

Nos. 11-2260, 11-2375

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

NEUROS CO., LTD. and AVIATION AND POWER GROUP INC.,
d/b/a APG-NEUROS, INC.,
Plaintiffs–Appellees / Cross-Appellants,

v.

KTURBO, INC.,
Defendant–Appellant / Cross-Appellees.

On Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
Case No. 1:08-cv-05939
The Honorable District Judge John W. Darrah

**CORRECTED COMBINED RESPONSIVE AND OPENING BRIEF
FOR PLAINTIFFS–APPELLEES/CROSS-APPELLANTS
NEUROS CO., LTD. AND AVIATION AND POWER GROUP INC.,
D/B/A APG-NEUROS, INC.**

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENTAppellate Court No: 11-2260, 11-2375Short Caption: Neuros Co. Ltd. et al. v. KTurbo, Inc.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

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Neuros Co. Ltd.Aviation and Power Group Inc., d/b/a APG-Neuros, Inc.

- (2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

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- (3) If the party or amicus is a corporation:

- i) Identify all its parent corporations, if any; and

Neither party has a parent corporation.

- ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

No publicly held company owns 10% or more of either party.Attorney's Signature: /s/ Joshua D. YountDate: March 12, 2012Attorney's Printed Name: Joshua D. YountPlease indicate if you are *Counsel of Record* for the above listed parties pursuant to Cir. Rule 3(d). Yes X No .Address: Mayer Brown LLP, 71 South Wacker Drive, Chicago, Illinois 60606Phone Number: (312) 782-0600Fax Number: (312) 701-7711E-Mail Address: jyount@mayerbrown.com

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JURISDICTIONAL STATEMENT

The jurisdictional statement in the brief of Defendant-Appellant/Cross-Appellee KTurbo, Inc. (“KTurbo”) is not complete and correct.

The district court had jurisdiction over this case pursuant to 15 U.S.C. § 1121, 28 U.S.C. § 1331, and 28 U.S.C. § 1367. Plaintiffs-Appellees/Cross-Appellants Neuros Co., Ltd. and Aviation and Power Group Inc., d/b/a APG-Neuros, Inc. (collectively, “APG-Neuros”) asserted a claim under the Lanham Act, 15 U.S.C. § 1125, along with several state law claims that are so related to the Lanham Act claim as to form part of the same case or controversy. D1 at 7-15.¹ KTurbo likewise asserted a counterclaim under the Lanham Act, 15 U.S.C. § 1125, along with several state law counterclaims that are so related to the Lanham Act claim and the Lanham Act counterclaim as to form part of the same case or controversy. D23 at 20-30.

The court of appeals has jurisdiction over these consolidated appeals pursuant to 28 U.S.C. § 1291. On May 4, 2011, the district court entered a Judgment In A Civil Action that resolved all claims and counterclaims in the action. A 38 (dated May 3, 2011, but “entered” the following day per docket entry 245). Pursuant to Fed. R. App. P. 4(a)(1)(A), KTurbo timely filed a notice of appeal from that Judgment on June 2, 2011. D249. Pursuant to Fed. R. App. P. 4(a)(3), APG-Neuros timely filed a notice of appeal from the Judgment on June 16, 2011. D255.

¹ “D__ at __” refers by district court docket number and the ECF-assigned page number to items in the record on appeal. “A __” refers by page number to items in the attached and separate appendices submitted with KTurbo’s brief. “SA __” refers by page number to items in the Supplemental Appendix submitted with this brief.

STATEMENT OF THE ISSUES PRESENTED

1. Were KTurbo's false statements about APG-Neuros "substantially true"?
2. Did KTurbo abuse any privilege it may have had to disparage APG-Neuros?
3. Did APG-Neuros have to prove "actual malice" on KTurbo's part to obtain presumed and punitive damages, yet fail to make the necessary showing?
4. Does the "commercial advertising or promotion" requirement in Section 43(a) of the Lanham Act categorically preclude liability (under the Lanham Act and Illinois's Uniform Deceptive Trade Practices Act) for misrepresentations disseminated throughout an industry by direct correspondence and face-to-face presentations?

STATEMENT OF THE CASE

The parties in this case are competing manufacturers of high-speed turbo blowers used by waste water treatment plants ("WWTPs"). This case arose when KTurbo falsely accused APG-Neuros of "cheating" to secure turbo blower sales, and continued to make those accusations throughout the WWTP purchasing community despite a cease-and-desist letter from APG-Neuros. In October 2008, APG-Neuros filed suit against KTurbo, asserting statutory claims under the Lanham Act and Illinois's Uniform Deceptive Trade Practices Act ("DTPA"), and common law claims for defamation *per se* and *per quod*, trade libel, and intentional interference with prospective economic relations. D1. KTurbo responded in December 2008 with

counterclaims for the same causes of action, plus one under Illinois's Consumer Fraud and Deceptive Business Practices Act ("CFA"), alleging that APG-Neuros had made false statements about Neuros blowers and KTurbo's products, services, and finances. D21 at 8-16; D23 at 20-30.

In October 2010, the district court held a five-day bench trial on the claims and counterclaims of the parties. A 2. Seven months later, in May 2011, the district court entered judgment on the claims and counterclaims and issued written findings of fact and conclusions of law explaining its decision. A 1-37, 38. The court granted judgment in favor of APG-Neuros on its defamation *per se* claim and all of KTurbo's counterclaims, awarding APG-Neuros \$10,000 in presumed damages and \$50,000 in punitive damages on the successful defamation *per se* claim. A 38. On APG-Neuros's remaining claims, the court entered judgment for KTurbo. *Id.* These consolidated appeals followed.

On appeal, KTurbo challenges only the judgment awarded on APG-Neuros's defamation *per se* claim. KTurbo Br. 2-3. In its cross-appeal, APG-Neuros challenges the district court's ruling on its Lanham Act and DTPA claims. *See infra* pp. 40-52.

STATEMENT OF FACTS

A. **How Turbo Blowers Are Promoted, Sold, and Tested in the Waste Water Treatment Plant Industry.**

WWTPs use blowers to maintain the dissolved oxygen levels needed by the aerobic bacteria that assist in the water treatment process. SA 320-21. In recent years, WWTPs have been replacing their traditional blowers with high-speed turbo

blowers, which are smaller, quieter, easier to maintain, and more energy efficient. SA 149, 297-99.

In 2006, APG-Neuros became the first firm to offer turbo blowers in the North American WWTP market. SA 83, 297-99. A year later, K-Turbo entered the market. A 309. Since then, the two firms (and others that now sell in North America) have competed to supply turbo blowers to various WWTPs. SA 150. There are several points of competition: price, operating costs, experience, product support, and financial stability. *E.g.*, A 49; SA 329-35. APG-Neuros has remained the leading supplier in North America. SA 302-04.

WWTPs hire consulting engineers to manage the process of selecting, testing, and installing turbo blowers. A 288-89; SA 84-87, 147, 158. Efforts to promote and sell turbo blowers, therefore, are usually directed toward the relatively small group of engineering firms that do that kind of work. SA 86; *see infra* pp. 9-12. In the typical competitive bidding situation, the consulting engineer will develop and publish project specifications designed to meet the WWTP's needs. SA 84-85, 159. Then, turbo blower manufacturers, or their sales representatives, will submit bid packages with the specified information, certifications, and guarantees for their turbo blowers. SA 85-86, 160.

Ultimately, the WWTP and its consulting engineers select a supplier, often based on a project-specific scoring methodology that weighs the different aspects of each bid—*e.g.*, price, operating costs, product support. A 49; SA 2-3, 161. The manufacturer selected then contracts with the WWTP and builds the ordered turbo

blowers. SA 86-88. Once the blowers are complete, they typically undergo testing at the manufacturer's facility to determine whether their performance meets the manufacturer's original guarantees. SA 153-54, 162-63. If the performance falls short, the WWTP ordinarily can assess a pricing penalty. SA 239-40.

B. How KTurbo Defamed APG-Neuros by Accusing It of “Cheating” and “Crimes” Despite Being Warned Against Making Such Accusations.

In June 2008, APG-Neuros won the right to supply 13 turbo blowers to a WWTP in South Valley, Utah. A 49; SA 140. KTurbo also submitted a bid for that project—its first significant bid in North America—but it came in a distant third out of three bidders because of deficiencies in product support, responsiveness, and financial stability. A 49; SA 2, 199. Shortly afterward, KTurbo's CEO, HeonSeok Lee, obtained APG-Neuros's bid submission for the South Valley project (A 47-48) and a test report on a Neuros blower prepared by the engineering firm CH2MHill for a WWTP in King County, Washington (A 81-129).² Lee then created a series of PowerPoint slides and related tables that accused APG-Neuros of “cheating” and committing a “crime” when it supposedly “guaranteed” a technically impossible 82.2% (or 82.5%) “total efficiency” to the South Valley WWTP and claimed 75.6% “total efficiency” in the CH2MHill report. A 51-130; SA 5, 12-14, 201-02. Lee's intention in making those accusations was “to say that Neuros was dishonest in its business.” SA 14.

APG-Neuros did not make any “total efficiency” guarantees to the South Valley WWTP. SA 64. Instead, pursuant to the applicable project specifications, it

² APG-Neuros had submitted a portion of the test report in the South Valley bidding after labeling it “preliminary.” A 349-50.

guaranteed only a series of “wire power” figures—which measure the amount of power the blower draws—under a series of 30 different operating conditions. A 47-48, 329; SA 246, 291.³ The connection between “wire power” figures and total efficiency depends—in a way not specified at trial—on the values assigned to a host of other variables. A 16, 410-11.

Using that malleable connection between “wire power” and efficiency, Lee calculated the supposed 82%+ “guarantee” by “manipulating some of the data from APG-Neuros’s South Valley bid submission.” A 7. Even though the bid submission clearly states that the wire power guarantees were based on a blower inlet pressure of 12.6 psia (pounds per square inch absolute), Lee assumed an inlet pressure of 12.4 psia. A 47-48, 311-12; SA 3-4. Lee admitted that doing so increased the supposed efficiency guarantee by nearly five percentage points and that accusing APG-Neuros of intentional deception in using the higher inlet pressure was “not too appropriate” and a “mistake.” SA 266-67, 269-70. Lee likewise acknowledged that a “mistake” in failing to consider humidity inflated the supposed guarantee by another point-and-a-half. SA 134, 263-65; *see also* A 329 (using stated assumptions, efficiency would be close to 76%).

³ Although KTurbo tries to confuse this issue by describing the standards specified for *later testing* of the blowers ultimately selected and built for the South Valley WWTP (KTurbo Br. 8-9; SA 338), the bid submission provided only performance guarantees, not test results. A 47-48; SA 331-32. Tellingly, KTurbo never offered any evidence that APG-Neuros failed to satisfy its wire power guarantees for the South Valley project. To the contrary, KTurbo (successfully) opposed the introduction of evidence on that subject. D236 at 20-44 (Trial Tr., Vol. 2A, at 192-216).

The CH2MHill report stated that tests of the core of one Neuros turbo blower model resulted in system efficiency figures ranging from 70% to 75.4%. A 86; SA 72.⁴ In his slides and tables, Lee purported to provide “corrected” efficiency figures that ranged as low as 65%. A 59-60; *see also* A 424-25 (Lee claiming recalculated efficiency range of 63% to 65%); SA 137 (same); SA 236 (recalculated efficiency of 63%). But to arrive at those figures he raised the discharge temperature and lowered the discharge pressure from the numbers used in the CH2MHill report. A 59-60; SA 137. He also wrongly assumed that a manometer was not used to confirm pressure measurements, despite a contrary statement in the CH2MHill report. A 333-34; SA 35-42, 295; *see also* SA 76-78, 241-44 (describing other errors in Lee’s analysis).

Even though the accusations of “cheating” and criminal activity in Lee’s slides and tables rested on manipulations of the South Valley bid and the CH2MHill report, KTurbo began disseminating the slides and tables in the WWTP industry. On July 7, 2008, KTurbo’s marketing manager e-mailed the slides and tables, the South Valley bid, and the CH2MHill report to Dennis Livingston, who worked for an equipment manufacturer with which KTurbo wanted to do business. A 144-220; SA 6-7, 255. The cover e-mail stated that KTurbo was giving Livingston “some

⁴ One can test a blower core alone, which is known as a “core test,” or one can test a blower in its enclosure or “package,” which is known as a “package test” or a “functional test.” SA 65. The tests have different purposes and can help control for the fact that manufacturers offer different configurations that reflect the different needs of purchasers. SA 65-66, 80-81, 88-91. Core tests are accepted to measure performance guarantees. SA 70, 133, 143. Lee understood that the CH2MHill report described the results of a core test. SA 293.

information on how Neuros is providing false efficiency data when they bid.” A 144. The e-mail also urged Livingston “to use these materials” in connection with his efforts to obtain a turbo blower order for a WWTP project. *Id.*

A week later, on July 14, 2008, another member of KTurbo’s sales department e-mailed the same package of materials to 73 individuals in the WWTP industry, primarily existing and prospective sales representatives for KTurbo. A 50-130; SA 8-11, 200-02, 203-05. The cover e-mail, which had a subject line of “The issue with cheating of Neuros,” stated:

I’m just writing to inf[or]m you that Neuros which is one of turbo blower maker in South Korea gua[ra]nteed 82.2% total effi[ci]ency in South Valley Project, but it was NOT truth and a crime to win the bid for the project. I attached the cheating data and all evidence relevant to this cheating data.

We posted writings regarding the cheating of neuros on the public notice of our salesnet and uploaded all evidence relevant to this cheating data.

Please check the data and writings. It would be appreciated if you leave your opinion on our salesnet or send e-mail regarding the issue with cheating of neuros.

Public notice bulletin board’s link: <http://sales.kturbo.com/>

Please let me know if you need more information.

A 50. The accusatory slides and tables had indeed been placed on KTurbo’s salesnet, which is a website open to KTurbo sales representatives that collects marketing materials for use in promoting KTurbo blowers. SA 7-8, 11-12, 210-11, 248-49; *see* SA 281-82 (purpose of posting Lee’s PowerPoint slides to salesnet was “to promote sales” of KTurbo blowers). KTurbo also posted to the Korean-language

portion of its publicly accessible website similar accusations of cheating and crimes by APG-Neuros. SA 23, 249-52.

Two recipients of the July 14 e-mail promptly replied with express advice that KTurbo not accuse APG-Neuros of cheating and lying. A 133, 135; SA 15-16. Indeed, Dennis Livingston (presciently) explained that “these kinds of claims (lying, cheating, etc.) can in some cases result in damaging legal situations.” A 133. Even before the July 14 e-mail, a third sales representative warned Lee about “publically discussing” his allegations and advised him to review his “Neuros testing publication” with an attorney. A 131-32; SA 15, 223-24, 229.

Nonetheless, at a July 29 and 30, 2008 meeting with sales representatives (as well as at least one equipment manufacturer and one contractor) to inaugurate KTurbo’s U.S. headquarters, Lee reiterated his accusations of cheating and criminal activity while presenting his slides on the subject. SA 42-44, 252-56, 307-10. He also handed “Neuros cheating full data” to an executive of another turbo blower manufacturer on July 16, 2008. SA 33, 359. And throughout July 2008, Lee urged his sales representatives to explain APG-Neuros’s supposed “cheating” and use his accusatory slides in promoting KTurbo blowers to the consulting engineer for a Napa Valley, California WWTP, Greg Harris of Herwit Engineering. A 131-32; SA 31-32, 359. Noting that “[p]ersuading engineer never need attorney’s consulting,” Lee insisted that presenting his accusations to Harris offered an “ABSOLUTELY GREAT CHANCE of breaking Neuros.” A 132; SA 59, 227-28, 229, 259.

By mid-August 2008, KTurbo had received notice directly from APG-Neuros that the accusations of cheating and criminal activity were false and should cease. An APG-Neuros executive responded to the accusations on KTurbo's publicly accessible website, expressly telling Lee that the efficiency figures Lee had calculated from the South Valley bid were wrong because Lee had not used the correct inlet pressure. SA 22-26. And after APG-Neuros received a copy of KTurbo's July 14 e-mail, counsel for APG-Neuros sent a cease-and-desist letter to KTurbo. SA 400-01. That August 1, 2008 letter explained that the statements in the July 14 e-mail "are untrue and defamatory" and demanded that KTurbo stop its "inappropriate and unlawful conduct immediately." SA 400.

Undeterred, KTurbo followed through on its plan to disseminate its accusations against APG-Neuros in the WWTP industry. SA 28, 51, 232-33. Lee and his sales representatives sent Greg Harris a number of slides and other documents that accused APG-Neuros of "cheating" and criminal activity in the South Valley bid and the CH2MHill report. SA 169-70, 180-81, 225. They also met with Harris in August 2008, gave a PowerPoint presentation using the slides detailing APG-Neuros's supposed "cheating" and "crimes," and repeated Lee's accusations that APG-Neuros "was cheating on the efficiencies that they were using to win projects." SA 166-69, 181; *see also* SA 33, 275-77. Lee then "reiterated similar points" when Harris visited KTurbo's Korean facility in September 2008. SA 165-66, 178-79.

APG-Neuros nevertheless won the contract to supply turbo blowers to Napa Valley, and Harris confirmed that APG-Neuros met its performance guarantees after he witnessed extensive testing of the blower core pursuant to the “PTC-10” industry standard. SA 155-56, 163-64, 171, 172-73, 176-77, 193-94, 363-64. Indeed, Harris testified that he specifically checked on the points raised in KTurbo’s statements accusing APG-Neuros of “cheating,” and he concluded that the accusations made “mistakes,” were not “accurate,” and were “misleading.” SA 183-92.

But KTurbo’s campaign to promote its turbo blowers by accusing APG-Neuros of “cheating” did not end with Greg Harris and the Napa Valley WWTP. Lee and KTurbo’s sales representatives made a concerted effort to spread KTurbo’s accusations throughout the entire market of North American WWTP engineers. SA 45 (after the July meeting with sales representative, Lee “went out on a trip to meet with engineers”); SA 212, 418-35. Lee e-mailed his “cheating” slides to Julie Gass of the engineering firm Black & Veatch and presented those slides to Black & Veatch engineers on several occasions. SA 45, 213-14, 272-74, 277-78; 418. He met with engineers from Bowen Collins and expressly accused APG-Neuros of “cheating.” SA 47, 221. He and a sales representative made the same accusations in presenting Lee’s “cheating” slides to CH2MHill. SA 49, 278-80, 418. In the course of his promotional road trip, Lee and his sales representatives also “educated” HDR, Inc., Hazen and Sawyer, and other engineering firms on KTurbo’s view that APG-Neuros was overstating its efficiencies. SA 49, 311-16, 418.

Indeed, Lee admitted that by October 19, 2008 he “had been to see . . . most of the big engineering companies” involved in running competitions for North American WWTP projects. SA 48-49; *see* SA 418. He likewise acknowledged presenting his slides accusing APG-Neuros of “cheating” to U.S. engineers “many times” in 2008. SA 215-17; *see also* SA 306 (sales representative heard Lee “refer[] to Neuros as cheaters or as cheating . . . [c]ountless times”). Lee explained that he accused APG-Neuros of “cheating” to engineers for “[a]lmost all” of the WWTP projects where “our product performance was low and we were – when our products were rejected from the bidding acceptance.” SA 218.

Although its brief argues otherwise, KTurbo did not found its accusations that APG-Neuros engaged in “cheating” and “crimes” on any failure to comply with the PTC-10 standard for testing blowers. For nearly a year, Lee’s slides never even suggested that APG-Neuros did not comply with PTC-10. *See* A 51-80, 130, 146-69. That is not surprising, since Lee admitted that he had little experience with PTC-10 and that KTurbo itself did not test according to that standard. SA 196-97. In fact, PTC-10 compliance did not become an issue in this case until July 2009 when KTurbo’s expert witness opined on the subject. *See* D61-3 at 25-26.

C. How KTurbo Continued To Defame APG-Neuros Even After This Litigation Began.

Because KTurbo showed no signs of stopping its defamatory promotional campaign, APG-Neuros was forced to file suit against KTurbo in October 2008. D1. APG-Neuros asserted claims for violations of the Lanham Act and the DTPA, defamation *per se* and *per quod*, trade libel, and intentional interference with

prospective economic relations. D1 at 7-15. APG-Neuros sought injunctive relief, appropriate damages, and attorneys' fees. D1 at 15-16.

KTurbo responded in kind, filing counterclaims for the same causes of action and under the CFA. D21 at 8-16; D23 at 20-30. KTurbo alleged that APG-Neuros had overstated the efficiency of Neuros blowers and had disparaged KTurbo and its products. *Id.*

But the counterclaims were far from KTurbo's only response to APG-Neuros's lawsuit. Before KTurbo did anything else, Lee immediately recommitted KTurbo to destroying APG-Neuros, promising to "break [APG-Neuros] of immorality completely" (A 137), to "terminate Neuros completely" (A 143), and to start "fighting and breaking Neuros in NA market" (A 139). SA 60-63, 258-61. KTurbo also continued to disseminate its accusations that APG-Neuros was "cheating" on efficiency figures in the WWTP industry. Indeed, by October, Lee was specifically quantifying the amount by which APG-Neuros was supposedly overstating the efficiency of its blowers. As to APG-Neuros's South Valley bid, he claimed "26% cheating" (SA 290, 415, 450, 504, 542) and "25% false claiming" (SA 54-55, 292, 479, 488). He asserted that the CH2MHill report reflected "16.7% cheating on customer." SA 55-56, 457, 520. And, more generally, he accused APG-Neuros of overstating the efficiency of its blowers by 15% and 20%. A 141, 143.⁵ Remarkably,

⁵ The district court believed that the evidence did not show publication of accusations of more than 15% "cheating." A 18 n.4. But at trial, APG-Neuros directed Lee to a particular slide stating that APG-Neuros engaged in 26% cheating, and Lee said, "This is material I used when I make a presentation to engineers." SA 54-55; *see* SA 542. He then agreed that "[he] included an accusation that Neuros

KTurbo continued to accuse APG-Neuros of “cheating” on and otherwise overstating the efficiency of Neuros blowers through at least October 2009. A 143, 253-55; SA 51-52, 207-09.

At trial, KTurbo rested its defense against APG-Neuros’s claims, as well as the proof of its own counterclaims, largely on the opinions of the two experts in the case. D231 at 3. KTurbo’s expert, David Japikse, opined that APG-Neuros’s methods for testing blowers—as described in the CH2MHill report and two reports on the blowers accepted by the Napa Valley WWTP—did not comply with PTC-10 standards. SA 98-100. He also opined that the two reports on the Napa Valley *package* testing overstated the total efficiency of the blowers by 2% to 7%. SA 102-11, 125. Japikse based his opinions not on any actual testing of a Neuros blower (SA 130), but rather on analysis of the CH2MHill and Napa Valley reports. SA 95-96, 98. Japikse offered no opinion on whether the *core tests* performed by APG-Neuros—which were the basis for the efficiency figures in the CH2MHill report and the only Napa Valley report to claim PTC-10 compliance—resulted in any overstatement of efficiency. SA 112-29. Japikse likewise expressly testified that he was “not asked” to “validate” or “prove out” the numbers and calculations formulated by HeonSeok Lee and published to the WWTP industry as proof of APG-Neuros’s supposed “cheating.” SA 94. Indeed, Japikse flatly refused to adopt Lee’s views on how APG-Neuros supposedly overstated blower efficiency figures, despite Lee’s repeated demands that he do so. SA 96, 132, 527, 529, 530, 533.

was claiming 82.2 percent when [he] said their efficiency was 65 percent, and that constituted 26 percent cheating.” SA 55.

KTurbo also tried to capitalize on the opinion of APG-Neuros's expert, Nicolas D'Orsi, that the blower testing reported in the CH2MHill and Napa Valley reports did not comply with PTC-10. SA 138-39. But D'Orsi testified that, with respect to the core testing, any deviations from the PTC-10 standard were "minor." SA 142-43. D'Orsi also explained that the core tests accurately measured and calculated the efficiency of the Neuros blowers. SA 144. Finally, D'Orsi confirmed that none of the testing reports at issue represented that APG-Neuros's package testing complied with PTC-10. SA 141.

D. How the District Court Entered a \$60,000 Judgment for APG-Neuros on Its Defamation *Per Se* Claim.

After a five-day bench trial, the district court ruled for APG-Neuros on its *per se* defamation claim, but otherwise rejected APG-Neuros's claims and KTurbo's counterclaims. A 38. The court explained its rulings in a 37-page Memorandum Opinion. A 1-37.

On APG-Neuros's *per se* defamation claim, the court found that "KTurbo published false statements accusing APG-Neuros of 'cheating' and committing a 'crime' by overstating its efficiency in connection with the South Valley project." A 24. There was "no evidence that APG-Neuros guaranteed *any* total efficiency figure" for that project, "much less a purportedly impossible figure of 82.2%." *Id.* And even if efficiencies could be calculated from the data provided to the South Valley WWTP, "the evidence does not support Lee's accusations that APG-Neuros overstated the capabilities of its blowers by 15%." *Id.* No qualified privilege could protect KTurbo from liability, the district court further concluded, because "Lee's

statements regarding his intent to ‘break’ and ‘terminate’ APG-Neuros show that his statements were not made in good faith.” *Id.* Finally, the court found that KTurbo’s “cheating” accusations were defamatory *per se* because they “convey words that prejudice APG-Neuros, or impute lack of ability, in APG-Neuros’s business.” A 25.

On APG-Neuros’s claims for defamation *per quod*, trade libel, and intentional interference with prospective economic relations, the district court ruled that KTurbo was not liable because APG-Neuros did not prove actual damages resulting from KTurbo’s false statements. A 25-27. The court also declined to hold KTurbo liable on APG-Neuros’s Lanham Act claim, contending that KTurbo’s dissemination of false statements did not “rise to the level of advertising or promotion” because the promotional materials “consist[ed] almost entirely of direct correspondence and computer files used in face-to-face communications; and there is no evidence that the statements at issue were presented to any members of the general public.” A 27. The court rejected APG-Neuros’s DTPA claim “for the same reason,” believing that the “legal inquiries” under the Lanham Act and the DTPA “are the same.” *Id.*

As for KTurbo’s counterclaims, the district court rejected the counterclaims asserted under the Lanham Act, the DTPA, and the CFA because there was “no evidence to show that APG-Neuros widely distributed any allegedly false statements.” A 30. APG-Neuros was not liable on KTurbo’s defamation, commercial disparagement, and DTPA counterclaims, since KTurbo “failed to prove that APG-Neuros made any false statements about KTurbo or its finances.” *Id.*

And the fact that “KTurbo did not prove that APG-Neuros caused KTurbo to incur any damages” doomed KTurbo’s counterclaim for intentional interference with prospective economic relations. A 31.⁶

As relief on APG-Neuros’s meritorious *per se* defamation claim, the district court awarded APG-Neuros \$10,000 in presumed general damages and \$50,000 in punitive damages. A 34, 36. In doing so, the court specifically found that “punishment is appropriate” because “KTurbo published false statements about APG-Neuros; expressly stated its intent to ‘break’ and ‘terminate’ APG-Neuros; and continued to accuse APG-Neuros of cheating after its representatives advised it not to do so, after receiving a cease-and-desist letter, and after the initiation of this lawsuit.” A 36. The court, however, declined to award injunctive relief or attorney’s fees based on the *per se* defamation claim alone. *Id.*

SUMMARY OF ARGUMENT

On appeal, KTurbo asserts three meritless arguments for overturning the district court’s finding that KTurbo is liable for presumed and punitive damages on APG-Neuros’s *per se* defamation claim. First, KTurbo contends that its disparagement of APG-Neuros was “substantially true.” But the evidence invoked by KTurbo to supposedly show the truth of its disparaging statements has nothing

⁶ KTurbo lards its Statement of Facts with a selective and inaccurate recitation of the evidence bearing on its counterclaims. KTurbo Br. 15-18. But KTurbo does not challenge on appeal the district court’s complete rejection of each and every counterclaim. *Id.* at 25-27; A 28-31. Thus, there is no reason to burden this Court with a point-by-point demonstration that the counterclaims were indeed meritless. It suffices to say that abundant evidence supports the district court’s judgment on the counterclaims. *See* D227 at 13-25; D228 at 57-71.

to do with the subjects of those statements. The disparaging statements asserted massive efficiency overstatements in a “wire power” bid guarantee for the South Valley WWTP project and a CH2MHill report on core testing for a Neuros blower. Yet KTurbo founds its “substantial truth” challenge on expert opinions regarding a *much smaller* efficiency overstatement in a *package* testing report for the *Napa Valley WWTP* and a supposed failure to comply with PTC-10 testing standards. As the district court found, there is no evidence that remotely validates KTurbo’s actual disparaging statements. They are completely false.

Second, KTurbo asserts that it had a qualified privilege to disparage APG-Neuros. Even if it had such a privilege, however, it abused and thus lost the privilege. As the district court found, KTurbo published its disparaging statements in bad faith with an intent to injure APG-Neuros. Plus, KTurbo completely failed to properly investigate the truth of its statements, and it had ample reason to know that the statements were false. Those circumstances easily establish the reckless disregard of APG-Neuros’s rights that Illinois law requires to establish abuse of the qualified privilege claimed by KTurbo.

Third, KTurbo contends that APG-Neuros is not entitled to presumed or punitive damages because it did not prove that KTurbo acted with “actual malice.” That argument is wrong for two reasons. KTurbo’s thoroughly commercial speech did not raise issues of “public concern” that trigger First Amendment scrutiny and require use of the “actual malice” standard. And even if proof of actual malice were required, there is overwhelming evidence that KTurbo published its disparaging

statements with actual malice. It was aware of numerous facts contradicting its statements, it completely failed to investigate the truth of the statements, and it had an undeniably malicious motive for making the statements. Together, that evidence establishes actual malice.

Nothing in KTurbo's arguments shows a reversible error in the judgment for APG-Neuros on its defamation *per se* claim. That judgment should be affirmed.

In the consolidated cross-appeal, APG-Neuros challenges the district court's ruling that the "commercial advertising or promotion" requirement in Section 43(a) of the Lanham Act categorically precludes liability under the Lanham Act and the DTPA for disparagement conveyed through direct correspondence, face-to-face communications, and statements not directed to the general public. Contrary to the district court's assumption, Seventh Circuit precedent does not compel that interpretation of Section 43(a). Indeed, such an interpretation effectively reads the term "promotion" out of the requirement. That interpretation also finds no support in the requirement's legislative history. And it defeats the remedial purpose of the Lanham Act. Plus, other circuit courts have uniformly rejected the narrow interpretation adopted by the district court. The best reading of the "commercial advertising or promotion" requirement allows liability for the kind of industry-wide direct correspondence and face-to-face communications through which KTurbo disseminated its disparaging statements in this case. Accordingly, the judgment against APG-Neuros on its Lanham Act and DTPA claims should be reversed.

STANDARD OF REVIEW

On appeal from a judgment entered after a bench trial, the district court's conclusions of law are reviewed *de novo*, but its findings of fact are reversed only if clearly erroneous. *BASF Corp. v. Old World Trading Co.*, 41 F.3d 1081, 1088 (7th Cir. 1994). The district court's application of legal principles to factual determinations is also "reviewed only for clear error." *Murdock & Sons Constr., Inc. v. Goheen Gen. Constr., Inc.*, 461 F.3d 837, 840 (7th Cir. 2006).

A ruling is not clearly erroneous unless the reviewing court is left with a "definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948). Stated differently, "[i]f the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573-74 (1985). Moreover, "[s]pecial deference is given to determinations based on credibility findings, which can virtually never be clear error." *Wells Fargo Bank, N.A. v. Siegel*, 540 F.3d 657, 663 (7th Cir. 2008) (internal quotation marks omitted).

Nearly all of the matters at issue in KTurbo's appeal are questions of fact subject to clear error review. That is true for KTurbo's arguments that it established the "substantial truth" of its disparaging statements and that it did not abuse any "qualified privilege" to make those statements. *See Parker v. House O'Lite Corp.*, 756 N.E.2d 286, 296, 299 (Ill. App. Ct. 2001). It is also true for the

district court's determination that under Illinois law, the facts of this case warranted presumed and punitive damages. *Cirrincione v. Johnson*, 703 N.E.2d 67, 70 (Ill. 1998). Of course, to the extent that the First Amendment governs the availability of those damages, this Court conducts a more searching review of whether the evidence "is sufficient to support a finding of actual malice." *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 685-86, 688 (1989).

As for the issue raised in APG-Neuros's cross-appeal—whether the district court correctly interpreted Section 43(a) of the Lanham Act—it is "purely a question of law" that is subject to *de novo* review. *Cent. States, Se. & Sw. Areas Pension Fund v. Fulkerson*, 238 F.3d 891, 894 (7th Cir. 2001).

ARGUMENT

I. The District Court Committed No Reversible Error in Finding KTurbo Liable for Defamation *Per Se* and Awarding APG-Neuros Presumed and Punitive Damages.

On appeal, KTurbo challenges only the district court's ruling that it is liable for presumed and punitive damages on APG-Neuros's claim for defamation *per se*. Such a claim requires proof that the defendant both made a false statement about the plaintiff that falls into one of the categories of *per se* defamation and published that statement without privilege to a third party. *Republic Tobacco Co. v. N. Atl. Trading Co.*, 381 F.3d 717, 726 (7th Cir. 2004). KTurbo does not dispute that its disparaging statements about APG-Neuros were "literally false." A 15. Nor does KTurbo challenge the district court's determination that its statements come within a category of *per se* defamation because they "prejudice APG-Neuros, or impute lack

of ability, in APG-Neuros's business." A 25. And KTurbo acknowledges that it published its disparaging statements to many third parties. KTurbo Br. 13-14.

KTurbo instead argues that its statements were "substantially true," that it did not abuse a "qualified privilege" to make the statements, and that the record evidence does not allow presumed or punitive damages. None of those fact-bound arguments warrant a reversal.

A. KTurbo's Disparaging Statements Are Not Substantially True.

KTurbo first contends that its disparaging statements about APG-Neuros do not amount to defamation because those statements supposedly were "substantially true." There is no merit to that argument. KTurbo mischaracterizes the defamatory statements, misunderstands the "substantial truth" rule, and disregards the applicable standard of review.

KTurbo says that its disparaging statements challenged "the accuracy of APG-Neuros's claimed efficiencies" and "APG-Neuros's compliance with ASME PTC-10 testing standards." KTurbo Br. 30. That is wrong. As the district court expressly found, "none of Lee's statements regarding APG-Neuros's 'cheating' addressed PTC-10 compliance." A 17. In reality, KTurbo's disparaging statements accused APG-Neuros of "cheating" and committing a "crime" in two ways: (1) by guaranteeing 82% total efficiency to the South Valley WWTP and (2) by claiming up to 75.6% total efficiency in the CH2MHill core testing report. *E.g.*, A 50, 64, 72, 155, 169; SA 437, 450, 457, 460. The district court correctly found that neither accusation was substantially true. A 15-18. And KTurbo certainly has not shown that the evidence on the subject is so plainly to the contrary that the district court

committed the kind of “clear error” required to reverse that factual finding. *See supra* p. 20.

To be sure, “substantial truth is a complete defense to an allegation of defamation” under Illinois law. *Republic Tobacco*, 381 F.3d at 727. But contrary to KTurbo’s insinuations, that rule does not require a court to ignore all of the actual details of the disparaging statement in assessing whether its “gist” is true. Instead, as KTurbo’s own authorities recognize, the “substantial truth” rule merely directs a court to look to the “highlight” of the statement rather than “items of secondary importance which are inoffensive details, immaterial to the truth of the defamatory statement.” *Myers v. Levy*, 808 N.E.2d 1139, 1152 (Ill. App. Ct. 2004) (internal quotation marks omitted); *Gist v. Macon County Sheriff’s Dep’t*, 671 N.E.2d 1154, 1157 (Ill. App. Ct. 1996) (same).

Here, the “substantial truth” rule does not remotely warrant second-guessing the district court’s determination that KTurbo’s accusations of “cheating” were completely false. Take first the accusation that APG-Neuros guaranteed an impossible 82%+ efficiency to the South Valley WWTP. It was undisputed that APG-Neuros submitted no such efficiency guarantee. A 329; SA 64, 246, 291. Instead, APG-Neuros submitted only “wire power” draws. A 47-48. And it was undisputed that the “wire power” figure that corresponded to 82.2% efficiency according to KTurbo’s “cheating” accusations actually corresponded to approximately 76% efficiency. A 329; SA 266-67. To calculate the 82.2% number, HeonSeok Lee changed the stated inlet pressure and ignored the effect of humidity.

SA 263-67. There is *no* truth, much less substantial truth, to the accusation that APG-Neuros guaranteed an impossible 82% efficiency.

As for the accusation that the CH2MHill report overstated the efficiency of Neuros blowers by claiming up to 75.6% total efficiency for a blower core, there is no evidence that the efficiencies claimed in the CH2MHill report were overstated at all. APG-Neuros's expert expressly affirmed that the CH2MHill report accurately stated the efficiency of the tested blower core. SA 144. And KTurbo's expert offered no opinion at all on the matter. SA 112-29. The only efficiency overstatement he identified was in the *Napa Valley* reports on *package* testing. SA 102-11, 125. That does not prove the substantial truth of alleged overstatements in the *CH2MHill* report on *core* testing.

Even if the 2% to 7% overstatement that KTurbo's expert identified in Napa Valley package testing had any relevance to KTurbo's actual "cheating" accusations, it still would not validate them. As the district court found, a 2% to 7% overstatement is a far cry from the 15% (and greater) "cheating" claimed by KTurbo. A 18; *see, e.g.*, A 141 (20%); A 143 (15%); SA 415 (26%); SA 542 (same); SA 457 (16.7%); SA 520 (same); SA 54-56, 290. KTurbo itself asserts that "[e]ven seemingly minor differences in blower efficiency are significant" because of the effect of efficiency on the lifetime costs of operating a blower. KTurbo Br. 7-8. In that context, an accusation of 15% (or more) "cheating" on efficiency could not be "substantially true" if the overstatement were actually less than half that amount.

This case is nothing like the cases where disparaging statements were deemed “substantially true” despite inaccuracies in “inoffensive details.” *See Myers*, 808 N.E.2d at 1152-53 (inaccuracy in number of people joining petition did not diminish substantial truth of statement that many favored removal of football coach); *Gist*, 671 N.E.2d at 1157 (potentially inaccurate warnings about those on outstanding warrant list did not prevent list from being substantially true where plaintiff had outstanding warrant). Here, the falsity goes directly to the highlights of the disparaging statements: APG-Neuros did not guarantee an impossible 82%+ efficiency, the CH2MHill report did not overstate the efficiency of a Neuros blower core, and APG-Neuros did not “cheat” in either instance. Those are not “inoffensive details.” The district court thus did not remotely commit clear error in finding that KTurbo’s “cheating” accusations were not substantially true.

Indeed, ample authority supports that conclusion. *Parker v. House O’Lite Corp.*, 756 N.E.2d 286 (Ill. App. Ct. 2001), is particularly instructive. The defendants in *Parker* had accused the plaintiff of “rigging” the specifications used for public bidding on a lighting project for a public hospital in a way that supposedly aided family members. *Id.* at 292-93. When sued for defamation, the defendants asserted that the “gist” of their accusations was that the plaintiff “rigged” bidding by not complying with statutory and contractual requirements. *Id.* at 296-97. The Appellate Court ruled that a jury had to decide whether the defendants’ accusations were substantially true. *Id.* at 297. If “substantial truth” was an issue for the fact finder in *Parker*—where, unlike here, the truthful gist claimed by the defendant at

least had something to do with the actual disparaging statements—then “substantial truth” has to be left to the fact finder here too. *See also, e.g., Tunney v. Am. Broad. Co.*, 441 N.E.2d 86, 89-90 (Ill. App. Ct. 1982) (“substantial truth” defense was for jury to decide because libelous statement that problems with new homes resulted from poor construction was not an “inoffensive detail”); *Fopay v. Noveroske*, 334 N.E.2d 79, 89-93 (Ill. App. Ct. 1975) (affirming jury finding that defamatory statement was not substantially true where claimed evidence of truthfulness did “not appear to support the breadth of defendant’s allegation”); *Bogosian v. Bd. of Educ. of Cmty. Unit Sch. Dist. 200*, 134 F. Supp. 2d 952, 957-58 (N.D. Ill. 2001) (admission that teacher had some physical contact with students did not establish substantial truth of claim that teacher had two students inside his thighs).

In short, there is no basis to reverse the district court’s finding that KTurbo’s “cheating” accusations were completely false.

B. KTurbo Abused Any Privilege It May Have Had To Disparage APG-Neuros.

KTurbo also asserts that a qualified privilege protected it from being held liable for its defamatory statements about APG-Neuros. Again, KTurbo is mistaken. The trial evidence leaves no doubt that KTurbo thoroughly abused any privilege it may have had to disparage APG-Neuros.

In *Kuwik v. Starmark Star Marketing & Administration, Inc.*, 619 N.E.2d 129 (Ill. 1993), the Illinois Supreme Court adopted a new regime for adjudicating qualified privilege defenses to defamation claims, in order to better separate the

legal determinations made by a court from the factual questions reserved for the finder of fact. See *Dawson v. N.Y. Life Ins. Co.*, 932 F. Supp. 1509, 1528-29 (N.D. Ill. 1996) (describing changes wrought by *Kuwik*). Following the lead of the Restatement (Second) of Torts, the *Kuwik* court ruled that a trial court should decide as a matter of law whether the occasion for the communication “created some recognized duty or interest to make the communication so as to make it privileged.” 619 N.E.2d at 134. But such a decision would not end the inquiry, because a qualified privilege could be lost, under *Kuwik*, if the finder of fact concluded that the defendant abused the privilege. *Id.* at 135. And the *Kuwik* court expressly expanded the ways to prove such abuse beyond “actual malice,” to include factors that formerly limited a court’s initial qualified privilege determination:

We now hold that to prove an abuse of the qualified privilege, the plaintiff must show a direct intention to injure another, or a reckless disregard of the defamed party’s rights and of the consequences that may result to him. Thus, an abuse of a qualified privilege may consist of any reckless act which shows a disregard for the defamed party’s rights, including the failure to properly investigate the truth of the matter, limit the scope of the material, or send the material to only the proper parties.

Id. at 135-36 (internal citations, quotation marks, brackets, and ellipses omitted).

KTurbo says that the district court misapplied *Kuwik* by concluding that KTurbo’s defamatory statements “were not privileged” because they arose from an “intent to ‘break’ and ‘terminate’ APG-Neuros” and thus “were not made in good faith.” A 24. KTurbo ignores the likely possibility that, in the district court’s shorthand, “not privileged” includes situations when a privilege is lost through abuse. But even if the district court did mistakenly revert to the pre-*Kuwik*

standard that made “good faith” an element of establishing privilege in the first instance, any error was completely harmless because the district court, as the finder of fact, determined that KTurbo had a direct intention to injure APG-Neuros. A 24. That finding conclusively establishes that KTurbo abused any qualified privilege, and it has the same effect as a ruling that KTurbo’s defamatory statements were not privileged in the first place. *Kuwik*, 619 N.E.2d at 135-36.

KTurbo also faults the district court for not demanding “clear and convincing evidence” that KTurbo abused any qualified privilege for its defamatory statements. But KTurbo did not argue for such a standard of proof in the district court. D230 at 27-33; D231 at 12-14; D233 at 1-3. It therefore has waived any right to claim on appeal that the district court erred by using the usual “preponderance of the evidence” standard. *See Republic Tobacco*, 381 F.3d at 728, 730 (“It is axiomatic that issues and arguments which were not raised before the district court cannot be raised for the first time on appeal” (internal quotation marks omitted)). In any event, the “clear and convincing evidence” standard should not apply in this case because that standard applies only to claims brought by a “public figure” or a “public official,” and KTurbo has never contended, much less established, that APG-Neuros is either. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 244 (1986).⁷

⁷ KTurbo cites *Myers*, 808 N.E.2d at 1148, for the notion that the “clear and convincing evidence” standard applies here. But *Myers* takes its description of the applicable standard from *Martin v. State Journal-Register*, 612 N.E.2d 1357, 1362 (Ill. App. Ct. 1993), which expressly relied upon *Anderson* and tied the standard to the fact that the case involved “a reporter’s comments about a public figure.” *Anderson* is plain that the “clear and convincing evidence” standard applies only if the case is brought by a “public official” or a “public figure.” 477 U.S. at 244.

Thus, the real question for this Court on the qualified privilege issue is whether the district court committed clear error in finding that KTurbo had a direct intention to injure APG-Neuros. The evidence is overwhelming that KTurbo had exactly that intention. On multiple occasions, HeonSeok Lee expressly stated that KTurbo intended to “break” and “terminate” APG-Neuros by disseminating defamatory statements that APG-Neuros had engaged in “cheating” and “crimes” on its South Valley bid and in the CH2MHill report. A 132 (“ABSOLUTELY GREAT CHANCE of breaking Neuros”); A 137 (“break [APG-Neuros] of immorality completely”); A 143 (“terminate Neuros completely”); A 139 (“fighting and breaking Neuros in NA market”); *see* SA 59-63, 227, 258-61. Lee also testified that he made his accusations “when our product performance was low” and “when our products were rejected from the bidding acceptance.” SA 218. And Lee continued his defamatory campaign even after his own sales representatives advised him against making those accusations (A 131, 133, 135; SA 15-16, 20), APG-Neuros detailed to him why the accusations were wrong (SA 22-26), and APG-Neuros’s lawyers sent him a cease-and-desist letter calling the accusations “untrue and defamatory” (SA 400-01). The inference is inescapable that Lee had an overriding desire to harm APG-Neuros in order to improve KTurbo’s competitive position.

KTurbo points to trial testimony in which Lee claimed that his “primary purpose” in defaming APG-Neuros was actually to create a “fair market environment.” A 426. But the district court was well aware of that testimony. D233 at 3. And, as the finder of fact, the court obviously decided not to credit that

testimony in light of the abundant contemporaneous evidence that KTurbo's true intention was to "break" and "terminate" APG-Neuros. *See* A 2-3 ("The Court weighed the testimony of each witness and determined whether the testimony was truthful and accurate (in part, in whole, or not at all) and decided what weight, if any, to give to the testimony of each witness"); A 24 (finding that defamatory statements "were not made in good faith"). Nothing about that determination suggests that the district court committed a "clear error." *See supra* p. 20.

Furthermore, KTurbo independently abused any qualified privilege for its defamatory statements through "reckless act[s] which show[] a disregard for the defamed party's rights." *Kuwik*, 619 N.E.2d at 136. In particular, KTurbo utterly failed "to properly investigate the truth of" its accusations that APG-Neuros cheated on the South Valley bid and in the testing described in the CH2MHill report. *Id.* KTurbo made no effort to contact the CH2MHill engineer who witnessed the testing behind the CH2MHill report, missing an opportunity to understand the nature of the testing. SA 5. Nor did KTurbo consult an attorney before widely disseminating its accusations, despite being advised to do so by its sales representatives. A 131-32; SA 15, 223-24, 228, 229. KTurbo likewise waited nearly a year after it began its defamatory campaign to obtain the opinion of an independent expert, who (not surprisingly) was unable to "validate" HeonSeok Lee's calculations or otherwise conclude that the South Valley bid or the CH2MHill report reflected any efficiency overstatement. SA 94, 96, 112-29, 521-28. And KTurbo failed to go back to Greg Harris after he accepted Neuros blowers for the Napa Valley WWTP in September

2008 based on testing that led him to conclude that KTurbo's accusations made "mistakes," were not "accurate," and were "misleading." SA 183-192, 276. Taking those simple steps surely would have helped KTurbo avoid the admitted "mistakes" in Lee's defamatory slides. SA 134, 263-67, 269-70.

The fact that KTurbo also "had reason to know" that its defamatory accusations were false further establishes its "reckless disregard" for APG-Neuros's rights. *See Giant Screen Sports v. Canadian Imperial Bank of Commerce*, 553 F.3d 527, 536 (7th Cir. 2009). Lee well understood that he was changing the stated conditions behind the South Valley bid and the efficiency numbers in the CH2MHill report. A 47-48, 59-60, 311-12; SA 3-4, 137. APG-Neuros expressly and repeatedly informed KTurbo that the accusations were false. SA 22-26, 400-01. And KTurbo saw more than one consulting engineer affirm the supposedly overstated efficiency numbers after witnessing tests on Neuros blowers. A 86, 101-04; SA 363-64.

Given all of the evidence that KTurbo intended to injure APG-Neuros, failed to properly investigate its accusations, and had reason to know the accusations were false, there is no basis for reversing the *per se* defamation judgment for APG-Neuros on qualified privilege grounds. To the contrary, abundant authority supports affirmance. Consider, for example, *Gibson v. Philip Morris, Inc.*, 685 N.E.2d 638, 645-46 (Ill. App. Ct. 1997). In that case, the defendants raised a qualified privilege challenge to a defamation judgment entered after a bench trial regarding statements disparaging the plaintiff for supposedly selling "incentive items" intended for sales representatives. *Id.* at 640-41, 645. Rejecting that

challenge, the Illinois Appellate Court affirmed not just on the ground adopted by the trial court—that the defendants acted with “actual malice”—but also on the additional ground that the defendants made the defamatory statements “because of a malicious intent” and the lead defendant “improperly investigated the truth” of those statements. *Id.* at 645-46. The timing of the accusations suggested maliciousness, and the lead defendant had failed to consider the plaintiff’s explanation, check available records, or conduct any independent investigation. *Id.*

Gibson is just one of many authorities to have left determinations about the abuse of a qualified privilege to the finder of fact where the evidence showed an intent to injure, inadequate investigation, or reason to suspect falsity. *See, e.g., Giant Screen*, 553 F.3d at 536 (finding “triable issues” as to whether defendant “knew or had reason to know of” falsity); *Kuwik*, 619 N.E.2d at 136 (finding “question of fact” as to whether defendants “conduct[ed] a proper investigation into the truth of their statements”); *Duncan v. Peterson*, 947 N.E.2d 305, 315-16 (Ill. App. Ct. 2010) (upholding jury finding that defendant “knew that [defamatory letters] contained false statements or he acted in reckless disregard for whether any statements were false”); *Parker*, 756 N.E.2d at 298-301 (ordering trial on qualified privilege defense because defendant “never conducted a careful investigation” and she knew that several individuals “disagreed” with her accusations); *Patlovich v. Rudd*, 949 F. Supp. 585, 594 (N.D. Ill. 1996) (nature and quantity of defamatory statements are “probative of an intent to injure [plaintiff’s] reputation rather than

merely to inform” recipients about tissue testing issue).⁸ Here, where the evidence establishes all three kinds of recklessness, KTurbo’s qualified privilege defense does not remotely warrant a reversal. The district court’s rejection of that defense should be affirmed.

C. KTurbo’s Conduct Warranted the Award of Presumed and Punitive Damages.

KTurbo asserts lastly that the evidence in this case does not establish the “actual malice” that is a prerequisite for an award of presumed or punitive damages based on defamation involving matters of public concern. KTurbo is wrong. Its defamatory statements did not raise public concerns. And, in any event, there is abundant evidence that it published those statements with “actual malice.” The award of presumed and punitive damages should be affirmed.

Under First Amendment principles, presumed or punitive damages may not be awarded for defamation on a matter of public concern unless the plaintiff shows actual malice. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 751 (1985); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974). But states remain free to adopt their own less demanding standards of proof for presumed and punitive damages where the case involves defamation against a private figure on a

⁸ The qualified privilege cases on which KTurbo relies are not to the contrary. *Myers* determined that a dispute over whether the defendant abused a qualified privilege *had to go to the jury* because the timing of the defamatory statements suggested knowledge or recklessness in making the statements. 808 N.E.2d at 1149-52. In *Naleway v. Agnich*, 897 N.E.2d 902, 909-17 (Ill. App. Ct. 2008), the court never considered whether the evidence supported a finding that the defendant did not abuse a qualified privilege. And *Underwager v. Salter*, 22 F.3d 730, 733-36 (7th Cir. 1994), addressed whether well-supported statements made in the course of a scholarly dispute over child abuse reporting abused a qualified privilege *under Wisconsin law*, which unlike Illinois law demands proof of “actual malice.”

matter of private interest. *Dun & Bradstreet*, 472 U.S. at 751, 761. Illinois has done so. *Imperial Apparel, Ltd. v. Cosmo's Designer Direct, Inc.*, 882 N.E.2d 1011, 1020 (Ill. 2008) (“Where the defamatory statements involve a purely private matter, by contrast, an award of punitive damages is not dependent upon actual malice being established.”). At most, a plaintiff seeking punitive damages under Illinois law must show that the tort was “committed with fraud, actual malice, deliberate violence or oppression” or that the defendant acted “willfully, or with such gross negligence as to indicate a wanton disregard of the rights of others.” *Slovinski v. Elliot*, 927 N.E.2d 1221, 1225 (Ill. 2010).⁹

Public concern. KTurbo does not dispute the correctness of the district court’s finding that the evidence in this case satisfied the requirements for punitive damages under Illinois law. See A 35-36. Thus, if KTurbo’s defamatory statements addressed only matters of private interest, the award of presumed and punitive damages must be affirmed. KTurbo insists that the defamatory statements addressed “public concerns,” based on the *Parker* case, where the Illinois Appellate Court held that the defendant had (but may have abused) a qualified privilege to make a “bid-rigging” accusation against an engineer who ran bidding for a public construction project. 756 N.E.2d at 290-91, 297-301. At least in those

⁹ Earlier Appellate Court authorities—one of which the Illinois Supreme Court cited with approval in *Imperial Apparel*, 882 N.E.2d at 1020—hold that “punitive damages may be awarded on the basis of implied malice” for defamation *per se* claims. *Mullen v. Solber*, 648 N.E.2d 950, 952 (Ill. App. Ct. 1995); *Brown v. Farkas*, 511 N.E.2d 1143, 1147 (Ill. App. Ct. 1986).

circumstances, “fair bidding on a public project” was an “interest of social importance.” *Id.* at 298.

The circumstances in this case are different. Here, the question is whether the defamatory statements trigger First Amendment scrutiny, not whether they create a state-law qualified privilege. Here, the accusations are not against a party acting on the public entity’s behalf to develop bid specifications and select among bidders, but rather against one of the bidders. *See supra* p. 5. Here, the accusations were not conveyed to the press in an effort to expose public corruption, but were communicated to sales representatives and consulting engineers in an effort to win business. *See supra* pp. 7-12. And here, standard contractual terms already provide a mechanism to deal with any “efficiency” overstatements in bid materials by imposing penalties if testing witnessed by the consulting engineer reveals an overstatement. SA 239-40.

As in *Dun & Bradstreet*—where no matter of public concern was found in a “hardy” form of “wholly false” commercial speech that was disseminated to a limited business audience and was already constrained by market forces—the “content, form, and context” of KTurbo’s defamatory statements show that the statements involved only matters of private interest. 472 U.S. at 761-63. Indeed, the Third Circuit has concluded that comparative advertising and other forms of commercial speech simply do not trigger the “heightened protection of the actual malice standard,” even when the speech has some plausible connection to a public concern. *U.S. Healthcare, Inc. v. Blue Cross of Greater Phila.*, 898 F.2d 914, 931-37 (3d Cir.

1990) (advertising about costs and consequences of competing health care delivery programs not subject to actual malice standard). After all, the Supreme Court has long held that “[a]dvertisers should not be permitted to immunize false or misleading product information from government regulation simply by including references to public issues.” *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 67-68 (1983).

Accordingly, KTurbo’s defamatory statements should not be deemed to raise matters of public concern that trigger the actual malice standard for presumed and punitive damages. On that ground alone, the damage awards should be affirmed.

Actual malice. Even if KTurbo’s defamatory statements did somehow raise a matter of public concern, the awarded damages still should be affirmed because the evidence of actual malice is overwhelming. “Actual malice” exists when a defamatory statement is made “with knowledge that it was false or with reckless disregard of whether it was false or not.” *Harte-Hanks Commc’ns, Inc. v. Connaughton*, 491 U.S. 657, 659 (1989) (internal quotation marks omitted). And establishing the necessary “reckless disregard” requires proof that the “defendant must have made the false publication with a high degree of awareness of probable falsity or must have entertained serious doubts as to the truth of his publication.” *Id.* at 667 (internal citations, quotation marks, and ellipses omitted).

But “a plaintiff is entitled to prove the defendant’s state of mind through circumstantial evidence.” *Id.* at 668. Such evidence includes motive, failure to conduct a complete investigation, inherent improbability, distortions of third party

reports, and receipt of denials or other contrary information. *See Harte-Hanks*, 491 U.S. at 668, 682-85, 692; *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968); *Republic Tobacco*, 381 F.3d at 735; *Brown & Williamson Tobacco Corp. v. Jacobson*, 827 F.2d 1119, 1137 (7th Cir. 1987). Plus, “[t]he defendant in a defamation action . . . cannot . . . automatically insure a favorable verdict by testifying that he published with a belief that the statements were true.” *St. Amant*, 390 U.S. at 732.

KTurbo nonetheless insists that actual malice is absent simply because HeonSeok Lee claimed at trial that KTurbo “firmly believed” that APG-Neuros was misrepresenting the efficiency of its blowers. KTurbo Br. 41. That unelaborated testimony cannot overcome the abundant direct and circumstantial evidence that KTurbo must, at least, have entertained serious doubts as to the truth of its defamatory statements.¹⁰

First, Lee’s own testimony shows that KTurbo well understood that its defamatory statements were false. When Lee accused APG-Neuros of “cheating” by supposedly guaranteeing 82%+ efficiency to the South Valley WWTP, he knew that no such guarantee had been made. A 310-12; SA 3-4. He knew that APG-Neuros had guaranteed only wire power figures. A 310-11. And he knew that his 82%+ efficiency number resulted from calculations he performed after changing one of the conditions stated in the bid materials. A 311-12; SA 3-4. Likewise, with respect to

¹⁰ KTurbo also asserts that APG-Neuros had to show “actual malice” by clear and convincing evidence. But, yet again, KTurbo did not argue for that standard of proof in the district court. *See* D230 at 27-33, 40-44; D231 at 12-14, 17; D233 at 1-3. KTurbo thus has forfeited any argument for that standard. *See Republic Tobacco*, 381 F.3d at 728, 730. In any event, the evidence of “actual malice” is ample enough to be “clear and convincing.” *See infra* pp. 37-40.

the accusation that the CH2MHill report overstated the efficiency of a Neuros blower, Lee knew that he arrived at his “corrected” efficiency figures by simply changing two key numbers in the report. SA 136-37.

Second, KTurbo had in front of it considerable evidence confirming the falsity of its defamatory statements. In direct communications with KTurbo, APG-Neuros vociferously denied KTurbo’s accusations and explained how they were false. SA 22-26, 400-01. KTurbo also saw two different consulting engineers confirm the accuracy of APG-Neuros’s efficiency numbers after they witnessed tests of Neuros blowers. A 86, 101-04; SA 363-64. And when other turbo blower manufacturers published efficiency and wire power numbers similar to APG-Neuros’s numbers, KTurbo took the highly implausible position that every manufacturer except KTurbo was massively overstating the efficiency of their blowers. SA 283-87, 464, 468.

Third, as we have already detailed, KTurbo failed to conduct any meaningful investigation into the truth of its defamatory statements. *See supra* pp. 30-31. It did not contact the engineer who witnessed the testing described in the CH2MHill report or follow up with the engineer who accepted the Neuros blowers built for the Napa Valley project. SA 5, 276. Nor did KTurbo heed the advice of its own sales representatives to consult with legal counsel before publishing its accusations. A 131-32; SA 15, 223-24, 228, 229. And KTurbo defamed APG-Neuros for almost a year before it bothered to find out from an independent expert that the calculations

on which Lee based his accusations could not be validated. SA 94, 96, 112-29, 521-28.

Fourth, as we also described above, there is no question that KTurbo harbored tremendous ill will towards APG-Neuros and disseminated its defamatory statements for that reason. *See supra* pp. 29-30. Lee specifically stated that KTurbo intended to “break” and “terminate” APG-Neuros by spreading its accusations of “cheating.” A 132, 137, 139, 143. And Lee saw those accusations as a way to compensate for “low” performance by KTurbo’s products. SA 218. Indeed, the district court expressly found that KTurbo’s defamatory statements “were not made in good faith.” A 24.

Together, all of this evidence leaves no doubt that, at the very least, KTurbo acted with “reckless disregard” for whether its defamatory statements were true or not. Similar evidence has established actual malice in many other cases. For instance, in *Harte-Hanks*, the Supreme Court determined that a newspaper defendant had acted with “actual malice” where the newspaper was aware of facts inconsistent with the allegations at issue (including the defendant’s denial of those allegations), yet the newspaper “fail[ed] to conduct a complete investigation” in circumstances suggesting “a deliberate effort to avoid the truth.” 491 U.S. at 684-85, 691-93. Likewise, in *Babb v. Minder*, 806 F.2d 749 (7th Cir. 1986), this Court ruled that an employee plaintiff had proved actual malice where the employer defendant had accused the employee of certain unprofessional acts, but had “in effect” made “no investigation at all” and an investigation would have refuted the

basis for the accusations. *Id.* at 755-56, 758. Finally, in *Republic Tobacco*, this Court found that sufficient proof of actual malice came from evidence that the defendant sent defamatory letters “in order to gain a business advantage over its competitor” and “deliberately used the letters to harm [the plaintiff’s] business.” 381 F.3d at 735.¹¹

Under these authorities, KTurbo’s knowledge of so many facts contradicting its defamatory accusations, its complete failure to investigate the truth of those accusations, and its malicious motive for making the accusations easily establish actual malice. Accordingly, the presumed and punitive damages awarded to APG-Neuros should be affirmed.

II. The District Court Relied on an Erroneous Interpretation of the Lanham Act in Rejecting APG-Neuros’s Claims Under the Lanham Act and Illinois’s Uniform Deceptive Trade Practices Act.

While the district court was absolutely correct in finding KTurbo liable for defamation *per se* and awarding APG-Neuros punitive and presumed damages, the district court unfortunately committed an error of law in denying APG-Neuros any relief under the Lanham Act and the DTPA. The district court rejected APG-Neuros’s claims under those statutes solely because it believed that the

¹¹ See also *Brown & Williamson*, 827 F.2d at 1137 (actual malice present where case “combin[ed] a distortion of a government report with a vehement denial . . . and an investigation . . . that tended to corroborate the denial”); *Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 538-40 (7th Cir. 1982) (actual malice found where defamatory article was created to promote story line and there was “virtually no effort to check the validity of statements”); *Poulos v. Lutheran Social Servs. of Ill., Inc.*, 728 N.E.2d 547, 556 (Ill. App. Ct. 2000) (actual malice shown where defendant had before it test results that contradicted defamatory statement); *Fopay*, 334 N.E.2d at 87-88, 90-92 (“defendant’s failure to investigate despite ample time to do so, his reliance on clearly biased sources, his deliberate concealment of information, and his obvious desire to have plaintiff dismissed” showed actual malice).

dissemination of KTurbo's false statements through "direct correspondence" and "face-to-face communications," without any distribution to "members of the general public," did not "rise to the level of advertising or promotion" required by Section 43(a) of the Lanham Act. A 27.¹² In so ruling, the district court relied on an unduly parsimonious reading of this Court's decision in *Sanderson v. Culligan International Co.*, 415 F.3d 620 (7th Cir. 2005), that does real violence to the text and purpose of Section 43(a). The district court's ruling on APG-Neuros's Lanham Act and DPTA claims therefore should be reversed and those claims should be remanded for an award of injunctive relief and attorneys' fees.

Section 43(a) of the Lanham Act provides, in relevant part:

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)(1). The issue in this case is whether KTurbo's dissemination of its false statements about APG-Neuros to "most of the big engineering companies" running turbo blower competitions for WWTP projects (SA 48-49) can count as

¹² Relying on decisions regarding other Lanham Act requirements, the district court ruled that "[c]laims under the DTPA" must "'rise or fall' based on Lanham Act claims for the same conduct because the legal inquiries are the same under either cause of action." A 24, 27.

“commercial advertising or promotion” under Section 43(a)(1)(B), even though the statements did not go to the “general public” and KTurbo made the statements in “direct correspondence” and “face-to-face presentations.”

This Court did consider the scope of the “commercial advertising or promotion” requirement in *Sanderson*. But, in that case, there were “just three examples of supposedly false statements” about the plaintiff’s water conditioners, all of which “were person-to-person communications at trade shows.” 415 F.3d at 624. And the plaintiff did not contend that those statements were “commercial advertising or promotion” under the Court’s prior decision in *First Health Group Corp. v. BCE Emergis Corp.*, 269 F.3d 800 (7th Cir. 2001), or even mention that decision. *Sanderson*, 415 F.3d at 624. Nonetheless, and without any discussion of the matter, the *Sanderson* court stated that the Seventh Circuit had “held in *First Health* . . . that § 43(a) addresses ‘promotional material disseminated to anonymous recipients,’ . . . leav[ing] to state law the evaluation of oral statements and brochures at trade shows.” *Id.* (quoting *First Health*, 269 F.3d at 804).

In *First Health*, this Court did suggest that the “commercial advertising or promotion” requirement would turn on whether sales endeavors “entailed promotional material disseminated to anonymous recipients.” 269 F.3d at 804. But that suggestion was actually dicta because the Court ultimately assumed that the requirement was satisfied without any analysis of the sales endeavors at issue. *Id.* Plus, the Court’s discussion of the matter principally took aim at the district court’s extremely expansive view that “commercial advertising or promotion” was a

“synonym for all commercial speech” subject to government regulation. *Id.* at 803. Furthermore, the Court based its suggested standard on its understanding of the term “advertising,” which it defined as “a form of promotion to anonymous recipients, as distinguished from face-to-face communication.” *Id.* (analogizing to “advertising injury” cases). The Court offered no separate view on the meaning of Section 43(a)’s disjunctive reference to “promotion” as another type of communication covered by the statute. Finally, the Court acknowledged that the plaintiff had not presented any legislative history or other evidence to explain the purpose or meaning of the “commercial advertising or promotion” requirement. *Id.* at 804.

Nothing in *Sanderson* or *First Health* supports the district court’s view that KTurbo’s statements were not made in “commercial advertising or promotion” because they did not go to the “general public.” Nor does anything in *Sanderson* or *First Health* foreclose the possibility that the kind of dissemination of false statements in this case—an organized sales campaign of direct communications and in-person presentations to “most of” the relevant purchasing agents—could be commercial “promotion” under Section 43(a). Indeed, district courts in this Circuit have applied Section 43(a) to similar promotional efforts notwithstanding *Sanderson* and *First Health*. See *Enesco Group Inc. v. Jim Shore Designs, Inc.*, No. 05-C-4371, 2005 WL 3334436, at *4 (N.D. Ill. Dec. 6, 2005) (sales calls and individual communications at trade shows); *Derby Indus., Inc. v. Chestnut Ridge*

Foam, Inc., 202 F. Supp. 2d 818, 822-23 (N.D. Ind. 2002) (videotape sent to seven potential customers).

Abundant authority supports such a reading of the “commercial advertising or promotion” requirement. Consider first the text of the requirement. It refers disjunctively to “advertising *or promotion*.” 15 U.S.C. § 1125(a)(1)(B) (emphasis added). Established principles of statutory interpretation require courts to “read a statute to give effect to each word so as to avoid rendering any words meaningless, redundant, or superfluous.” *Witzke v. Femal*, 376 F.3d 744, 753 (7th Cir. 2004). Thus, “promotion” should not receive the same definition as “advertising.” It must refer to other methods of encouraging the purchase of goods or services. Indeed, the relevant dictionary definition of “promotion” goes beyond mere “advertising” to encompass “active furtherance of sale of merchandise through advertising *or other publicity*.” Webster’s Third New International Dictionary 1815 (1993) (emphasis added). In the context of Section 43(a), therefore, the term “promotion” most naturally denotes any active campaign to further the sale of the promoter’s goods or services throughout the relevant market, aside from traditional advertising. Nothing in that understanding of “promotion” categorically excludes direct correspondence or face-to-face communications, which certainly can be used to construct such a campaign.

Giving the term “promotion” that reading does not make all “commercial speech” subject to Section 43(a). Most broadly defined, commercial speech includes all “expression related solely to the economic interests of the speaker and its

audience.” *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 561 (1980). Even when read to include widespread direct correspondence or face-to-face communications, the “commercial advertising or promotion” requirement still cuts back on that universe of speech in two ways. First, it excludes commercial speech that does not seek to encourage the purchase of goods or services, such as instruction manuals, contracts, credit reports, and similar communications. *See, e.g., Gillette Co. v. Norelco Consumer Prods. Co.*, 946 F. Supp. 115, 134 (D. Mass. 1996) (statements inside product packaging). Second, it excludes one-off communications about goods and services that are not part of an active campaign to publicize falsehoods in the relevant market. *See, e.g., Am. Needle & Novelty, Inc. v. Drew Pearson Mktg., Inc.*, 820 F. Supp. 1072, 1077 (N.D. Ill. 1993) (single letter privately addressed to a non-consuming licensor).

The legislative history of the “commercial advertising or promotion” requirement confirms that Congress had no intention to limit Section 43(a) to traditional advertising directed at anonymous recipients. Congress added that requirement as part of a larger rewrite of Section 43(a) in 1988. *See Trademark Law Revision Act of 1988*, Pub. L. No. 100-667, Title I, § 132, 102 Stat. 3935, 3946.¹³

¹³ Prior to the 1988 revision, Section 43(a) read:

Any person who shall affix, apply, or annex, or use in connection with any goods or services, or any container or containers for goods, a false designation of origin, or any false description or representation, including words or other symbols tending falsely to describe or represent the same, and shall cause such goods or services to enter into commerce, and any person who shall with knowledge of the falsity of such designation of origin or description or representation cause or procure the same to be transported or used in commerce or deliver the

The House sponsor of the law amending Section 43(a), Representative Robert Kastenmeier, explained how the requirement came to be. 134 Cong. Rec. H10411, H10419-21 (daily ed. Oct. 19, 1988).

When first passed by the Senate, the proposed changes included an expansion of Section 43(a) to cover false descriptions and representations of “another person’s” products or services. *Id.* at H10420; *see also* Trademark Law Revision Act of 1988, S. 1883, 100th Cong. § 35 (as referred to H. Comm. on the Judiciary, May 17, 1988). Because that proposal “raised the issue of commercial defamation in the context of section 43(a),” it also raised “a host of constitutional problems” in the view of the House. 134 Cong. Rec. at H10420. Namely, “[t]he proposal was not limited to commercial speech, and appeared to apply to private citizens, the news media, and business competitors alike.” *Id.* “To avoid legitimate constitutional challenge,” the House added language to “limit the reach of the subsection.” *Id.* Rep. Kastenmeier summarized the intent of the new language: “Because section 43(a) will now provide a kind of commercial defamation action, the reach of the section specifically extends only to false and misleading speech that is encompassed within the ‘commercial speech’ doctrine by the United States Supreme Court.” *Id.* (citing *Central Hudson*).

same to any carrier to be transported or used, shall be liable to a civil action by any person doing business in the locality falsely indicated as that of origin or in the region in which said locality is situated, or by any person who believes that he is or is likely to be damaged by the use of any such false description or representation.

15 U.S.C. § 1125(a) (1982).

With respect to the “commercial advertising or promotion” requirement, in particular, Rep. Kastenmeier endorsed the analysis put forward by a noted trademark commentator who described the misrepresentations excluded from Section 43(a) coverage as “the type which raise free speech concerns,” such as product reviews by Consumer Reports or commentary on corporate product liability and injuries to the public. *Id.* at H10421. Rep. Kastenmeier concluded that “the proposed change in section 43(a) should not be read in any way to limit political speech, consumer or editorial comment, parodies, satires, or other constitutionally protected material” and that “[t]he section is narrowly drafted to encompass only clearly false and misleading commercial speech.” *Id.* The Senate agreed to the House’s addition of the “commercial advertising or promotion” requirement, with a sponsor of the law stating that “Congress’ intent” was that the language “be interpreted only as excluding political speech.” 134 Cong. Rec. S16973 (daily ed. Oct. 20, 1988) (statement of Sen. DeConcini).

Two things are clear from the legislative history. Section 43(a) is best understood as providing “a kind of commercial defamation action” (134 Cong. Rec. at H10420), rather than simply a “false advertising” remedy. And the purpose of the “commercial advertising or promotion” requirement was not to insist on traditional advertising to anonymous recipients, but to ensure that Section 43(a) was limited to core commercial speech used to advertise or promote goods or services. *See* 2 Anne Gilson LaLonde, *Gilson on Trademarks* § 7.02[6][b][i][D], at 7-54 (2011) (“Congress included this requirement in order to distinguish regulatable

commercial speech from political speech, news commentary, and other clearly protectible forms of expression.”).

The overwhelming weight of authority from around the nation likewise supports a reading of the “commercial advertising or promotion” requirement that does not categorically exclude direct correspondence or face-to-face communications from Section 43(a)’s scope. Six different federal courts of appeals—the First, Second, Fifth, Eighth, Ninth, and Tenth Circuits—have agreed that Section 43(a) reaches beyond classic advertising to more informal types of promotion that are part of a campaign to reach the relevant market of purchasers. *See Podiatrist Ass’n, Inc. v. La Cruz Azul de P.R., Inc.*, 332 F.3d 6, 19 (1st Cir. 2003) (Section 43(a) “covers more than classic advertising campaigns,” but actionable statements must “target a class or category of purchasers or potential purchasers”); *Fashion Boutique of Short Hills, Inc. v. Fendi USA, Inc.*, 314 F.3d 48, 57 (2d Cir. 2002) (“‘promotion’ may take other forms of publicity used in the relevant industry, such as . . . sales presentations to buyers,” if they are “part of an organized campaign to penetrate the relevant market”); *Proctor & Gamble Co. v. Haugen*, 222 F.3d 1262, 1273-74 (10th Cir. 2000) (“representations need not be made in a ‘classical advertising campaign,’ but may consist instead of more informal types of ‘promotion’” if “disseminated sufficiently to the relevant purchasing public”); *Porous Media Corp. v. Pall Corp.*, 173 F.3d 1109, 1121 (8th Cir. 1999) (similar); *Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co.*, 173 F.3d 725, 735 (9th Cir. 1999) (same); *Seven-Up Co. v. Coca-Cola Co.*, 86 F.3d 1379, 1384-86 (5th Cir. 1996) (same).

For instance, in *Seven-Up*, the Fifth Circuit determined that Section 43(a) covered a series of disparaging sales presentations delivered to 11 out of 74 “cross-franchise” soft-drink bottlers in the course of discussions between Coca-Cola and the bottlers about switching from Seven-Up to Sprite. 86 F.3d at 1381-87. Rejecting Coca-Cola’s argument that “face-to-face business meetings with a few local bottlers” did not constitute “commercial advertising or promotion,” the court reasoned that “both the required level of circulation and the relevant ‘consuming’ or ‘purchasing’ public addressed by the dissemination of false information will vary according to the specifics of the industry.” *Id.* at 1384-85. In the case before it, the Fifth Circuit concluded that “Coca-Cola’s use of part or all of the presentation materials during negotiations” with the 11 bottlers satisfied the “commercial advertising or promotion” requirement because the presentation materials were developed and used as part of a concerted effort to convince bottlers to switch and “the presentation was disseminated sufficiently to the relevant purchasing public.” *Id.* at 1386-87. *See also Porous Media*, 173 F.3d at 1121 (Section 43(a) covered alert sent to five customers in a small market for disposable box filters); *Coastal Abstract*, 173 F.3d at 735 (disparaging statements made to one of three nationwide refinancing operations were “commercial promotion”).

This Court appears to be the only court of appeals to have even suggested that Section 43(a) might be limited to traditional advertising or might categorically exclude promotion through face-to-face communications and direct correspondence. Indeed, the Second Circuit has specifically rejected such a limitation, writing that

“[t]he problem with the Seventh Circuit’s focus on the term ‘advertising’ is that it fails to define the term ‘promotion’ in any meaningful way.” *Fashion Boutique*, 314 F.3d at 57. There simply is no reason for this Court to take an outlier position that narrows Section 43(a) beyond anything demanded by the text or history of the “commercial advertising or promotion” requirement.

Indeed, courts widely recognize that “Section 43(a) is remedial in nature and should be interpreted and applied broadly so as to effectuate its remedial purpose.” *Planetary Motion, Inc. v. Techsplosion, Inc.*, 261 F.3d 1188, 1193 (11th Cir. 2001); *see also Seven-Up*, 86 F.3d at 1383 (Section 43(a) “should be broadly construed”). Limiting Section 43(a) to traditional advertising aimed at anonymous recipients, or requiring dissemination to the “general public,” or excluding “face-to-face communications” and “direct correspondence” would completely defeat that remedial purpose for the enormous number of businesses that operate in smaller industries where traditional advertising is not used. Those businesses would lose the important protections of the Lanham Act even though a campaign of commercial defamation through face-to-face communications and direct correspondence in a small universe of purchasers can be just as devastating as traditional advertising that delivers the same message. *See Lampi Corp. v. Am. Power Prods., Inc.*, No. 93 C 1225, 1994 WL 501996, at *2-3 (N.D. Ill. Sept. 12, 1994) (for distributors of fluorescent lighting to chain stores, “making statements and sales presentations to representatives of only a few such chains could have a large impact in the industry”). In short, the best reading of Section 43(a)’s “commercial advertising or

promotion” requirement allows liability when a defendant makes misrepresentations about the plaintiff or its goods or services in an organized campaign within the relevant market to further the sale of the defendant’s goods or services.

The undisputed facts of this case easily satisfy that standard. KTurbo created a package of defamatory PowerPoint slides for the express purpose of using them in a campaign to promote the sale of KTurbo blowers. A 50-72, 130, 144-69; SA 5, 11-12, 201-02, 281-82. In furtherance of that campaign, KTurbo then disseminated the slides and the false information in them throughout the WWTP industry, particularly among the relatively small group of engineering firms that typically run the purchasing process for WWTPs that want to acquire turbo blowers. A 50-130, 131-32, 144-69; SA 7-8, 11-12, 31-32, 33, 42-45, 47, 49, 165-70, 178-79, 180-81, 210-11, 213-14, 221, 225, 248-49, 262-56, 272-80, 307-16, 359, 418; *see supra* pp. 7-12. Thanks to KTurbo’s tireless efforts to publicize its false accusations, KTurbo succeeded in presenting its defamatory slides to U.S. engineers “many times” in 2008 and ultimately laid out its accusations to “most of the big engineering companies” involved in running competitions for North American WWTP projects. SA 48-49, 215-17; *see* SA 418. That sort of industry-wide campaign constitutes “commercial promotion” under Section 43(a) of the Lanham Act. *See supra* pp. 48-49.

Because Section 43(a)’s “commercial advertising or promotion” requirement was the only basis on which the district court rejected APG-Neuros’s Lanham Act

and DTPA claims, the judgment against APG-Neuros on those claims should be reversed and those claims should be remanded so that the district court can award appropriate injunctive relief and attorneys' fees. *See* 15 U.S.C. §§ 1116(a), 1117(a) (authorizing an injunction and attorneys' fees to remedy Section 43(a) violation); 815 ILCS 510/3 (same for DTPA violation).

CONCLUSION

For the foregoing reasons, APG-Neuros respectfully asks that the Court affirm the judgment for APG-Neuros on its defamation *per se* claim, reverse the judgment against APG-Neuros on its Lanham Act and DTPA claims, and remand the Lanham Act and DTPA claims for an award of injunctive relief and attorneys' fees.

Respectfully submitted,

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August 17, 2012

CERTIFICATE OF COMPLIANCE

1. This Brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 28.1(e)(2)(B)(i) because it contains 13,785 words excluding the parts of the Brief exempted by Rule 32(a)(7)(B)(iii).

2. This Brief complies with typeface and type style requirements of Federal Rule of Appellate Procedure 32(a)(5) & (6) and Circuit Rule 32(b) because it was prepared in a proportionally spaced typeface using Microsoft Word 2007 in 12-point Century Schoolbook for both the text and footnotes.

Dated: August 17, 2012

/s/ Joshua D. Yount

CIRCUIT RULE 30(d) CERTIFICATION

Pursuant to Circuit Rule 30(d), counsel certifies that all materials required by Circuit Rule 30(a) are included in the Short Appendix attached to the Opening Brief submitted by KTurbo and all materials required by Circuit Rule 30(b) are included in the Supplemental Appendix that accompanied APG-Neuros's original Combined Responsive and Opening Brief or the Separate Appendix submitted by KTurbo.

Dated: August 17, 2012

/s/ Joshua D. Yount

CERTIFICATE OF SERVICE

I hereby certify that on August 17, 2012, I electronically filed the foregoing Corrected Combined Responsive and Opening Brief with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Joshua D. Yount