three times more effective than Zephyr's software, ZephyrSoft, in preventing security breaches," is false and misleading, and misrepresented the characteristics and qualities of both Secur-Space's and Zephyr's products.

48. The false and misleading statement in the advertisement deceived, and has a tendency to continue to deceive, a substantial segment of its intended audience.

49. The deception of the advertisement is material, and has influenced, and will continue to influence, the purchasing decisions of potential customers of Zephyr, specifically companies that plan to purchase security products and services.

50. The deceptive advertisement was published in the Boston Business Bee, a business newspaper distributed in Massachusetts and other states, and was thereby placed into interstate commerce.

51. The deceptive advertisement injured, and is likely to continue to injure, Zephyr.

52. The deceptive advertisement violates Section 43(a) of the Lanham Act, codified at 15 U.S.C. § 1125(a), which prohibits Defendants from using false, misleading, or disparaging representations of fact that misrepresent the nature, characteristics, or qualities of its own or Zephyr’s products.

53. Zephyr has no adequate remedy at law.

**COUNT V**

54. [Other counts may include unfair competition, violation of statutes, intentional interference with contractual relations, breach of non-compete agreement, etc.]

THEREFORE, Plaintiffs respectfully request that this Court:

- A. Preliminarily and permanently enjoin Defendants from publishing further defamatory statements about Zephyr, Anderson, and ZephyrSoft;
- B. Enter judgment against Defendants on all counts of the Complaint;
- C. Award Plaintiffs damages in an amount to be determined at trial;
- D. Award Plaintiffs enhanced damages as permitted by law, plus its reasonable attorneys’ fees and the costs of this action; and
- E. Grant such other relief as the Court deems just and proper.

**JURY DEMAND**

Zephyr demands a jury trial on all triable issues.

Dated: \_\_\_\_\_

ZEPHYR SECURITY SOFTWARE, INC.  
 JOHN ANDERSON  
 By their attorney,

---

Josephina Kermit, BBO #000001  
 KERMIT & KIBBLESTONE LLP  
 1 Winter Street  
 Boston, MA 02110  
 Tel. (617) 111-2222

## Exhibit 7: Sample Answer

### COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT  
DEPARTMENT OF THE  
TRIAL COURT

\_\_\_\_\_  
ZEPHYR SECURITY SOFTWARE, INC., )  
and JOHN ANDERSON, )  
 )  
Plaintiffs, )  
 )  
v. )  
 )  
SECUR-SPACE, INC., )  
and DOUGLAS BALMY )  
 )  
Defendants. )  
\_\_\_\_\_

Civil Action No. 10-0000

### ANSWER OF DOUGLAS BALMY

Defendant Douglas Balmy (“Balmy”) in the above-captioned action answers the Complaint as follows:

#### PARTIES

1. Balmy is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 1 of the Complaint.
2. Balmy is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 2 of the Complaint.
3. Denied to the extent that the allegation in paragraph 3 of the Complaint alleges that Balmy uses an “alias.” Otherwise, admitted.
4. Balmy admits the allegations contained in paragraph 4 of the Complaint.

#### JURISDICTION AND VENUE

5. Balmy admits the allegations contained in paragraph 5 of the Complaint.
6. [If filed in federal court: Balmy admits the allegations contained in paragraph 6 of the Complaint.]

#### FACTS

7. Balmy is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 7 of the Complaint and therefore denies the same.
8. Balmy admits that he was hired by Zephyr Security Software, Inc. (“Zephyr”) as a computer engineer in June 1989. Otherwise denied.
9. Balmy denies the allegations contained in paragraph 9 of the Complaint.
10. Balmy admits the allegations contained in paragraph 10 of the Complaint.

11. Balmy admits that he develops custom security software for clients. Balmy denies that he competes for the same clients as Zephyr.
12. Balmy admits the allegations contained in paragraph 12 of the Complaint.
13. Balmy admits the allegations contained in paragraph 13 of the Complaint.
14. Balmy is without information or knowledge sufficient to admit or deny the allegations contained in paragraph 14 of the Complaint and therefore denies the same.
15. Balmy denies the allegations contained in paragraph 15 of the Complaint.
16. Balmy is without information or knowledge sufficient to admit or deny the allegations contained in paragraph 16 of the Complaint and therefore denies the same.
17. Balmy admits the allegations contained in paragraph 17 of the Complaint.
18. Balmy denies the allegations contained in paragraph 18 of the Complaint.
19. Balmy denies the allegations contained in paragraph 19 of the Complaint.
20. Balmy denies the allegations contained in paragraph 20 of the Complaint.
21. Balmy is without information or knowledge sufficient to admit or deny the allegations contained in paragraph 21 of the Complaint and therefore denies the same.
22. Balmy is without information or knowledge sufficient to admit or deny the allegations contained in paragraph 22 of the Complaint and therefore denies the same.
23. Balmy is without information or knowledge sufficient to admit or deny the allegations contained in paragraph 23 of the Complaint and therefore denies the same.

#### **COUNT I**

24. Balmy incorporates by reference the answers set forth in paragraphs 1 through 23 of this Answer.
25. Balmy denies the allegations contained in paragraph 25 of the Complaint.
26. Balmy denies the allegations contained in paragraph 26 of the Complaint.
27. Balmy denies the allegations contained in paragraph 27 of the Complaint.
28. Balmy denies the allegations contained in paragraph 28 of the Complaint.
29. Balmy denies the allegations contained in paragraph 29 of the Complaint.

#### **COUNT II**

30. Balmy incorporates by reference the answers set forth in paragraphs 1 through 29 of this Answer.
31. Balmy denies the allegations contained in paragraph 31 of the Complaint.
32. Balmy denies the allegations contained in paragraph 32 of the Complaint.
33. Balmy denies the allegations contained in paragraph 33 of the Complaint.
34. Balmy denies the allegations contained in paragraph 34 of the Complaint.

- 35. Balmy denies the allegations contained in paragraph 35 of the Complaint.
- 36. Balmy denies the allegations contained in paragraph 36 of the Complaint.
- 37. Balmy denies the allegations contained in paragraph 37 of the Complaint.

**COUNT III**

- 38. Balmy incorporates by reference the answers set forth in paragraphs 1 through 37 of this Answer.
- 39. Balmy denies the allegations contained in paragraph 39 of the Complaint.
- 40. Balmy denies the allegations contained in paragraph 40 of the Complaint.
- 41. Balmy denies the allegations contained in paragraph 41 of the Complaint.
- 42. Balmy denies the allegations contained in paragraph 42 of the Complaint.
- 43. Balmy denies the allegations contained in paragraph 43 of the Complaint.
- 44. Balmy denies the allegations contained in paragraph 44 of the Complaint.
- 45. Balmy denies the allegations contained in paragraph 45 of the Complaint.

**COUNT IV**

- 46. Balmy incorporates by reference the answers set forth in paragraphs 1 through 45 of this Answer.
- 47. Balmy denies the allegations contained in paragraph 47 of the Complaint.
- 48. Balmy denies the allegations contained in paragraph 48 of the Complaint.
- 49. Balmy denies the allegations contained in paragraph 49 of the Complaint.
- 50. Balmy denies the allegations contained in paragraph 50 of the Complaint.
- 51. Balmy denies the allegations contained in paragraph 51 of the Complaint.
- 52. Paragraph 52 contains a legal conclusion to which no response is required. To the extent a response is deemed required, Balmy denies the allegations contained in paragraph 52 of the Complaint.
- 53. Paragraph 53 contains a legal conclusion to which no response is required. To the extent a response is deemed required, Balmy denies the allegations contained in paragraph 53 of the Complaint.

**COUNT V**

- 54. [Responses to other counts, as listed in Complaint.]

**FIRST AFFIRMATIVE DEFENSE**

The Complaint fails to state a claim upon which relief can be granted.

**SECOND AFFIRMATIVE DEFENSE**

Plaintiff's claims are barred because the allegedly defamatory or disparaging statement or statements set forth in the Complaint are statements of opinion.

**THIRD AFFIRMATIVE DEFENSE**

Plaintiff’s claims are barred because the allegedly defamatory or disparaging statement or statements are true.

**FOURTH AFFIRMATIVE DEFENSE**

Plaintiff’s claims are barred because the allegedly defamatory or disparaging statement or statements are statements of opinion, which Balmy believed, as a matter of Balmy’s opinion, to be true.

**FIFTH AFFIRMATIVE DEFENSE**

Plaintiff’s claims are barred because the allegedly defamatory or disparaging statement or statements set forth in the Complaint are rhetorical hyperbole or puffery.

**SIXTH AFFIRMATIVE DEFENSE**

Some or all of Plaintiff’s claims are barred by the First Amendment and the state and federal constitutional protections afforded free speech.

**SEVENTH AFFIRMATIVE DEFENSE**

Plaintiff’s claims are barred because Plaintiff has suffered no harm, to its reputation, its business or otherwise, as a result of the alleged defamatory or disparaging statement or statements set forth in the Complaint or as a result of any other conduct set forth in the Complaint.

**EIGHTH AFFIRMATIVE DEFENSE**

[Other defenses may be based on laches, estoppel, acquiescence, statute of limitations, jurisdiction, etc.]

WHEREFORE, with respect to the Complaint, Balmy respectfully requests that this Court:

- A. Enter an Order dismissing the Complaint;
- B. Enter judgment on behalf of Balmy on each count of the Complaint;
- C. Grant Balmy his reasonable attorneys’ fees and costs; and
- D. Grant such other relief as the Court deems just and proper.

**DEMAND FOR JURY TRIAL**

Balmy demands a jury trial on all triable issues.

Dated: \_\_\_\_\_

DOUGLAS BALMY  
By his attorney,

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Francis X. Wigglesworth, BB0#000002  
WIGGLESWORTH & WIGGLESWORTH  
2 Winter Street  
Boston, MA 02110  
(617) 555-5555

## Exhibit 8: Sample Jury Instructions

### I. Defamation

#### A. Elements of Claim

In a claim for defamation, the plaintiff must prove by a preponderance of the evidence that the defendant has made a defamatory statement of or concerning the plaintiff. The statement must be one that was false and made publicly. It must also be a statement that damaged the plaintiff.<sup>1</sup> Making a defamatory statement to even one person is sufficient to prove publication.<sup>2</sup>

A statement is considered defamatory if it tends to injure the plaintiff's reputation in the community and exposes him or her to hatred, ridicule, or contempt.<sup>3</sup> You must determine if the statements alleged in this case, and the circumstances under which they were made, discredit the plaintiff in the minds of any considerable, respectable class of the community.<sup>4</sup>

Our judicial system works to balance the right of free speech with the right to recover damages for defamation. For that reason, the plaintiff must also prove "fault" on the part of the defendant by a preponderance of the evidence.

[If a private plaintiff: Private individuals, such as the plaintiff, are afforded greater protection than public figures under the First Amendment. In Massachusetts, a plaintiff who is a private figure need only prove that the defendant acted with negligence in making the defamatory statement.<sup>5</sup>]

[If the plaintiff is a public official or public figure: The burden of proof for proving fault varies depending on the status of the plaintiff. If you find that the plaintiff is a public official or a public figure, the plaintiff must prove that the defendant acted with "actual malice." A statement was published with "actual malice" if it was published with knowledge that it was false or with "reckless disregard" as to whether it was false.<sup>6</sup>]

[Choose the applicable instruction]:

1. The status of "public official" generally applies to government employees who have substantial responsibility or control over the conduct of government affairs;<sup>7</sup> or
2. The status of "public figure" applies to individuals who have assumed roles of prominence in the affairs of society.<sup>8</sup> A corporation may be a public figure under certain circumstances.<sup>9</sup>

1 *Cignetti v. Healy*, 89 F. Supp. 2d 106 (D. Mass. 2000).

2 *Shafir v. Steele*, 431 Mass. 365, 372, 727 N.E.2d 1140, 1145 (2000).

3 *Flotech, Inc. v. E.I. Du Pont de Nemours Co.*, 627 F. Supp. 358, 367 (D. Mass. 1985), *aff'd*, 814 F.2d 775 (1st Cir. 1987).

4 *Flotech, Inc.*, 627 F. Supp. at 367.

5 *Schrottman v. Barnicle*, 386 Mass. 627, 630, 437 N.E.2d 205, 208 (1982); *Stone v. Essex County Newspapers, Inc.*, 367 Mass. 849, 851, 330 N.E.2d 161, 164 (1974).

6 *New York Times Co. v. Sullivan*, 375 U.S. 254, 280 (1964). 7 *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1996).

7 *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1996).

8 *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974).

9 *Flotech, Inc.*, 627 F. Supp. at 365.



## B. Defenses

You may find that the defendant has one or more defenses to the claim of defamation [or commercial disparagement]. Truth is an absolute defense to a defamation [or commercial disparagement] action. If you find, by a preponderance of the evidence, that the statement is true, you must find for the defendant.

I will now explain some other defenses that may apply, including:

1. the statement is an opinion,
2. the plaintiff is “libel-proof,” or
3. the defendant has a privilege.

An opinion is constitutionally protected speech, and therefore not actionable as defamation.<sup>10</sup> A defendant, however, cannot escape potential liability just by using the word “opinion” while asserting a factual untruth. For example, a statement couched as an opinion – “in my opinion, John Jones is a liar” – may be defamatory if it implies false and defamatory facts.<sup>11</sup> The relevant question for you to determine is not whether the statement is couched as an opinion, but rather whether the statement presents or implies the existence of facts that are capable of being proven true or false.<sup>12</sup>

In making this determination, you must consider whether the context in which the statement is published negates the impression that it is factual. You should consider all the words used, not merely a particular phrase. You should also consider any cautionary terms used by the defendant, the publication in which the statement was published, and the intended readers.<sup>13</sup>

If the statement presents or implies actual facts, the defense of opinion does not apply. On the other hand, if it is plain from the context of the statement that the defendant is merely expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, or that the statement is merely hyperbole or fiery rhetoric, you must find the statement to be a non-actionable opinion.<sup>14</sup>

Even where the challenged statement is found to be false and not an opinion, a plaintiff may be deemed “libel-proof” and therefore unable to prevail. If the plaintiff’s reputation is already so tarnished by prior acts, it is possible that he or she cannot be defamed or disparaged. For example, in a criminal context, a mass murderer cannot be defamed by being falsely described as a tax evader.

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10 *Flotech, Inc.*, 627 F. Supp at 368 (D. Mass. 1985); *Cole v. Westinghouse Broad. Co.*, 386 Mass. 303, 306-09, 435 N.E.2d 1021, 1023-25 (1982).

11 *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18-19 (1990).

12 Note that whether a statement is a fact or an opinion is a question of law to be decided by the court. However, if the statement could be understood by the average reader to be either, the issue of whether it is a fact or an opinion must be decided by the jury. *Myers v. Boston Magazine Co.*, 380 Mass. 336, 339-40 (1980).

13 *Levinsky’s, Inc. v. Wal-Mart Stores, Inc.*, 127 F.3d 122, 127 (1st Cir. 1997); *Phantom Touring, Inc. v. Affiliated Publ’n.*, 953 F.2d 724, 727 (1st Cir. 1992); *Aldoupolis v. Globe Newspaper Co.*, 398 Mass. 731, 733-34 (1986).

14 *Gray v. St. Martin’s Press, Inc.*, 221 F.3d 243, 248 (1st Cir. 2000).

Under certain circumstances, a privilege may apply. In such cases, the defendant is generally permitted to make statements that would otherwise be defamatory so long as the defendant reasonably believed the statement was true and acted in good faith. [Describe any privileges that are applicable to the specific facts of the case, such as the litigation privilege, employer privilege, fair reporting privilege, common interest privilege, public interest privilege, credit report privilege, law enforcement privilege, or competitive privilege.]

However, the defendant is not entitled to the benefit of the privilege if the plaintiff proves that the defendant abused the privilege or made the statement with malicious intent.

If you find that the defendant had a privilege in making [his or her] statement and did not abuse this privilege, you must find for the defendant.

The defendant has the burden of proof of establishing, by a preponderance of the evidence, any claimed defenses and privileges. If a qualified privilege is established by the defendant, the plaintiff must in turn prove, by a preponderance of the evidence, that the privilege was abused.

### **C. Damages**

A plaintiff is entitled to damages if he or she prevails at trial in a defamation case. Actual damages may include the damage to the value of the plaintiff's reputation as determined by you, and costs, such as medical expenses, related to remedying emotional injuries such as mental anguish, embarrassment and humiliation.<sup>15</sup>

In cases involving slander, which is spoken defamation, the plaintiff must prove "special damages," rather than mere damage to reputation, to recover a monetary award. Special damages require economic loss.<sup>16</sup>

In a case of defamation, the plaintiff's recovery is limited to compensatory damages for actual injury resulting from the wrong done by the defendant. The plaintiff has the burden of proving the actual harm inflicted by the defamatory statement, which includes impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. The plaintiff may also recover specific economic harm caused by the defamation. However, punitive damages are prohibited.<sup>17</sup> That means you must not award damages based on an intent to punish defendant's conduct or attempt to deter future conduct.

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<sup>15</sup> *Dexter's Hearthsides Rest., Inc. v. Whitehall Co.*, 24 Mass. App. Ct. 217, 220, 508 N.E.2d 113, 116 (1987)

<sup>16</sup> *Alba v. Sampson*, 44 Mass. App. Ct. 311, 312, 690 N.E.2d 1240, 1242 (1998).

<sup>17</sup> *Mass. Gen. Laws c. 231*, § 93.

## II. Commercial Disparagement

### A. Elements of Claim

The plaintiff has charged the defendant with commercial disparagement. Commercial disparagement consists of a false statement made with the intent to call into question the quality of a competitor's goods or services in order to inflict economic harm on that competitor.<sup>18</sup>

[The elements the plaintiff must prove in a commercial disparagement action are the same as the elements of defamation.] The plaintiff must also prove, by a preponderance of the evidence, "special damages." Special damages require economic loss. Thus, the plaintiff must establish that the disparaging statement caused economic loss in order to recover damages for commercial disparagement.<sup>19</sup>

### B. Defenses

[Same defenses as for defamation.]

### C. Damages

The plaintiff is entitled to actual or compensatory damages if you find that the defendant made a disparaging statement that caused economic loss.<sup>20</sup> Actual damages may include the value of lost business opportunities.<sup>21</sup>

## III. False Advertising

### A. Elements of Claim

The plaintiff has charged the defendant with false advertising under Lanham Act § 43(a). In order to prevail on a false advertising claim under the Lanham Act, the plaintiff must prove, by a preponderance of the evidence:

1. the defendant made a false or misleading statement in a commercial advertisement about its own or the plaintiff's product;
2. the deception is material (*i.e.*, it is likely to influence the purchasing decision);
3. the statement actually deceives or has the tendency to deceive a substantial segment of its audience;
4. the defendant placed the statement into interstate commerce; and
5. the plaintiff has been or is likely to be injured as a result of the statement, either by direct diversion of sales to defendant or by a lessening of goodwill associated with the plaintiff's products.<sup>22</sup>

<sup>18</sup> *Picker Int'l., Inc. v. Leavitt*, 865 F. Supp. 951 (D. Mass. 1994).

<sup>19</sup> *Flotech, Inc.*, 627 F. Supp. at 365 (D. Mass. 1985).

<sup>20</sup> *Flotech, Inc. v. E.I. Du Pont de Nemours Co.*, 627 F. Supp. 358, 365 (D. Mass. 1985), *aff'd*, 814 F.2d 775 (1st Cir. 1987).

<sup>21</sup> *Dexter's Hearthsides Rest., Inc.*, 24 Mass. App. Ct. at 220.

<sup>22</sup> *Cashmere & Camel Hair Mfg., Inst. v. Saks Fifth Ave.*, 284 F.3d 302, 310-311 (1st Cir. 2002).

If the statement is literally false or the defendant acted in bad faith to intentionally mislead consumers, the court will presume actual deception and the burden shifts to the defendant to prove that consumers were not actually deceived.<sup>23</sup>

## **B. Defenses**

A statement in an advertisement cannot be false or misleading in violation of the Lanham Act if you find that it expresses an opinion rather than a fact.<sup>24</sup> Additionally, a statement will not constitute false advertising if you find that it is mere “puffery.” Puffery is an exaggerated statement contained in an advertisement, often made in a blustering or boasting manner, on which no reasonable buyer would rely. While a general claim of product superiority which is too vague to be measured can also be puffery, a claim of product superiority that you determine to be specific and measurable is not puffery.<sup>25</sup>

Exaggerated negative comments made about the products of a competitor may also be considered puffery, but only if you find that no reasonable consumer would rely on the exaggerated claims.<sup>26</sup>

## **C. Damages**

In order to recover damages, the plaintiff must show that customers were actually deceived by the false advertising and that the plaintiff was harmed as a result.<sup>27</sup> In that event, the plaintiff is entitled to compensation for the harm that it suffered.

If you find the statement was literally false, you may presume that deception has occurred, and the plaintiff is not required to prove that customers were actually deceived.<sup>28</sup>

If you find that the statement was literally true but misleading, and you also find that the defendant acted willfully or in bad faith or intentionally deceived the public, you may presume deception and the plaintiff is not required to prove that customers were actually deceived.<sup>29</sup>

If you presume deception for one of the reasons described above, the burden shifts to the defendant to prove that consumers were not actually deceived.<sup>30</sup>

23 *Cashmere*, 284 F.3d at 311-318.

24 *Gillette Co. v. Norelco Consumer Prods. Co.*, 946 F. Supp. 115, 136-37 (D. Mass. 1996).

25 *Clorox Co. P. R. v. Procter & Gamble Commercial Co.*, 228 F.3d 24, 38-39 (1st Cir. 2000).

26 *Gillette Co.*, 946 F. Supp. at 131.

27 *Brown v. Armstrong*, 957 F. Supp. 1293, 1302 n.8 (D. Mass. 1997), *aff'd*, 129 F.3d 1252 (citing *Aktiebolaget Electrolux v. Armatron Intl., Inc.*, 999 F.2d 1, 5 (1st Cir. 1993)).

28 *Cashmere & Camel Hair Mfg., Inst. v. Saks Fifth Ave.*, 284 F.3d 302, 310-311 (1st Cir. 2002).

29 *Cashmere*, 284 F.3d 316-18.

30 *Cashmere*, 284 F.3d 318.

## About the Author



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Julia Huston, Partner in Foley Hoag LLP's Intellectual Property Department and Chair of the firm's Trademark, Copyright and Unfair Competition practice group, is well known for her high-profile victories in trademark, copyright and false advertising cases.

Julia's practice includes litigation, counseling and strategy in the areas of trademarks, copyrights, trade secrets, Internet commerce, domain name piracy, false advertising, unfair competition, and patents. Julia has handled major trademark matters for the owners of famous trademarks in a variety of industries. Julia has obtained several multimillion-dollar IP judgments and settlements, including a \$20.7 million verdict in a false advertising case. She regularly advocates on behalf of clients in federal and state courts, the Trademark Trial and Appeal Board of the U.S. Patent and Trademark Office, and in national and international domain name dispute resolution proceedings.

In addition to litigation, Julia regularly counsels clients on developing long-term strategies for their IP portfolios. Julia's extensive experience in litigation and dispute resolution enables her to build her clients' IP portfolios strategically with an eye toward enforcement and defense for maximum advantage in the marketplace.

In the context of corporate transactions, Julia leads due diligence teams that thoroughly investigate, and assist clients in assessing the value of, intellectual property being acquired. Julia also provides comprehensive advice concerning protection of intellectual property rights in licensing and assignment transactions.

Ms. Huston holds degrees from Boston University (J.D., magna cum laude; B.A., magna cum laude with distinction, Phi Beta Kappa; B.S., magna cum laude) and Harvard University (Ed.M.).

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# Trademark & Copyright Law Blog

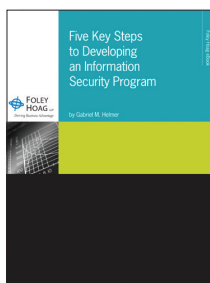
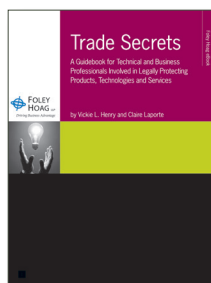
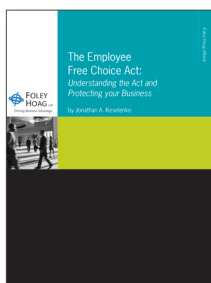
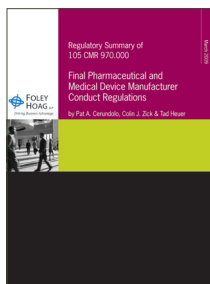
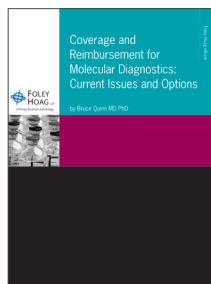
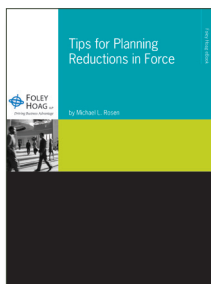
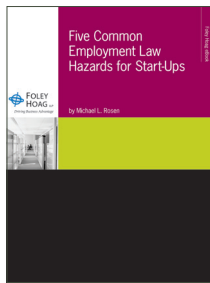
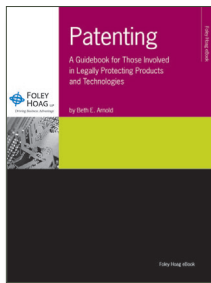
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