

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

**REPLY 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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INTRODUCTION

Our opening brief in support of APG-Neuro's cross-appeal showed that the district court erroneously rejected APG-Neuro's claims under the Lanham Act and the Illinois Uniform Deceptive Trade Practices Act ("DTPA") based on an incorrect legal ruling that direct communications do not satisfy the "commercial advertising or promotion" requirement of Section 43(a) of the Lanham Act. APG-Neuro Opening Br. 40-52.¹ We showed that the text, history, and purpose of that requirement—as well as the precedent interpreting it—make clear that Section 43(a) imposes liability for false statements made in a market-wide campaign of face-to-face and other direct communications. *Id.*

KTurbo responds that the district court's factual findings, rather than its legal conclusions, control the cross-appeal, that the district court correctly read the "commercial advertising or promotion" requirement, and that the district court's ruling can be affirmed on other grounds. KTurbo Resp. Br. 46-63. None of KTurbo's arguments has merit. First, the district court made no factual finding on the magnitude of the face-to-face communications at issue; it simply concluded that any direct communications categorically were not "commercial advertising or promotion," regardless of how widespread the communications were. Second,

¹ "APG-Neuro Opening Br. ___" refers by page number to the Combined Responsive and Opening Brief for Plaintiffs-Appellees/Cross-Appellants Neuros Co., Ltd. and Aviation and Power Group Inc. d/b/a APG-Neuro, Inc. "KTurbo Resp. Br. ___" refers by page number to the Combined Reply Brief and Answering Brief for Defendant-Appellant/Cross-Appellee KTurbo, Inc. Other citation conventions in this brief are described in the first footnote of our opening brief. APG-Neuro Opening Br. 1.

KTurbo's arguments about how to read the "commercial advertising or promotion" requirement rest on mischaracterizations of the statutory text, the legislative history, and the relevant precedents. Third, all of KTurbo's alternative grounds for affirmance are legally irrelevant, completely waived, or substantively meritless.

Accordingly, the district court's ruling on APG-Neuros's Lanham Act and DTPA claims should be reversed, and those claims should be remanded for an award of injunctive relief and attorneys' fees.²

ARGUMENT

I. The District Court Made No Factual Findings that Require Affirmance in APG-Neuros's Cross-Appeal.

KTurbo begins its response to our cross-appeal arguments by asserting that the district court ruled that KTurbo did not engage in a market-wide campaign to publicize its false accusations against APG-Neuros. KTurbo Resp. Br. 48-51. According to KTurbo, that supposed factual finding is now binding on appeal because APG-Neuros challenges only the district court's legal conclusion that the "commercial advertising or promotion" requirement of Section 43(a) excludes "direct correspondence" and "face-to-face communications." KTurbo completely misconstrues the district court's ruling.

In evaluating APG-Neuros's Lanham Act claim, the district court first reached the legal conclusion that the "commercial advertising or promotion" requirement "addresses promotional material disseminated to anonymous

² Pursuant to Fed. R. App. P. 28.1(c)(4), this reply brief is limited to issues presented by the cross-appeal and thus does not address the merit or timeliness of the arguments raised by KTurbo's reply in the main appeal.

recipients” and excludes “[d]irect communications, whether in person or by letter.” A 23 (internal quotation marks omitted). Then the court described the evidence of “advertising or promotion”: (1) “a couple of isolated emails”; (2) “face-to-face conversations”; (3) PowerPoint presentations conveyed to KTurbo representatives; and (4) PowerPoint presentations posted on KTurbo’s “non-public ‘salesnet’” or “the Korean-language version of its public website.” A 26. Finally, the court deemed APG-Neuros’s evidence of promotional materials “unpersuasive” because it “consists 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 27.³

Crucially, the district court did not even consider, much less rule on, how widely KTurbo engaged in face-to-face communications in the relevant market of potential purchasers. That is understandable because the court had already determined that, as a matter of law, the “commercial advertising or promotion” requirement categorically excludes “direct communications.” A 23. It was the type

³ In its extended block quote from the district court’s opinion (KTurbo Resp. Br. 50), KTurbo tellingly omits the last four sentences of the court’s analysis:

What APG-Neuros characterizes as a “massive library of promotional materials,” *see* Pl. Closing Argument Br. 6, consists 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. APG-Neuros’s attempts to characterize KTurbo’s comments as false advertising are unpersuasive. Because APG-Neuros has failed to prove that KTurbo’s communications rise to the level of advertising or promotion, APG-Neuros failed to prove its Lanham Act claim. Judgment is awarded in favor of KTurbo on Count I of APG-Neuros’s Complaint.

A 27.

of KTurbo's communications, not how widely KTurbo engaged in them, that formed the basis for the court's ruling. The district court thus never held that KTurbo was saved from Section 43(a) liability because its false face-to-face communications were not publicized widely enough to turbo blower purchasers in the waste water treatment plant ("WWTP") industry.

Indeed, such a finding would not be possible. The district court would have had to disregard the uncontradicted admissions of KTurbo's president that he presented his defamatory PowerPoint slides to U.S. engineers "many times" and made his false accusations to "most of the big engineering companies" running competitions for North American WWTP projects. SA 48-49, 215-17. Nothing in the district court's ruling remotely suggests that the court took that implausible and unfounded step. And the fact that KTurbo, even now, does not dispute any of the evidence regarding how widely it disseminated its disparaging statements (*see* APG-Neuros Opening Br. 51) confirms that the district court did not (and could not) make the factual finding imagined by KTurbo.

In short, the district court's factual findings are no obstacle to reversing its erroneous legal conclusion that APG-Neuros could not satisfy the Lanham Act's "commercial advertising or promotion" requirement with evidence of market-wide face-to-face communications. *See Billington v. Prudential Ins. Co. of Am.*, 254 F.2d 428, 430 (7th Cir. 1958) ("findings induced by an erroneous view of the law are not binding on this court on appeal"); 9C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2585, at 401-02 (3d ed. 2008) ("Insofar as a finding

is derived from the application of an improper legal standard to the facts, it cannot be allowed to stand.”⁴

II. **Face-to-Face and Other Direct Communications Can Be “Commercial Advertising or Promotion” Under Section 43(a) of the Lanham Act.**

KTurbo also tries to defend the district court’s legal ruling that “commercial advertising or promotion” is limited to traditional advertisements “disseminated to anonymous recipients” and excludes “direct correspondence” and “face-to-face communications.” A 23, 27. Nothing KTurbo says, however, changes the fact that the text, history, and purpose of Section 43(a), as well as the overwhelming weight of authority interpreting the statute, support a broader reading that imposes liability for a market-wide campaign to publicize false statements through face-to-face and other direct communications.

KTurbo’s Flip-Flop. It is hard to square KTurbo’s current rhetoric about the reach of Section 43(a)’s “commercial advertising or promotion” requirement with the position it took in the district court. KTurbo now calls the district court’s narrow interpretation of that requirement the “plain reading” of the statute. KTurbo Resp. Br. 56. It also asserts that “any reasonable reading” must exclude face-to-face communications and direct correspondence. *Id.* at 51. But in the district court, KTurbo argued precisely the opposite. It maintained that

⁴ KTurbo cites *Williams v. Leach*, 938 F.2d 769 (7th Cir. 1991), in support of its argument, but that decision is of no relevance here. In *Williams*, the appellant did not make any legal or factual challenge to a ruling that the statute of limitations warranted dismissal. *Id.* at 772-73. Here, APG-Neuros expressly raises a legal challenge to the district court’s ruling that its Lanham Act and DTPA claims failed because KTurbo’s face-to-face communications supposedly did not qualify as “commercial advertising or promotion.”

“commercial speech under the statute encompasses more than just a traditional advertising campaign.” D230 at 25. And it insisted that “a sales presentation to a buyer” is “‘promotion’ under the terms of the Lanham Act.” D233 at 3. KTurbo’s flip-flop belies any notion that APG-Neuros advances an unreasonable or unfounded reading of Section 43(a).

Text. When KTurbo finally gets to the text of the “commercial advertising or promotion” requirement, it becomes clear that KTurbo has no answer to our showing that the requirement’s disjunctive reference to “promotion” (15 U.S.C. § 1125(a)(1)(B)) is best read to encompass campaigns of face-to-face or other direct communications that publicize false statements throughout the relevant market of purchasers. *See* APG-Neuros Opening Br. 44-45. Everything KTurbo says on the subject already has been rebutted or actually supports our reading.

KTurbo maintains that “commercial advertising or promotion” should not encompass all “commercial speech.” KTurbo Resp. Br. 57. But KTurbo ignores our showing that the statutory language applies to a campaign of face-to-face communications, yet still excludes some other commercial speech. *See* APG-Neuros Opening Br. 44-45. For example, commercial speech that does not encourage the purchase of goods or services is not “commercial advertising or promotion.” *See, e.g., Gillette Co. v. Norelco Consumer Prods. Co.*, 946 F. Supp. 115, 134 (D. Mass. 1996) (statements inside product packaging). Nor are one-off communications made outside of a campaign to publicize falsehoods. *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). And the same is true for commentary of the sort that appears in Consumer Reports. *See, e.g., New.Net, Inc. v. Lavasoft*, 356 F. Supp. 2d 1090, 1117-18 (C.D. Cal. 2004) (acknowledging limitation and applying it to database of “unauthorized” software products).

KTurbo also asserts that “commercial advertising or promotion” suggests “public dissemination beyond individual face-to-face business meetings or in-person communications.” KTurbo Resp. Br. 57. But it supports that assertion with dictionary definitions that describe promotion as “something devised to publicize,” including a “personal appearance,” or as “the furtherance of the acceptance and sale of merchandise through advertising, publicity, or discounting.” *Id.* at 57-58 (internal quotation marks omitted). Those definitions are consistent with the meaning we ascribe to “promotion”: a campaign to further the sale of the promoter’s goods or services throughout the relevant market. *See* APG-Neuros Opening Br. 44-45. And nothing in those definitions excludes face-to-face communications or direct correspondence from being a form of “promotion.”

Indeed, the definitions confirm that “promotion” encompasses all forms of publicizing to potential purchasers, not just traditional advertising to anonymous recipients. Because Section 43(a) refers disjunctively to “advertising *or promotion*” (15 U.S.C. § 1125(a)(1)(B)), the best reading of the statute’s text thus includes a campaign to publicize false statements to potential purchasers through face-to-face communications or direct correspondence.

Legislative History. KTurbo also fails to rebut our showing that the legislative history behind the “commercial advertising or promotion” requirement fully supports the interpretation we advance. KTurbo ignores what the law’s sponsors said about why they inserted the requirement. And it mischaracterizes general statements about the broader rewrite of Section 43(a).

KTurbo first asserts that courts “have recognized that the legislative history of Section 43(a) provides little insight into the meaning of ‘commercial advertising or promotion.’” KTurbo Resp. Br. 52. But the cases they cite—*Coastal Abstract Service, Inc. v. First American Title Insurance Co.*, 173 F.3d 725 (9th Cir. 1999), and *Semco, Inc. v. Amcast, Inc.*, 52 F.3d 108 (6th Cir. 1995)—do not remotely support that assertion. *Coastal Abstract* merely comments that the legislative history does not define “advertising” or “promotion.” That is true, but it does not mean that the legislative history offers no guidance on the purpose or effect of the “commercial advertising or promotion” requirement. Indeed, although *Coastal Abstract* undertook no analysis of the legislative history, it adopted a broad reading of “promotion” in reliance on cases that expressly drew lessons from the legislative history. 173 F.3d at 735; see *Gordon & Breach Sci. Publishers S.A. v. Am. Inst. of Physics*, 859 F. Supp. 1521, 1533-34 (S.D.N.Y. 1994).

As for *Semco*, it analyzes the history of the “commercial advertising or promotion” requirement and concludes that the House of Representatives intended the requirement to limit Section 43(a) to commercial speech, while the Senate believed the requirement excluded only political speech. 52 F.3d at 111-12. *Semco*

declined to settle that dispute because the defendant's misrepresentations—in trade show brochures and *in direct communications with individual purchasers*—fit either conception of the requirement and thus constituted “commercial advertising or promotion.” *Id.* at 112, 114. That analysis is completely consistent with our analysis in this case.

In any event, the legislative history of the “commercial advertising or promotion” requirement makes it clear that Congress did not insert the requirement in order to limit Section 43(a) to traditional advertising. The House sponsor specifically explained the requirement's purpose: “The provision revising section 43(a) to prohibit a kind of commercial defamation has been carefully limited to commercial advertising and promotion. Therefore, consumer reporting, editorial comment, political advertising, and other constitutionally protected material is not covered by this provision.” 134 Cong. Rec. H10419 (daily ed. Oct. 19, 1988) (statement of Rep. Kastenmeier); *see also* APG-Neuros Opening Br. 46-47. With respect to the same provision, the Senate sponsor noted: “Although the Senate sees this language as unnecessary because section 43(a) requires that the misrepresentations be made with respect to goods or services, we consider inclusion of the language harmless so long as Congress' intent that it be interpreted only as excluding political speech is clear.” 134 Cong. Rec. S16973 (daily ed. Oct. 20, 1988) (statement of Sen. DeConcini).

Notwithstanding the clear evidence of what Congress wanted the “commercial advertising or promotion” requirement to accomplish, KTurbo

maintains that the requirement should limit Section 43(a) to traditional advertising because Congress supposedly had a general intent to simply “codify” prior judicial rulings that, according to KTurbo, “virtually all involved traditional advertising.” KTurbo Resp. Br. 53-54 (internal quotation marks omitted). KTurbo’s argument is deeply flawed.

In the first place, as one of the articles cited by KTurbo acknowledges, the “codification” of Section 43(a) case law was highly selective, with changes made to judicial rulings in several areas. *See* Jean Wegman Burns, *Confused Jurisprudence: False Advertising Under the Lanham Act*, 79 B.U. L. Rev. 807, 821-22 (1999). The legislative history also shows that any “codification” was directed at rulings that had evolved Section 43(a) into a prohibition on not just “false advertising,” but also “unfair competition.” 134 Cong. Rec. S16972 (daily ed. Oct. 20, 1988) (statement of Sen. DeConcini); S. Rep. No. 100-515, at 40 (1988); 134 Cong. Rec. S5869 (daily ed. May 13, 1988) (statement of Sen. Grassley).

Furthermore, neither KTurbo nor the article it cites on pre-1988 case law supplies any authority for KTurbo’s assertion that courts had refused to apply the original version of Section 43(a) to sales efforts outside of traditional advertising. *See* KTurbo Resp. Br. 53; *Burns*, 79 B.U. L. Rev. at 818-19. In fact, it is easy to find cases that applied the original Section 43(a) to promotional efforts far beyond traditional advertising. *See Radio Today, Inc. v. Westwood One, Inc.*, 684 F. Supp. 68, 74 (S.D.N.Y. 1988) (“The Lanham Act does not apply merely to false advertising through traditional media channels, but to a broad range of deceptive statements

made in connection with the sale of goods or services.”); *Williams Elecs., Inc. v. Bally Mfg. Corp.*, 568 F. Supp. 1274, 1282 n.24 (N.D. Ill. 1983) (internal memo provided to 20 of defendant’s distributors for use in selling defendant’s products). Those cases viewed the statute as reaching any material used “to influence purchasing decisions.” *Williams Elecs.*, 568 F. Supp. at 1282 n.24. Thus, a congressional intent to codify judicial rulings predating the 1988 statutory rewrite would actually support our position that Section 43(a) applies to a campaign of face-to-face communications or direct correspondence that spreads misrepresentations throughout the relevant purchasing community.

Finally, KTurbo declares that “nothing in the legislative history” suggests that Congress intended to create a commercial defamation action. KTurbo Resp. Br. 55. In reality, however, the legislative history expressly describes the revised Section 43(a) as prohibiting “commercial defamation.” 134 Cong. Rec. H10419, H10420 (daily ed. Oct. 19, 1988) (statement of Rep. Kastenmeier). Those statements dovetail with all of the other legislative history showing that the “commercial advertising or promotion” requirement was not meant to limit Section 43(a) to traditional advertising. *See generally* 2 Anne Gilson LaLonde, *Gilson on Trademarks* § 7.02[6][b][i][D], at 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.”).

Case Law. KTurbo claims that the judicial rulings on the scope of the “commercial advertising or promotion” requirement support its narrow reading of

the statute. KTurbo Resp. Br. 55-60. But KTurbo disregards important limitations on this Court's decisions and completely mischaracterizes the authorities from outside the Seventh Circuit. Properly understood, the Seventh Circuit decisions do not control this case, and the other authorities uniformly reject KTurbo's reading of the statute for good and persuasive reasons.

This Court's discussion of the "commercial advertising or promotion" requirement in *First Health Group Corp. v. BCE Emergis Corp.*, 269 F.3d 800 (7th Cir. 2001), was dicta because the Court ultimately assumed that Section 43(a) applied to some of the defendant's promotional materials. *Id.* at 804. The *First Health* court also lamented the plaintiff's failure to come forward with legislative history that shed light on the meaning or purpose of the requirement. *Id.* And, most critically, the Court never considered whether the disjunctive reference to "promotion" broadened Section 43(a) beyond traditional advertising; the Court simply assumed that "advertising or promotion" meant "advertising." *Id.*

Sanderson v. Culligan International Corp., 415 F.3d 620 (7th Cir. 2005), took the position that *First Health* had held that the "commercial advertising or promotion" requirement "addresses promotional material disseminated to anonymous recipients." *Id.* at 624 (internal quotation marks omitted). But the *Sanderson* court did not receive briefing from the plaintiff on how *First Health* should be viewed. *Id.* Nor did the Court discuss the assumptions behind *First Health's* dicta on the scope of Section 43(a). *Id.* Ultimately, the Court merely ruled

that *three* person-to-person communications at trade shows did not amount to “commercial advertising or promotion.” *Id.*⁵

If the *First Health*, *Sanderson*, or *ISI* courts had intended to lay down a broad rule that even widespread direct communications could never be “commercial advertising or promotion,” then they surely would have circulated their opinions to all of the active Seventh Circuit judges in compliance with Circuit Rule 40(e). Such a ruling would have created a circuit split because several other federal courts of appeals had already ruled that direct communications can trigger Section 43(a) liability when disseminated sufficiently to the relevant purchasing public. *See Proctor & Gamble Co. v. Haugen*, 222 F.3d 1262, 1273-74 (10th Cir. 2000); *Porous Media Corp. v. Pall Corp.*, 173 F.3d 1109, 1121 (8th Cir. 1999); *Coastal Abstract*, 173 F.3d at 735; *Seven-Up Co. v. Coca-Cola Co.*, 86 F.3d 1379, 1384-86 (5th Cir. 1996); *Semco*, 52 F.3d at 111-14. Yet *First Health*, *Sanderson*, and *ISI* do not contain the footnote required by Circuit Rule 40(e) when a decision of the Court would “create a conflict between or among circuits.” 7th Cir. R. 40(e).

Properly understood, the Seventh Circuit decisions invoked by KTurbo offer only limited holdings and qualified analysis that do not require affirmance of the district court’s ruling on APG-Neuros’s Lanham Act and DTPA claims. The arguments in this case show that the text and history of the “commercial

⁵ KTurbo also references *ISI Int’l, Inc. v. Borden Ladner Gervais LLP*, 316 F.3d 731 (7th Cir. 2003). But, like *Sanderson*, *ISI* takes *First Health* as making a *holding* on the scope of the “commercial advertising or promotion” requirement, without considering the limitations and qualifications on that decision’s analysis. *Id.* at 733.

advertising or promotion” requirement do not limit Section 43(a) to traditional advertising. And the undisputed factual record shows that KTurbo disseminated its false and defamatory statements in an organized sales campaign of direct communications and in-person presentations to “most of” the relevant purchasers in the WWTP industry. *See* APG-Neuros Opening Br. 51.

Furthermore, accepting KTurbo’s narrow reading of the “commercial advertising or promotion” requirement and excluding all market-wide campaigns of face-to-face communications or direct correspondence from Section 43(a)’s coverage would put this Court into direct conflict with seven other circuit courts. Opinions from the First, Second, Fifth, Sixth, Eighth, Ninth, and Tenth Circuits recognize that Section 43(a) reaches beyond traditional advertising to any type of promotion used in a campaign to communicate with 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); *Fashion Boutique of Short Hills, Inc. v. Fendi USA, Inc.*, 314 F.3d 48, 57 (2d Cir. 2002); *Proctor & Gamble*, 222 F.3d at 1273-74 (10th Cir.); *Porous Media*, 173 F.3d at 1121 (8th Cir.); *Coastal Abstract*, 173 F.3d at 735 (9th Cir.); *Seven-Up*, 86 F.3d at 1384-86 (5th Cir.); *Semco*, 52 F.3d at 111-14 (6th Cir.); *see also* APG-Neuros Opening Br. 48-49 and *supra* pp. 8-9 describing holdings.

KTurbo tries to dodge this inconvenient fact by observing that most of the decisions require widespread dissemination within the relevant market. KTurbo

Resp. Br. 58-59.⁶ But the very decision cited for that proposition makes crystal clear that the need for market-wide dissemination does not rule out liability for face-to-face communications or direct correspondence. *Fashion Boutique*, 314 F.3d at 57. Indeed, *Fashion Boutique* expressly rejects the suggestion in *First Health* that Section 43(a) reaches only traditional advertising, because that approach “fails to define the term ‘promotion’ in any meaningful way.” *Id.* KTurbo’s other authorities likewise merely say that one-off false statements to an insignificant portion of the purchasing public are not “commercial advertising or promotion.”⁷ Nothing in those authorities, therefore, casts any doubt on the strong judicial support for our position that “commercial advertising or promotion” encompasses a market-wide campaign of face-to-face communications or direct communications.

* * *

In sum, the district court committed reversible error in rejecting APG-Neuros’s Lanham Act and DTPA claims on the ground that KTurbo’s campaign of

⁶ KTurbo also tries to suggest that many courts have decided that “one-on-one communications” are not “commercial advertising or promotion” by wrenching from its context a line from the McCarthy treatise that “[s]ome courts have said yes, but most courts have said no.” That completely mischaracterizes the treatise. In reality, the passage in question refers to the dispute over whether a *single* one-on-one communication, as opposed to a *pattern or campaign* of such communications, can be “commercial advertising or promotion.” 5 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 27:71, at 163-64 (4th ed. 2012).

⁷ See *Sports Unlimited, Inc. v. Lankford Enters., Inc.*, 275 F.3d 996, 1004-05 (10th Cir. 2002) (“informal types of promotion” can be actionable, but distribution to two persons on one project was insufficient); *Am. Needle*, 820 F. Supp. at 1077 (private letter delivered to single entity was insufficient); *Garland Co. v. Ecology Roof Sys. Corp.*, 895 F. Supp. 274, 279 (D. Kan. 1995) (communication to one contractor on one job was insufficient); *Licata & Co. Inc. v. Goldberg*, 812 F. Supp. 403, 408 (S.D.N.Y. 1993) (isolated and individualized oral comments were insufficient).

defamatory statements did not rise to the level of “commercial advertising or promotion” under Lanham Act Section 43(a).

III. The Ruling on APG-Neuros’s Lanham Act Claim Should Not Be Affirmed on Other Grounds.

At the end of its brief, KTurbo offers a hodge podge of conclusory alternative arguments that it says warrant affirmance of the district court’s ruling on APG-Neuros’s Lanham Act claim. KTurbo is mistaken. Its arguments are irrelevant under the Lanham Act, were forfeited in the district court, or are simply meritless.

Substantial Truth. KTurbo first asserts that its accusations against APG-Neuros—that APG-Neuros cheated by overstating blower performance figures on a bid form and in a test report—were not “false or misleading” for Lanham Act purposes because they were “substantially true.” KTurbo Resp. Br. 62. Tellingly, however, KTurbo cites no case law to support that assertion. And nothing in the cases we have seen, or in the Lanham Act itself, makes “substantial truth” a defense to a Section 43(a) claim. *See, e.g., Hot Wax, Inc. v. Turtle Wax, Inc.*, 191 F.3d 813, 819 (7th Cir. 1999) (listing elements); *Abbott Labs. v. Mead Johnson & Co.*, 971 F.2d 6, 13 (7th Cir. 1992) (discussing what statements are “false or misleading”). Indeed, the cases explain that proof of “literal falsity” in a Section 43(a) case both satisfies the “false or misleading” element and lifts the separate obligation to show actual or likely confusion. *See Hot Wax*, 191 F.3d at 820; *Abbott Labs.*, 971 F.2d at 14.

In any event, none of KTurbo’s “substantial truth” arguments have merit. The district court expressly found that “KTurbo’s statements were literally false”

and rejected KTurbo's efforts to prove their substantial truth. A 15-18. KTurbo's quibbles with that ruling do not amount to clear error. The very core of KTurbo's accusations is indisputably false.

KTurbo does not even try to defend its accusation that APG-Neuros "cheated" on the bid submission to the South Valley WWTP and in the CH2MHill report. KTurbo Resp. Br. 3-15. Nor does KTurbo dispute that the efficiency calculations in its PowerPoint slides were riddled with admitted errors and that its own expert refused to validate those calculations. *See id.* at 7-10; APG-Neuros Opening Br. 5-7, 14, 23-24.⁸ The evidence remains incontrovertible that KTurbo falsely claimed that APG-Neuros made a "total efficiency" guarantee to the South Valley WWTP. *See* KTurbo Resp. Br. 4-5; APG-Neuros Opening Br. 5-6, 23.⁹ And KTurbo concedes that even when its expert used package testing results from the Napa Valley WWTP—instead of core results from the South Valley WWTP or the CH2MHill report—he still could only come up with a fraction of the overstatement that KTurbo actually accused APG-Neuros of making. *See* KTurbo Resp. Br. 14-15;

⁸ Basically ignoring all of the other errors plaguing the calculations, KTurbo exerts considerable effort to defend its decision to change the stated inlet pressure (from 12.6 to 12.4 psia) when calculating APG-Neuros's supposed efficiency guarantee to the South Valley WWTP. KTurbo Resp. Br. 6-8. But KTurbo points to nothing in the South Valley bid specifications actually requiring that change. *See* SA 329-35 (bid specifications). And KTurbo acknowledges that its president admitted that he should not have accused APG-Neuros of intentionally failing to make the change. KTurbo Resp. Br. 7-8.

⁹ Contrary to KTurbo's assertion that our opening brief somehow acknowledged an efficiency guarantee, we specifically and repeatedly stated that no such guarantee had been made. APG-Neuros Opening Br. 5-6, 23, 25, 37. APG-Neuros guaranteed merely wire-power draws, which are only one of many variables that can affect the "total efficiency" of a turbo blower. A 16, 410-11.

APG-Neuros Opening Br. 14, 24.¹⁰ Those facts are enough to put to rest any notion that KTurbo's accusations were "substantially true."

Opinion. KTurbo next argues that its false statements about APG-Neuros were simply "opinions" that are "not actionable" under the Lanham Act. KTurbo Resp. Br. 62-63. That argument is meritless for two reasons.

First, KTurbo did not make the argument to the district court. D230 at 24-26; D231 at 9. It thus forfeited the argument as an alternative ground for affirmance. *See United States v. Jackson*, 207 F.3d 910, 917 (7th Cir.) ("a ground not raised at trial is forfeited and therefore cannot be used on appeal" to affirm), *vacated and remanded on other grounds*, 531 U.S. 953 (2000); *Gray v. Lacke*, 885 F.2d 399, 409 (7th Cir. 1989) (alternative ground for affirmance waived by failure to raise issue in district court).

Second, KTurbo's statements were ones of fact, not opinion. As one of the cases cited by KTurbo explains, "a statement is one of fact if it (1) admits of being adjudged true or false in a way that (2) admits of empirical verification." *Osmose, Inc. v. Viance, LLC*, 612 F.3d 1298, 1311 (11th Cir. 2010) (internal quotation marks omitted). KTurbo's accusations that APG-Neuros "cheated" by overstating the efficiency of its turbo blowers by 15% or more are exactly the kinds of statements

¹⁰ In addition, KTurbo is mistaken when it claims that its expert's opinion about package testing for the Napa Valley WWTP shows a clear error in the district court's ruling that KTurbo made false statements about core testing figures in the CH2MHill report, particularly where the expert refused to opine on whether that core testing resulted in any overstatement. *See* APG-Neuros Opening Br. 7, 14, 24; SA 112-29. Nor did KTurbo's expert cast any doubt on the accuracy of the South Valley bid, which promised wire-power figures that KTurbo was unable to show that APG-Neuros failed to deliver. *See* APG-Neuros Opening Br. 5-6 & n.3.

that can be adjudged true or false through empirical verification. Indeed, the PowerPoint slides containing KTurbo's false statements purported to provide precisely that sort of verification. *See, e.g.*, A 51-130; SA 402-17. And that sort of verification is what ultimately proved the statements false. A 15-18, 24.¹¹

Protected Speech. KTurbo further claims—without any elaboration at all—that its false statements were “protected speech.” KTurbo Resp. Br. 62. Again, however, any such argument has been forfeited by KTurbo's failure to raise it below. *See* D230 at 24-26; D231 at 9; *Jackson*, 207 F.3d at 917. And KTurbo's failure to develop the argument on appeal also results in waiver. *See Montgomery v. Am. Airlines, Inc.*, 626 F.3d 382, 392 (7th Cir. 2010). In any event, black letter law allows Congress to outlaw false or misleading commercial speech. *See Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 638 (1985) (“The States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading.”).

Injury. Finally, KTurbo asserts that the district court did not find, and APG-Neuros did not prove, the actual or likely injury needed to prevail on a Section 43(a) claim. KTurbo Resp. Br. 63. At least as to whether KTurbo's false statements were *likely to injure* APG-Neuros, KTurbo is wrong. The district court may not have reached the question in deciding APG-Neuros's Lanham Act claim, but it did rule

¹¹ KTurbo invokes this Court's declaration that “scientific disputes must be resolved by scientific means.” *Sanderson*, 415 F.3d at 624. But that unelaborated dicta does not remotely establish a rule that a statement is an unactionable opinion if its truth or falsity depends in any part on the application of scientific principles. Lanham Act cases often turn on the consideration of scientific evidence. *See, e.g., Abbott Labs.*, 971 F.2d at 15-16.

that “some harm can be presumed” from KTurbo’s misconduct when it addressed APG-Neuros’s defamation claim. A 34. Indeed, the court awarded APG-Neuros \$10,000 to compensate it “for the presumed damage to its reputation in the WWTP industry and the value of any resources it may have been required to expend to counteract any unspecified damages to its reputation caused by KTurbo’s statements.” A 34-35.

The trial evidence supports the conclusion that “some harm” was likely enough to be presumed. For instance, one engineer who runs WWTP projects testified that he found KTurbo’s accusations “misleading.” SA 190. To answer his resulting questions about Neuros blowers, APG-Neuros had to (and did) satisfy the engineer that the accusations made “mistakes” and were otherwise inaccurate when the engineer arrived to witness blower testing. SA 163-64, 176-77, 183-92, 363-64. Similarly, there was considerable testimony about how one of APG-Neuros’s executives prepared detailed responses to the accusations that appeared on KTurbo’s website. SA 22-26. This evidence, together with the district court’s presumed damages ruling, precludes any affirmance on the ground that APG-Neuros supposedly failed to prove actual or likely injury.

CONCLUSION

In its cross-appeal, APG-Neuros respectfully asks that the Court reverse the judgment against APG-Neuros on its Lanham Act and DTPA claims, and remand those claims for an award of injunctive relief and attorneys’ fees.

Respectfully submitted,

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June 8, 2012

CERTIFICATE OF COMPLIANCE

1. This Brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 28.1(e)(2)(C) because it contains 5,338 words excluding the parts of the Brief exempted by Rule 32(a)(7)(B)(iii).

2. This Brief complies with the 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: June 8, 2012

/s/ Joshua D. Yount

CERTIFICATE OF SERVICE

I hereby certify that on June 8, 2012, I electronically filed the foregoing Reply 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