**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF NEW YORK**

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| BROADSPRING, INC.,<br><br>Plaintiff,<br><br>v.<br><br>CONGOO, LLC, doing business as ADIANT and ADBLADE, ASHRAF NASHED, RAFAEL COSENTINO and DOES 1-10,<br><br>Defendants. | 13-cv-1866 (JMF) |

**PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

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Plaintiff Broadspring, Inc. ("Broadspring") respectfully submits this memorandum in opposition to the motion for summary judgment of Defendants Congoo, LLC, doing business as Adiant and Adblade ("Congoo"), Ashraf Nashed and Rafael Cosentino (collectively with Congoo, "Defendants").

## PRELIMINARY STATEMENT

The Defendants' misconduct is extraordinary. This action was commenced when Broadspring uncovered Defendants' three-week-old scheme to use a fake identity to create a review of online advertising companies. They gave their own company a glowing review, gave negative and defamatory reviews to their main competitors, and then set about disseminating the fake web site by using additional fake identities to tout it on numerous industry web sites, and by emailing links to publishers while lying about their authorship. Having been caught red-handed by Broadspring, one might have expected Defendants to modify their behavior. Instead, they doubled down. Within a month of being sued, Defendants used yet another fake identity to post defamatory statements about Broadspring on an industry web site. And, during this same period, Defendants disseminated a barrage of defamatory emails to publishers who where choosing between Broadspring and Congoo. These emails repeated, and in some cases even expanded on, the false statements Defendants had posted on the web using fake names.

The premise of Defendants' motion is that they should suffer no consequences for any of these actions. Their arguments are meritless. It is well-settled under both the Lanham Act and California law (which applies to the defamation claim) that one cannot escape liability for false or misleading statements of fact by dressing them up as opinion—particularly where, as here, the statements were falsely passed off as someone else's statements in the first instance. Nor are Defendants' statements "substantially true." Defendants' substantial truth arguments are for the

most part deeply misleading and, at best, only create issues of fact for a jury. There is also abundant evidence for a jury to find that Defendants' multitude of online postings and emails constitute commercial advertising or promotion under the Lanham Act, and more than enough evidence for a jury to find that Geology.com chose not to do business with Broadspring because of the Squidoo Lens. Accordingly, Defendants are not entitled to summary judgment on any of Broadspring's claims.

## SUMMARY OF THE FACTS

"In determining whether a genuine issue of material fact exists, a court must examine the evidence in the light most favorable to, and draw all inferences in favor of, the non-movant, in this case [Broadspring]." *Lucente v. Int'l Bus. Mach.*, 310 F.3d 243, 253 (2d Cir. 2002). Viewed in that light, the material facts can be summarized as follows.

### I. Defendants' Creation of the Squidoo Lens

Broadspring and Congoo are direct competitors in the online advertising business. (*See* ECF No. 26.) They operate competing advertising networks, which bring together advertisers and web site publishers. (Declaration of Jonathan Markiles in Opposition to Defendants' Motion for Summary Judgment, dated January 8, 2013 ("Markiles Dec."), ¶ 1.) Advertising networks pay publishers based on the quality and quantity of traffic their sites generate. (*Id.*, ¶ 3.) Typically, they pay publishers on either a CPM basis (that is, a fixed sum per every one thousand page impressions a site receives) or on a revenue share basis, whereby the publisher receives a percentage of the revenue Broadspring or Congoo generates through their advertisers. (*Id.,* ¶ 3.)

Competition for advertising space on premium web sites is fierce, and both Broadspring and Congoo have business development personnel dedicated to competing for such space.

Defendant Cosentino has been in charge of business development at Congoo since he co-founded the company with Defendant Nashed. (ECF No. 111, Declaration of Shari Alexander in Support of Motion for Summary Judgment ("Alex. Dec."), Ex. 3, pp. 66:11-69:24.) In late 2012 and early 2013, Congoo was experiencing particularly intense competitive pressure from Broadspring. Its business development personnel were commiserating regularly about Broadspring, and in one revealing exchange, Cosentino and another employee lamented that "all of [Cosentino's publishers] are dropping like flies." (Declaration of Joshua B. Katz in Opposition to Defendants' Motion for Summary Judgment ("Katz Dec."), Ex. 1.)

Unable to compete fairly with Broadspring, Defendants resorted to deception. On or about February 17, 2013, Cosentino created a web page on www.Squidoo.com ("Squidoo"). (ECF No. 107, ¶ 1.) Squidoo is a popular web site that allows users to create their own pages, called "Lenses," on subjects that interest them. (Katz Dec., Ex. 2.) Cosentino's Lens was about online advertising networks, and contained entries describing both Congoo and Broadspring.

However, Cosentino intentionally concealed his authorship of the Lens by using a Squidoo user account with the moniker "Recruiterman." According to the Recruiterman profile page, the account holder's name is Jonathan Tovar, and he lives in Brooklyn with his "wife Susan and four year old son Liam." (Katz Dec., Ex. 3.) These are all lies. Cosentino does not have a wife named Susan or a son named Liam; nor does he even know anyone named Jonathan Tovar. (Alex. Dec., Ex. 3, pp. 198:24-199:16.) To round out the deception, the Recruiterman page displayed a profile photograph of a person who looks nothing like Cosentino. (*Id.*)

Cosentino (a/k/a Jonathan Tovar) proceeded to write "reviews" under the guise of an unbiased web site publisher, falsely claiming in the introduction of the Lens that "my company

operates a network of vertical sites" and that "I have used many of the services listed here." (Katz Dec., Ex 4.) Naturally, Cosentino gave Congoo's Adblade network a glowing review, touting it as "getting the highest eCPM":

> Adblade ads have become ubiquitous on the web … Adblade works with larger local and national publishers and seems to work mostly with news sites like MSNBC, Fox News, Yahoo, Forbes, McClatchy Newspapers, etc. … Adblade ads only appear on the largest sites and they do not allow long tail sites to use their ads.
>
> Downside: I don't like Image + Text ads as much as regular old display ads but these seem to be getting the highest eCPM, and have become ubiquitous across the Web. The other downside is that Adblade probably won't approve you as they only work with the largest publishers.

(*Id*.) Cosentino then wrote false and negative reviews of Adblade's competitors, especially Broadspring:

> Broadspring is an Image + Text ad provider. I have only seen these fixed on a few websites so far. Most of their distribution seems to come through media buys at DSPs and other exchanges. All of their display units take users to howlifeworks.com where they embed links to advertiser pages for offers like "make your computer faster". Many of their advertisers appear to be continuity programs (re-bill offers) where the advertiser gets the customer to enter their credit card for a free trial and makes it tough to cancel. I'd be careful here.
>
> Best for: Sites that cannot get approved by a higher quality network.
>
> Downside: All ad links to Howlifeworks.com and advertorials which are designed to look like editorial content. Many continuity and rebill offers. You'll also notice the unit is not clearly marked as advertising. This is a red flag for me.

(*Id*.)

On February 23, Cosentino emailed Nashed a link to the Lens; he replied that it was "ingenious." (Katz Dec., Ex. 5.) Then, on March 2, Nashed emailed Cosentino a litany of additional false statements about Broadspring, and instructed Cosentino that "our publishers

should know about their background." (Katz Dec., Ex. 6.) Cosentino promptly complied with his co-founder's directive by updating the Broadspring entry of the Lens. (ECF No. 107, ¶ 16; Alex Dec., Ex. 3, pp. 219:18-221:23.) When he was done, the "downside" section of the Broadspring entry repeated the text of Nashed's March 2 email almost verbatim:

> Downside: A simple Google search shows that Broadspring was formerly Mindset Interactive, a notorious spyware company. Mindset was eventually shut down by the FTC in 2005 and Sanford Wallace, their founder, known as "Spamford Wallace" was banned from online activity for 5 years. In Nov 2006, Broadspring's shareholders then launched a notorious ringtones company, New Motion dba Atrinsic. Atrinsic has $17mm in financing (from various unknown investors), became public through a shady reverse-merger. They settled 3 years ago with 6 million users scammed: http://www.ftc.gov/os/caselist/0423142/wallacefinaljudgment.pdf

(Katz Dec., Ex. 7.) Cosentino then used Yahoo! Instant Messenger to send this revised version of the Lens to Nashed on March 4, to update him on the status of their scheme. (*Id*., Ex. 8.)

## II. Defendants' Dissemination of the Squidoo Lens

Cosentino began disseminating the Lens almost immediately. Adopting additional fake identities, he posted links to the Lens on industry web sites likely to be visited by publishers. For instance, using the fictitious name "Mark Jennings," Cosentino posted a link to the Lens on a discussion thread on www.Techulator.com, entitled "Which is the highest paid CPM ad network?" Cosentino (a/k/a Mark Jennings) wrote that publishers should "try this list of the highest CPM providers – http://www.squidoo.com/online-advertising-cpms." (*Id*., Ex. 9; Alex. Dec., Ex 3, 289:6-20.) Cosentino also posted a link on www.advertisingperspectives.com—this time using the fake name "Diana F."—and wrote: "the best inventory on the Web … is NOT available or controlled through exchanges or DSPs … Think about Adsense, Adblade … Great

list here: http://www.squidoo.com/online-advertising-cpms." (Katz Dec., Ex. 10; Alex. Dec., Ex. 3, 293:6-17 )

Cosentino also disseminated links directly to publishers, while concealing the fact that he wrote the Lens. In an email to Intermarkets.net, Cosentino falsely represented that "One of our publishers shared this link with me." (Katz Dec., Ex. 11.) Similarly, he sent a link to the New Hampshire Union Leader with the message: "I just Googled [B]roadspring: http://www.squidoo.com/online-advertising-cpms." (*Id*., Ex. 12.) In an email to the New York Daily News, he wrote: "A good read here: http://www.squidoo.com/online-advertising-cpms (See the Outbrain Review - This review does a decent job explaining the flaw in content recommendation units)." (*Id.*, Ex. 13.) And in an email to Hobart King, the owner of Geology.com, Cosentino wrote: "You may want to read about Broadspring/Howlifeworks/ContentAd here: http://www.squidoo.com/online-advertising-cpms." (*Id.*, Ex. 14.) Cosentino never disclosed to any of these recipients that he and Nashed wrote the Lens. (Alex. Dec., Ex. 3, pp. 298:18-307:11.)

## III. Defendants' Continued Dissemination of the False Statements About Broadspring Even After Being Exposed as the Authors of the Squidoo Lens

Broadspring discovered the Lens on or about March 10 when King from Geology.com informed a Broadspring business development team member that he had decided to stop doing business with Broadspring because he had been sent a link to the Squidoo Lens. (Alex. Dec., Ex. 7, 77:2-6.) On or about March 11, Squidoo locked the Lens in response to a demand letter from Broadspring. (Katz Dec., Ex. 15.)

Unable to continue disseminating links to the Lens itself, and having been sued for posting false and misleading information using the fake identity of "Jonathan Tovar," Cosentino proceeded to create yet another fake identity to publish the same defamatory accusations to Contextly.com in April. Using the fabricated moniker "Richard J," Cosentino posted the following:

> I have seen Broadspring change business models over the years. They used to distribute spyware under the company name Mindset Interactive. When they were named in a lawsuit by the FTC they dropped that name. They then formed a new company called Atrinsic dba New Motion which distributed Ring tone scams to 13 year olds. They were again sued and this time had to settle a class action lawsuit with 6 Million people. Now Broadspring is using content.ad to drive consumers to howlifeworks and those fake editorials which are not even marked as such so they can get their credit cards and re-bill them. Publishers who work with these guys simply have zero critical thinking or cares about their audience.

(*Id*., Ex. 16.) Relatedly, Cosentino also published to Contextly.com disparaging statements about another Congoo competitor, Taboola, using the pseudonym "Compliance guy." (*Id*.) No one knows how many times these Contextly.com posts have been viewed by publishers, but they remain accessible to this day, and Cosentino emailed links to the Contextly.com article to numerous publishers, including the New York Daily News, Talking Points Memo, Tech Media Network, Slate, Geology.com and Digital First Media/Journal Register Company.[1] (Katz Dec., Ex. 17.) Cosentino never disclosed to any of these recipients that he was "Richard J" or "Compliance guy." (Alex. Dec., Ex. 3, pp. 298:18-307:11.)

In addition to his sham web postings, Cosentino communicated the false statements about Broadspring via direct communications with numerous publishers. From February through May

[1] Indeed, despite Broadspring's interrogatories and document requests, Cosentino did not disclose his creation of the bogus "Richard J" and "Compliance guy" posts until he was deposed on October 29, leaving no time for either side to subpoena the web site.

of 2013, Cosentino unleashed a barrage of nearly 40 emails to publishers, in which he repeated the same defamatory accusations he posted to the Squidoo Lens and Contextly.com. (Katz Dec., Ex. 18.) This conduct is undoubtedly continuing, but discovery has closed and more recent documents are thus unavailable to Broadspring. (*See also* ECF No. 98 (spoliation motion).)

## ARGUMENT

### I. Defendants' Statements Are Actionably False Under Both the Lanham Act and California Law

#### A. California Defamation Law Applies

While Defendants argue that New York law governs Broadspring's defamation claim (Def. Mem., 3-5), that contention is clearly erroneous. This Court must apply whatever law a New York state court would apply, *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941), and in "tort cases like this, New York applies the law of the state with the most significant interest in the litigation." *Lee v. Bankers Trust Co.*, 166 F.3d 540, 545 (2d Cir. 1999). "If conduct regulating rules are in conflict, New York law usually applies the law of the place of the tort ('*lex loci delicti*')." *Id*. at 545. "Discouraging defamation is a conduct regulating rule," and accordingly "in defamation cases 'the state of the plaintiff's domicile will usually have the most significant relationship to the case,' and its law will therefore govern." *Id*. at 545 (quoting *Reeves v. Am. Broad. Co.*, 719 F.2d 602, 605 (2d Cir. 1983)); *see also Hamilton Bank, N.A. v. Kookmin Bank*, 245 F.3d 82, 94 (2d Cir. 2000) ("'practical necessity dictates that ordinarily an action for interstate libel be tried under the substantive law of one … jurisdiction[].' The district court correctly chose Florida law because Florida is both [plaintiff's] location and the place

where one copy of the allegedly libelous letter was received.") (quoting *Zuck v. Interstate Publ'g Corp.*, 317 F.2d 727, 734 (2d Cir. 1963)) (alterations in original).

Under the *lex loci delicti* rule, "[t]he locus of a tort is generally determined by the place where the plaintiff suffered injury." *Condit v. Dunne*, 317 F. Supp. 2d 344, 353 (S.D.N.Y. 2004) (quoting *La Luna Enterprs., Inc. v. CBS Corp.*, 74 F. Supp. 2d 384, 389 n. 2 (S.D.N.Y. 1999)). Thus, in defamation cases, "often the Court can resolve the choice of law analysis simply by observing the state of plaintiff's domicile and presuming that the publication injured him in that state." *Id*. at 353; *see also Adelson v. Harris*, 2013 U.S. Dist. LEXIS 141053, *20-21 (S.D.N.Y. Sept. 30, 2013) (applying "presumption that the law of Plaintiff's domicile should apply").

Here, there can be no question that California has a more significant relationship to Defendants' libels than any other state. Broadspring is domiciled in California, and Defendants' defamatory statements concern the California-based activities of Broadspring. (Markiles Dec., ¶ 1.) Although Congoo has offices in New York, its principal offices are in New Jersey, and that is where Cosentino was physically present when he created the Squidoo Lens and disseminated the vast majority of the defamatory statements. Further, the defamatory statements were transmitted to recipients in many different states and thus none of these states, standing alone, could be said to have a greater interest than California. Under these circumstances, the law of Broadspring's domicile should govern. *See, e.g., Adelson*, 2013 U.S. Dist. LEXIS 141053, *17-18 (applying law of plaintiff's domicile to allegedly defamatory internet petition and press release originating from District of Columbia); *Prudential Ins. & Annuity Co. v. State St. Bank & Trust*, 772 F. Supp. 2d 519, 559 (S.D.N.Y. 2011) (applying Massachusetts law because "the allegedly defamatory statements originate in Connecticut, but concern a Massachusetts entity's

Massachusetts-based actions"); *Condit*, 317 F. Supp. 2d at 355 (applying law of plaintiff's domicile where "plaintiff has no specific connection to New York" and "defendant's comments also have no specific connection to New York, except that defendant happened to be physically present in New York when he uttered the statements").[2]

**B. The Applicable Standards Under California Law and the Lanham Act**

**1. Opinion**

Unlike New York, California "extends no greater protection to opinions than does the United States Constitution." *Condit*, 317 F. Supp. 2d at 352. There is no "additional separate constitutional privilege for 'opinion,'" *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21 (1990), and the Constitution affords no protection to opinions that "imply an assertion of objective fact":

> If a speaker says, "In my opinion John Jones is a liar," he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications; and the statement, "In my opinion

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[2] In multi-state defamation cases, some courts in this district have employed the nine-factor test of *Palmisano v. News Syndicate Co., Inc.*, 130 F. Supp. 17, 19 n.2 (S.D.N.Y. 1955) (factors are: "(1) the state of plaintiff's domicile; (2) the state of plaintiff's principal activity to which the alleged defamation relates; (3) the state where plaintiff in fact suffered the greatest harm; (4) the state of the publisher's domicile or incorporation; (5) the state where defendant's main publishing office is located; (6) the state of principal circulation; (7) the place of emanation; (8) the state where the libel was first seen; and (9) the law of the forum."). That test, however, has never been endorsed by the Second Circuit or New York State courts, *see Lee*, 166 F.3d at 545-56, and "has been limited in recent decisions." *Hatfill v. Foster*, 401 F. Supp. 2d 320, 326 (S.D.N.Y. 2005); *see also Adelson*, 2013 U.S. Dist. LEXIS 141053, *19 n.6 ("Such contact counting is of limited value in determining which jurisdiction has the most significant interest in a tort claim."). In any event, California law applies under the *Palmisano* test. The first, second and third factors all point to California; the fourth points to Delaware; the fifth and sixth are inapplicable; the seventh points to New Jersey; the eighth is unknowable; and only the ninth factor points to New York.

> Jones is a liar," can cause as much damage to reputation as the statement, "Jones is a liar."

*Id*. at 18-19. In accordance with *Milkovich*, California courts consistently reject arguments that defendants who couch their defamatory statements as opinion cannot be held accountable. *See, e.g., Overstock.com, Inc. v. Gradient Analytics, Inc.*, 151 Cal. App. 4th 688, 703-04 (2007) ("the Gradient reports were 'liberally couched in terms of opinion.' However, statements in the publications do not attain constitutional protection simply because they are sprinkled with words to the effect that something does or does not 'appear' to be thus and so; or because they are framed as being 'in our opinion' or as a matter of 'concern.'"); *Weller v. Am. Broad. Cos.*, 232 Cal. App. 3d 991, 1004 (1991) ("we reject the notion that merely couching an assertion of a defamatory fact in cautionary language such as 'apparently' or 'some sources say' or even putting it in the form of a question, necessarily defuses the impression that the speaker is communicating an actual fact"); *accord Cianci v. New Times Pub. Co.*, 639 F.2d 54, 64 (2d Cir. 1980) (Friendly, J.) ("It would be destructive of the law of libel if a writer could escape liability for accusations of crime simply by using, explicitly or implicitly, the words 'I think.'").

Similarly, under the Lanham Act, purported opinions that can "reasonably be seen as stating or implying provable facts" are actionable. *Groden v. Random House, Inc.*, 61 F.3d 1045, 1051 (2d Cir. 1995). Indeed, even when an advertisement is "merely playful and absurd" on "a literal level," it may still be actionable if it subtly communicates an assertion of fact. *Verizon Directories Corp. v. Yellow Book USA, Inc.*, 309 F. Supp. 2d 401, 407 (E.D.N.Y. 2004) ("Literalness is not what these commercials are about. They are skillfully crafted and shown at great expense to subtly but firmly communicate an idea – that the Yellow Book is preferred by

users to Verizon's book and that, more to the point, advertisers will reach more potential consumers if they put their names and money in the former rather than the latter.").

**2. Truth and Falsity**

Although truth is a defense to defamation, because Broadspring is a private figure and the defamatory statements concern private matters, Defendants have the burden of proving truth. *Smith v. Maldonado*, 72 Cal. App. 4th 637, 646 & n.5 (1999). A statement need not be literally false to be actionable. "Statements, although perhaps 'true' when viewed in isolation, may create an overall false impression when considered in context." *Van Buskirk v. Cable News Network, Inc.*, 284 F.3d 977, 984 (9th Cir. 2002). Thus, if "the defendant juxtaposes [a] series of facts so as to imply a defamatory connection between them, or [otherwise] creates a defamatory implication … he may be held responsible for the defamatory implication, … even though the particular facts are correct." *Weller*, 232 Cal. App. 3d at 1003 n.10 (quoting Prosser, THE LAW OF TORTS § 116, 5th Ed. (Supp. 1988)) (alterations by the court).

Likewise, the Lanham Act prohibits not only literally false advertising, but also literally true but misleading advertising. "Two different theories of recovery are available to a plaintiff who brings a false advertising action under § 43(a) of the Lanham Act. First, the plaintiff can demonstrate that the challenged advertisement is literally false, *i.e.*, false on its face." *Time Warner Cable, Inc. v. DIRECTV, Inc.*, 497 F.3d 144, 153 (2d Cir. 2007). The literal falsity theory also encompasses statements that are "false by necessary implication," that is, where "the words or images, considered in context, necessarily imply a false message." *Id*. at 158.

"Alternatively, a plaintiff can show that the advertisement, while not literally false, is nevertheless likely to mislead or confuse consumers." *Id*. at 153. Indeed, it is well established

that "the Lanham Act encompasses more than literal falsehoods … otherwise, clever use of innuendo, indirect intimations, and ambiguous suggestions could shield the advertisement from scrutiny precisely when protection against such sophisticated deception is most needed." *American Home Prods. Corp. v. Johnson & Johnson*, 577 F.2d 160, 165 (2d Cir. 1978).

**C. Defendants' Fictitious Postings, Taken as a Whole, Are a Brazen Fraud**

Defendants' argue that, despite the numerous assertions of fact in the Lens, it is non-actionable opinion when "taken as a whole." (Def. Mem., 5-8.) This argument completely ignores the fundamental predicate that any statements of opinion were not disclosed as ***Cosentino's*** opinion. Instead, they were falsely held out as the opinions of a disinterested web site publisher, "Jonathan Tovar" (as well as the opinions of Richard J, Mark Jennings, Diana F. and Compliance guy). This deception renders actionable even statements of pure opinion. "If a defendant falsely reports that others hold an ill opinion of the plaintiff, the report would properly be considered a false statement of fact—the existence of the opinions is for this purpose a fact—upon which a cause of action for defamation may lie." 1 Robert D. Sack, SACK ON DEFAMATION § 4:3.4 (4th ed. 2010) (citing, *inter alia*, *Aisenson v. Am. Broad. Co.*, 220 Cal. App. 3d 146 (1990)). For the same reason, the Lens as a whole is plainly false and misleading under the Lanham Act. Indeed, Geology.com's principal testified that he was shocked eventually to learn Cosentino was behind the Lens, because "that was sent to me to influence" his decision whether to use Broadspring or Congoo. (Katz Dec., Ex. 19, pp. 80:3-16.)

Moreover, even if Cosentino had not used a battery of fake identities, the law is settled that any statement that either "declares or implies a provably false assertion of fact" is actionable, regardless of whether it is "liberally couched in terms of opinion." *Overstock.com, Inc.*, 151 Cal.

App. 4th at 701, 703. False statements of fact are not immunized merely because the defamer uses "cautionary language such as 'apparently' or 'some sources say,'" *Weller*, 232 Cal. App. 3d at 1004, or "[runs] a disclaimer that the information in them 'reflects our judgment at the time of original publication,'" *Overstock.com, Inc.*, 151 Cal. App. 4th at 704.[3]

Relatedly, Defendants get no mileage by claiming "Cosentino provided readers … with the source of the statements that he added in the paragraph that he added to the Lens." (Def. Mem., 8.) Putting the aside for the moment that Cosentino's real source was Nashed, the "black letter rule" is "that one who republishes a libel is subject to liability just as if he had published it originally, even though he attributes the libelous statement to the original publisher, and even though he expressly disavows the truth of the statement." *Cianci*, 639 F.2d at 60-61 (quotations omitted). As Judge Friendly went on to explain, the "law affords no protection to those who couch their libel in the form of reports or repetition," and "the repeater cannot defend on the ground of truth simply by proving that the source named did, in fact, utter the statement." *Id*. at 61 (quotations omitted).

Defendants are thus flatly wrong to suggest there is some sort of presumption or *per se* rule that "blogs or website postings" are non-actionable opinion. (Def. Mem., 6.) In fact, the law is clear that online statements can, and frequently do, give rise to liability. *E.g., Bently Reserve LP v. Papaliolios*, 218 Cal. App. 4th 418, 429 (2013) (anonymous online review actionable; "the mere fact speech is broadcast across the Internet by an anonymous speaker does not ipso facto

[3] Notably, the California and federal standard for distinguishing opinion from fact is markedly different from the New York standard on which Defendants rely. *See Sandals Resorts Int'l Ltd. v. Google, Inc.*, 86 A.D.3d 32, 39-40 (1st Dep't 2011) (explaining that *Milkovich* is inconsistent with New York's test).

make it nonactionable opinion and immune from defamation law"); *Wong v. Jing*, 189 Cal. App. 4th 1354, 1372-75 (2010) (numerous implied factual assertions in negative Yelp review held actionable); *Varian Med. Sys., Inc. v. Delfino*, 113 Cal. App. 4th 273, 288 (2006) ("Defendants argue generally that Internet message boards are so filled with outrageous anonymous postings that no reasonable person would take a typical anonymous and outrageous posting as a true statement of fact. We reject the argument for a number of reasons."), *rev'd on other grounds*, 106 P.3d 958 (Cal. 2005); *accord LeBlanc v. Skinner*, 103 A.D.3d 202, 214 (2d Dep't 2012) (pseudonymous blog entries stating "plaintiff put a severed horse head in a Town Board member's swimming pool constituted defamation per se"); *Super Future Equities, Inc. v. Wells Fargo Bank Minn., N.A.*, 553 F. Supp. 2d 680, 688-89 (N.D. Tex. 2008) ("the Court finds that the statements made on Predatorix [a web site] are verifiable statements of fact as opposed to protected opinions …. The disclaimer that 'This is my private information and opinion' does not transform the statements into opinions. … Predatorix accuses Orix of wrongdoings and purports to give factual information about Orix's behavior. The website provides links to court documents, deposition videos, news articles, and court cases. … Accordingly, these statements are not protected opinions.") (internal citations omitted).[4]

[4] Even Defendants' principal case, *SPX Corp. v. Doe*, 253 F. Supp. 2d 974, 981-82 (N.D. Oh. 2003), acknowledges "there is no blanket protection for statements made on an Internet message board." And *SPX* applied Ohio law, which takes a much more expansive view of opinion than California law. *Id*. at 980. Defendants' other case, *Seaton v. TripAdvisor, LLC*, 2012 WL 3637394 (E.D. Tenn. Aug. 22, 2012), is even less helpful to them. *Seaton* held that a list of "dirtiest" hotels was hyperbole that a reader would not understand as literally asserting that plaintiff's hotel was the dirtiest in the United States. Defendants' statements about Broadspring were not made in any hyperbolic or figurative sense; they were made as assertions of fact.

These cases demonstrate that the test for defamation on the internet is no different than in any other medium—that is, online statements are actionable if "a reasonable fact finder could conclude the published statement declares or implies a provably false assertion of fact." *Wong*, 198 Cal. App. 4th at 1370 (quoting *McGarry v. Univ. of S.D.*, 154 Cal. App. 4th 97, 113 (2007)). As explained next, a jury should so find with respect to many of Defendants' statements.

**D. Defendants' Specific Statements Are Neither Opinion Nor Substantially True**

As discussed in Broadspring's motion to file a second amended complaint (ECF No. 75), which is currently *sub judice*, discovery revealed that Defendants continued to republish the statements in the Squidoo Lens well after this action was commenced. In addition to the Contextly.com posting in April by "Richard J," Defendants sent nearly 40 emails directly to publishers that repeated—and indeed, elaborated on—the false accusations in the Lens. Although their precise verbiage varies slightly, Defendants' statements fall into four categories: (1) false statements about Broadspring being sued by the FTC; (2) false statements about Broadspring, Sanford Wallace being its founder, and spyware; (3) false statements about Broadspring's online advertisements; and (4) false statements about Broadspring and Atrinsic.[5] These statements are not opinion, and Defendants' attempts to justify them as substantially true are themselves false and misleading.

[5] Broadspring recognizes that the Court has not yet decided the motion to amend. Nevertheless, Defendants have moved for summary judgment with respect to these post-commencement statements. (Def. Mem., 17-21.) And regardless of how the Court decides the motion to amend, these statements will still be material to numerous issues, including negligence, malice, *respondeat superior*, and the extent to which Defendants engaged in commercial advertising or promotion under the Lanham Act.

**1. Defendants' False Statements about Broadspring and the FTC**

The Squidoo Lens unambiguously asserts that Broadspring was "formerly Mindset Interactive," which was "shut down by the FTC in 2005." (Katz Dec., Ex. 7.) After Squidoo locked the Lens, Cosentino (a/k/a Richard J) repeated this accusation on Contextly.com, writing: "When they were named in a lawsuit by the FTC they dropped that name [*i.e.*, Mindset] … They were ***again sued*** and this time had to settle a class action lawsuit with 6 Million people." (*Id.* (emphasis added).) Cosentino also repeated this assertion in an April 18, 2013 email to KSL/Deseret News: "So you know, the folks at Broadspring shut down their company (mindset interactive) soon after they were named by the FTC in a lawsuit for distributing spyware."[6] (*Id.*)

These are not hyperbole or subjective opinions; they are assertions of fact. Any reasonable reader would understand these statements to mean that the FTC successfully sued Broadspring and forced it to shut down. This is confirmed by the "again sued" language in the Contextly posting, as well as the deposition testimony of representatives of KSL/Deseret, Reader's Digest and Geology.com. (Katz Dec., Ex. 16.) It is undisputed that none of Broadspring, Mindset or Atrinsic was ever sued or forced to shut down by the FTC. (Declaration of Ray Musci in Opposition to the Motion of Defendants for Summary Judgment, dated January 8, 2013 ("Musci Dec."), ¶ 19; Markiles Dec. ¶ 12.).

Nevertheless, Defendants contend that Broadspring's CEO "admitted at his deposition that Broadspring closed down the operations it conducted through Vista (formerly Mindset) because of the FTC's investigation of Wallace and concerns that Vista/Mindset's business might

[6] Although the statement that Broadspring was "formerly" Mindset is literally false, Broadspring does not allege that it is independently defamatory. It does, however, conclusively demonstrate that Defendants' false statements about Mindset are defamatory of Broadspring.

get the company in trouble." (Def. Mem. 14-15.) Not so. He actually testified that Broadspring concluded "it was just not a business Broadspring wanted to be in" after discovering that Wallace had been distributing software in violation of Mindset's policies, and determining it would be "too difficult to police" third party software distributors like Wallace. (Alex. Dec., Ex. 4, p. 83:2-11.) This is not remotely the same as Defendants' lie that Broadspring was sued, and forced to shut down, by the FTC. *See Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 516-17 (1991) (Under California law, doctrine of substantial truth excuses only "slight inaccuracy in the details.") (quotation omitted).

As for the FTC's requests for information from Broadspring in connection with its investigation of Sanford Wallace, Broadspring simply provided the requested information and never heard another peep from the FTC. (*Id*., 225:25-226:9) Indeed, Broadspring encouraged the FTC to let it know if it had done or was doing anything wrong. (*Id*., Ex. 8, pp. 114:15-115:6.) In any event, the decision to end the Vista business was made long before Broadspring received the FTC's CID. (*Id*., Ex. 4, p. 226:10-22.)

**2. Defendants' False Statements about Broadspring and Spyware**

The Squidoo Lens states that "Broadspring was formerly Mindset Interactive, a notorious spyware company," and that "Sanford Wallace, their founder, known as 'Spamford Wallace' was banned from online activity for 5 years." (Katz Dec., Ex. 7.) And even after this lawsuit was filed, Cosentino posted to Contextly that Broadspring "used to distribute spyware under the company name Mindset Interactive." (*Id*., Ex. 16.) During the same period, Cosentino began inundating publishers with emails accusing Broadspring of purveying spyware, including the following emails:

- 3/18/13 Email to Tech Media Network: "The origins of that company are rooter [*sic*] in Spyware and continuity offers." (*Id*., Ex. 20.)

- 3/19/13 Email to Reader's Digest: "The origin of this company is a distributor of spyware and ringtone scams the company's current MO is not up to par with anything we can be associated with." (*Id*., Ex. 21.)

- 4/10/13 Email to Journal Register Company: "The company has a known history of distributing spyware and ringtone scams. … Broadspring distributing spyware http://www.ftc.gov/os/caselist/0423142/wallacefinaljudgment.pdf" (*Id*., Ex. 22.)

- 4/18/13 Email to KSL/Deseret News: "So you know, the folks at Broadspring shut down their company (mindset interactive) soon after they were named by the FTC in a lawsuit for distributing spyware." (*Id*., Ex. 23.)

Defendants do not even argue that these false statements are protected opinion. They argue only that "it is true that Sanford Wallace was connected to Mindset," and it is "substantially, if not literally, true" that "Mindset was a 'notorious spyware company.'" (Def. Mem., 14-15.)

To begin with, Defendants' reliance on the vague locution "connected" tacitly concedes the falsity of what they actually said—namely that Wallace founded Broadspring. There is an enormous difference between saying Wallace was "their founder" and saying Wallace was "connected" by virtue of being one of many third party distributors with whom Mindset did some business. And Defendants' new assertion that Mindset hired Wallace to perform silent installs (Def. Mem., 14) is a falsehood that a jury could, and indeed should, reject. There is no admissible evidence to support it, and every witness testified to the contrary. (Alex. Dec., Ex. 4, pp. 82:8-83:11; Ex. 8, pp. 83:21-84:12.)

As for the spyware accusation, Defendants rely on an attorney's affirmation submitted eight years ago in a case in which neither Broadspring nor Mindset was a party or had any involvement, and which merely describes what an "Investigator Ip" purportedly heard and saw. (Def Mem., 13.) The affirmation is inadmissible double hearsay, and probative of nothing. Even weaker is Defendants' argument that they are entitled to summary judgment because they hired an "expert" to say that Mindset distributed spyware. (Def. Mem., 13-14.) As discussed in Broadspring's *Daubert* motion, Lance James' testimony is not even admissible. (ECF No. 102.) And even if James were allowed to testify, the jury would be free to reject his erroneous conclusions based on, *inter alia*, the reasons set forth in the rebuttal report of Broadspring's expert, Marty Lafferty. (ECF No. 103-2.)

**3. Defendants' False Statements about Broadspring's Advertisements**

Like their other false statements, Defendants disseminated misrepresentations about Broadspring's advertising units through both phony internet posts and direct communications with publishers. The Squidoo Lens asserted: "Many of their advertisers appear to be continuity programs (re-bill offers) where the advertiser gets the customer to enter their credit card for a free trial and then makes it tough to cancel" (Katz Dec., Ex. 7); and the "Richard J" Contextly.com post stated that Broadspring's goal is to "get [consumers'] credit cards and re-bill them." (Katz Dec., Ex. 16.) Cosentino not only disseminated these same accusations in numerous emails to publishers ***after this action was commenced***, but also built upon them by falsely claiming that "fleeced" consumers often mistakenly blame Adblade for problems with Broadspring's advertisements:

- 3/22/13 Email to Tech Media Network: "They only have a handful of advertisers and most of those are continuity products which have a high degree of customer complaints and this creates headaches for us. We have been in court because customers confuse the ad unit they responded to after being scammed. This has created a lot of admin, cost and headache for us. ( (*Id*., Ex. 24.)
- 4/9/13 Email to Digital First Media: "If it was any other copycat we could run with them but that provider is copying our ad unit formats and many of these offers have high complaint rates as they are continuity and re-bill offers … it creates admin and customer complaints for us when customers think that the scam came from our unit." (*Id*., Ex. 25).
- 4/9/13 Email to New York Daily News: "If it was any other copycat we could run with them but that provider is copying our ad unit formats and many of them have high complaint rates as they are continuity and re-bill offers … it creates admin and customer complaints for us when customers think that the scam came from our unit." (*Id*., Ex. 26.)
- 4/9/13 Email to Journal Register Company: "If it was any other copycat we could run with them but that particular provider is copying Adblade's ad unit formats and many of those offers have high complaint rates as they are continuity and re-bill offers where users have their credit card billed every month and find it tough to cancel." ( *Id*., Ex. 27.)
- 4/10/13 Email to Journal Register Company: "On that site user [*sic*] are Fleeced [*sic*] of their credit card numbers to receive free trials. When the credit card bills begin coming in, it is your team and our team that will have to deal with the headaches. Since that provider began copying our ad formats identically about 8 months ago, we have been in more customer service headaches and this causes real damages to all of us." (*Id*., Ex. 28.)
- 4/11/13 Email to New York Daily News: "we don't allow the scammy continuity offers that that [*sic*] Broadspring does. Because consumers don't know the difference, when they get scammed (and hundreds will), they tell everyone it was this unit here 'Articles and offers from around the Web.'" ( *Id*., Ex. 29.)
- 4/12/13 Email to Journal Register Company: "I am positive the CPM on the lower unit would exceed that which you are netting from Broadspring by a significant factor plus you won't get any complaints from customers who are 'fleeced' by Broadspring's offers." (*Id*., Ex. 30.)
- 5/24/13 Email to Town Hall: "We really cannot run on a site that runs those because consumers confuse their offers with ours and it creates a lot of admin for us. It's even landed us in court and has cost a ton of legal fees." ( *Id*., Ex. 31.)

- 4/18/13 Email to KSL/Deseret News: "Broadspring began copying Adblade ad formats about 2 years ago. This has caused lots of problems and administrative costs. We just don't want an Adblade units [*sic*] running on the same website as a Broadspring unit. It costs us more to prove to angry customers and lawyers that it wasn't our ad." (*Id*., Ex. 32.)

And there are even more pre-filing examples:

- 11/15/12 Email to StarPulse: "we cannot rotate with How Life Works as they sell advertisements for Belly Fat, Acai Berry, Belly Fat [*sic*] and other advertisers whose sole revenue model is continuity programs which re-bill your audiences [*sic*] credit cards … consumers who get ripped off confuse Adblade with them this has cost Adblade real damages in terms of legal fees, admin and time in court." (*Id*., Ex. 33.)
- 2/25/13 Email to Talking Points Memo: "I would not want Broadspring (content.ad) as they sell Bizops and work at home ads which are tied to scams. Because they began copying our ad format about a year ago, consumers often think the ad came from us and we just don't want to be on pages with them." (*Id*., Ex. 34).
- 3/11/13 Email to Geology.com: "We have to be very careful about running on sites that run Broadspring because they copy our ad formats but take scam ads. This creates a lot of problems for us and has landed us in court." (*Id*., Ex. 35.)
- 3/18/13 Email to Tech Media Network: "I worry because they began copying Adblade's ad format about a year ago … Consumers that get scammed are confused about who showed the ad and often Adblade ends up being blamed." (*Id*., Ex. 20.)

There is no factual dispute that Cosentino was lying through his teeth when he told all of these publishers that irate consumers often blame Congoo for problems with Broadspring's ads, causing Congoo to incur administrative costs and legal fees in court. At their depositions, Defendants were unable to identify even a single instance where a consumer had blamed Congoo for a problem with a Broadspring ad. (Alex. Dec., Ex. 3, 339:21-342:17.) Nor have Defendants produced a single document to support these false statements. In short, these defamatory statements are totals fabrication.[7]

[7] Similarly false is Cosentino's repeated refrain that Broadspring "copied" Adblade's ad format. On the contrary, Broadspring was using the two-click advertorial model long before

In that regard, Defendants misleadingly argue that Erik Sanchez testified "that he personally has received hundreds of complaints regarding Broadspring's continuity offers." (Def Mem., 10.) Sanchez was not testifying about Broadspring's online advertising units, but rather his work years ago in a long-closed fulfillment center for a completely unrelated health and beauty products line of business. (Alex. Dec., Ex. 6, 33:15-34:8.) And the solitary Better Business Bureau complaint was also by a customer of the health and beauty products business, who no longer wished to receive Unbelievable by Cheryl Tiegs, a moisturizing cream. Her account was promptly closed. (*Id*., Ex. 4, 308:11-311:19; Katz Dec.; Ex. 43) None of this "evidence" is even relevant under Fed. R. Evid. 401.

These statements are not, as Defendants contend, non-actionable opinion. Whether consumers frequently blame Congoo for problems with Broadspring ad units is a provably false statement of fact. *See Reckitt Benckiser Inc. v. Motomco Ltd.*, 760 F. Supp. 2d 446, 455 (S.D.N.Y. 2011) ("It is also literally false for Defendant to state, with absolute certainty, that retailers carrying Plaintiff's products in New York State will experience disruptions to their businesses or penalties"). So, too, are the statements that Broadspring's advertisers "make it tough to cancel" and that Broadspring's "goal is to get [consumers'] credit cards and re-bill them." A reasonable publisher would interpret these false statements as accusing Broadspring of a specific unethical and illegal business practice—deliberately billing consumers without their consent. "This is not the sort of broad, unfocused and wholly subjective comment that is generally regarded as protected opinion." *Burrill v. Nair*, 217 Cal. App. 4th 357, 385 (2013)

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Adblade adopted it, and it is Adblade that has plagiarized Broadspring's copyrighted articles. (Markiles Dec. ¶ 15.)

(quotations omitted); *accord Flamm v. Am. Assoc. of Univ. Women*, 201 F.3d 144, 152 (2d Cir. 2000) (statement that lawyer was "ambulance chaser" "with interest only in slam dunk cases" actionable because it could "reasonably be interpreted to mean an attorney who improperly solicits clients and then takes only easy cases.").

**4. Defendants' False Statements about Broadspring and Atrinsic**

Lastly, Defendants disseminated several false statements of fact regarding Broadspring and New Motion d/b/a Atrinsic. First, the Squidoo Lens misrepresented that in "Nov 2006, Broadspring's shareholders then launched a notorious ringtones company, New Motion dba Atrinsic. Atrinsic has $17mm in financing (from various unknown investors), became public through a shady reverse-merger. They settled 3 years ago with 6 million users scammed: http://www.ftc.gov/os/caselist/0423142/wallacefinaljudgment.pdf." (Katz Dec., Ex. 7.) And on Contextly.com, Cosentino (a/k/a Richard J) posted that Atrinsic "distributed Ring tone scams to 13 year olds. They were again sued and this time had to settle a class action lawsuit with 6 Million people." (*Id.*, Ex. 16.) Finally, Cosentino sent the following related emails to publishers:

- 3/19/13 Email to Reader's Digest: "The origin of this company is a distributor of spyware and ringtone scams and the company's current MO is not up to par with anything we can be associated with." (Katz Dec., Ex. 36.)
- 4/10/13 Email to Journal Register Company: "Broadspring starts atrisic [*sic*], a convicted ringtone scam company … New Motion settles class action lawsuit with 6 million users scammed." (*Id.*, Ex. 28.)
- 4/18/13 Email to KSL/Deseret News: "New Motion then shut down after they had to settle a class action for scamming 6 million people with Ringtone scams. (*Id.*, Ex. 32.)

These statements are all actionably false. The assertion "They settled 3 years ago with 6 million users scammed: http://www.ftc.gov/os/caselist/0423142/wallacefinaljudgment.pdf" is unquestionably false and misleading. The FTC's default judgment against Wallace had absolutely nothing to do with Atrinsic. Atrinsic is not even mentioned or referenced in the document; nor is there any reference to "6 Million users scammed." And a publisher could reasonably conclude that "shady reverse merger," in context, implies that the author possesses facts showing that Atrinsic violated the securities laws. *See Kahn v. Brewer*, 232 Cal. App. 3d 1599, 1609 (1991) (accusations that plaintiff performed her job with "incompetence" actionable). Cosentino even admitted that was the exact message he intended to convey. (Alex Dec., Ex. 3, 228:14-232:1.)

As for the assertions that New Motion dba Atrinsic shut down because it was "convicted" of scamming six million consumers, the evidence shows that the putative class action was settled for nuisance value without any admission or finding of liability, and in any event did not result in any shut down. (Musci Dec., ¶ 17-18.) Thus, a jury could easily find these statements false and misleading. *See, e.g., Celle v. Filipino Reporter Enterprs. Inc.*, 209 F.3d 163, 173, 185 (2d Cir. 2000) (defamatory to report that a federal judge had found plaintiff liable when, in fact, judge had merely denied plaintiff's summary judgment motion); *American Home Prods. Corp. v. Johnson & Johnson*, 654 F. Supp. 568, 590 (S.D.N.Y. 1987) ("an advertisement violates section 43(a) if, in ostensible support of claims made therein, it cites authorities which do not in fact support the claim.").

Furthermore, Cosentino could not credibly maintain that he does not understand the import of the word "convicted," because he is himself a twice-convicted felon. Significantly,

both sets of convictions involved the use of fake identities. The first conviction resulted from Cosentino's arrest at an airport with more than 50 pounds of marijuana while pretending to be "John Cosentino." (Alex. Dec., Ex. 3, 43:14-54:6.) The second set convictions arose out of Cosentino's theft of a credit card, which he used to make various purchases while signing the receipts as "John Hastings." (*Id.*; Katz Dec. Ex. 37.)

* * * * *

In sum, Defendants have not come close to showing that a rational jury would have no choice but to accept their version of the facts. *See Lucente*, 310 F.3d at 254 ("summary judgment is improper if there is any evidence in the record that could reasonably support a jury's verdict for the non-moving party"). At best, they have presented only the flimsiest of evidence to support their allegations, while ignoring the mountain of evidence to the contrary. At worst, Defendants' arguments are attempts to mislead the Court, akin to their attempts to mislead the publishers at issue in this case.

**II. Defendants Engaged in Commercial Advertising or Promotion**

There is ample evidence from which a jury could find that Defendants' multitude of online postings and direct communications "are part of an organized campaign to penetrate the relevant market," which is "the touchstone of whether a defendant's actions may be considered 'commercial advertising or promotion' under the Lanham Act." *Fashion Boutique of Short Hills, Inc. v. Fendi USA, Inc.*, 314 F.3d 48, 57 (2d Cir. 2002). Defendants do not dispute that the Lanham Act "encompasses more than the traditional advertising campaign," *id.* at 57, and can include any form of communication with customers. *See, e.g., Zeneca, Inc. v. Barr Labs., Inc.*, 1999 U.S. Dist. LEXIS 10852, *88 (S.D.N.Y. Jul. 19, 1999) ("Courts have consistently held that

oral statements by a company's sales representative concerning a product constitute 'commercial advertising or promotion' under the Lanham Act."); *Nat'l Artists Mgmt. Co. v. Weaving*, 769 F. Supp. 1224, 1235 (S.D.N.Y. 1991) ("speaking by telephone with a number of friends, acquaintances, and colleagues" satisfies Lanham Act). Nor do they raise any argument with respect to the first, second or third *Gordon & Breach* factors. Rather, Defendants argue solely that their false and misleading statements were insufficiently disseminated. (Def. Mem., 17-21.) This argument misconstrues both the law and the facts of this case.

Because the "touchstone" is simply whether the communications "are part of an organized campaign to penetrate the relevant market," *Fashion Boutique of Short Hills, Inc.*, 314 F.3d at 57, the analysis is necessarily qualitative rather than quantitative, and there is no minimum number of communications required. *See Avon Prods, Inc.. v. S.C. Johnson & Son, Inc.*, 984 F. Supp. 768, 795 (S.D.N.Y. 1997) (Sotomayor, J.) ("I conclude that Avon has engaged in advertising and promotion under the Lanham Act. I find this despite the fact that the members of the relevant purchasing public indisputably number in the millions, and S.C. Johnson has only presented approximately 100 lists identifying SSS as an insect repellent from Avon's files."). Indeed, courts have held that a single communication can suffice. *Mobius Mgmt. Sys., Inc. v. Fourth Dimension Software, Inc.*, 880 F. Supp. 1005, 1020-21 (S.D.N.Y. 1994) (single letter to customer constituted commercial advertising or promotion); *Gordon & Breach Sci. Publs. S.A. v. Am. Inst. of Physics*, 905 F. Supp. 169, 182 (S.D.N.Y. 1995) (explaining "that breadth of dissemination, although important, is not dispositive. Rather, the primary focus is the degree to which the representations in question explicitly target relevant consumers. … We concur with

[the reasoning of *Mobius*] that ***any*** promotional statement directed at actual or potential purchasers falls within the reach of section 43(a)") (emphasis in original).

Here, the evidence of an organized campaign to penetrate the relevant market is compelling. The Squidoo Lens was created by Congoo's two top executives—Cosentino and Nashed—with the express purpose that "our publishers should know about [Broadspring's] background." (Katz Dec., Ex. 6.) Defendants then relentlessly disseminated the statements in the Squidoo Lens through even more fake online identities as well as dozens of emails. A jury would be fully justified in concluding that these are not the sort of isolated "off-the-cuff comments that do not violate the Lanham Act because no broad dissemination is intended or effected." *Fashion Boutique of Short Hills, Inc.*, 314 F.3d at 58.

Even if, as Defendants contend, a handful of the 85 Lens views were by the parties, a jury could still infer that about 75 of the views were by publishers. That is a remarkably high level of dissemination for a period of less than 30 days. What is more, a jury could conclude that the only thing that prevented even wider dissemination is that Broadspring serendipitously learned of Defendants' scheme from Geology.com and quickly moved to have the Lens locked; it would be perverse to say that Broadspring was required to sit on its hands and wait for the Lens to achieve wider dissemination, lest it be unable to prove a Lanham Act violation. The policy of the Lanham Act is to reward diligence, not discourage it. *Cf. Merck Eprova AG v. BrookStone Pharms., LLC*, 920 F. Supp. 2d 404, 431 (S.D.N.Y. 2013) (plaintiff's laches a factor in determining appropriateness of disgorgement damages).

The evidence also supports a finding that Defendants' de facto policy is to make the defamatory statements ***every time*** they communicate with a publisher about Broadspring. The

Second Circuit went out of its way to note that "a cause of action might exist where a defendant maintains a well-enforced policy to disparage its competitor each time it is mentioned by a customer," *Fashion Boutique of Short Hills, Inc.*, 314 F.3d at 58, which aptly describes Defendants' *modus operandi*. Cosentino testified that "a core part" of Congoo's promotional strategy is, as he put it, "to educate" publishers about Broadspring. Indeed, he specifically testified that the false statement "that Sanford Wallace was the founder of Mindset Interactive and that Mindset Interactive was shut down by the FTC" was a key part of Congoo's strategy of "educating publishers on the difference between what we do and what other people, especially ones that copy us, and this is a material piece of information which I believe our publishers should be aware of." (Alex. Dec., Ex. 3, p. 237:3-13.) The documentary evidence bears out Cosentino's testimony, as there appear to be virtually no instances where Defendants discussed Broadspring with a publisher ***without*** making the disparaging statements at issue. The documentary evidence also reflects Cosentino coaching and instructing his immediate subordinate, Ian Kane, to repeat the false statements to publishers choosing between Broadspring and Congoo.[8] (Katz Dec., Ex. 38.)

Furthermore, a rational jury will undoubtedly reject Defendants' argument that the relevant market includes everyone with a web site (which suggests that even a Super Bowl commercial would not suffice). The reality is that the type of publisher for which the parties compete—certain high quality sites, particularly news sites—represents only a minuscule fraction

[8] As discussed in Broadspring's motion for sanctions due to spoliation of evidence, the jury should receive an adverse inference charge due to the willful failure of Cosentino and Kane to preserve their instant messages. (ECF No. 98.) The jury thus could infer that these spoliated communications contain additional evidence of their organized campaign to penetrate the market.

of the internet, and probably less than one thousand total publishers. (Markiles Dec., ¶ 10.) After all, the Squidoo Lens asserts that the "downside" to Adblade is that it "probably won't approve you as they only work with the largest publishers." (Katz Dec., Ex. 7; *see also* ECF. No. 104, Nashed Dec. ¶ 35 (averring that Adblade section of Lens is accurate).) And both Broadspring and Congoo produced lists of "rejected" publishers that number well into the thousands. Indeed, just seven publishers account for more than 62% of Congoo's revenue. (Katz Dec., Ex. 39.) In short, the real relevant market comprises only those few publishers for which Broadspring and Congoo actively compete head to head at any given time.[9]

The jury could also find ample support for Broadspring's position in Defendants' own admissions. Congoo's original counterclaims alleged that Broadspring committed false advertising under the Lanham Act by making "false and/or misleading statements to the Congoo Clients," which, according to the pleading, consisted of five publishers. (ECF No. 26, ¶ 48.) Congoo thereby admitted that it believes such communications constitute "commercial advertising or promotion" in the context of its business. Although the Lanham Act counterclaim was dropped in July, the "amendment of a pleading does not make it any the less an admission of the party." *Andrews v. Metro N. Commuter R.R. Co.*, 882 F.2d 705, 707 (2d Cir. 1989) (abuse of discretion not to let jury consider prior inconsistent pleading).

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[9] Contrary to Defendants' gloss on his testimony, Jonathan Markiles did not testify that the relevant market includes every web site. He testified, rather, that "theoretically" any web site could run advertisements. (Alex. Dec., Ex. 4, pp. 186:25-187:8; *see also* Markiles Dec., ¶¶ 4-9.) Yet another misrepresentation is Defendants' argument that Markiles testified that "he does not consider" emails to be advertising or promotion; that statement appears nowhere in the cited testimony. (*See* Markiles Dec. ¶ 11).

Relatedly, the assertions in Nashed's Declaration that Congoo sends thousands of emails to publishers every year, and that these emails do not constitute advertising, is hopelessly contradictory. (Nashed Dec. ¶ 7.) If these "thousands of emails" are not advertising, then they cannot be the right denominator in the dissemination analysis. In any event, Defendants' argument rests on the false dichotomy that either every email constitutes advertising, or none does. The reality, however, is that the parties send a lot of emails to publishers, and that some of these are for promotional purposes, while others—such as discussions about technical or accounting issues—are not. (Markiles Dec., ¶ 11.) A rational jury should readily find that the emails in dispute in this case are the former, and there is no doubt that the postings on sites like Contextly.com are advertising.

**III. Although Not Required by the Lanham Act, Broadspring Can Prove Damages**

Defendants contend that Broadspring cannot show damages based on their conjecture that Geology.com "stopped working with Plaintiff for several factors other than the statements in the Lens -- Geology.com was in breach of its agreement with Congoo and Geology.com Googled 'How Life Works' and the reviews 'were not good.'" (Def. Mem., 22.) But the deposition testimony of Geology.com's principal, King, is clear that he removed Broadspring's ad units from his site because of the Squidoo Lens. (Katz. Dec., Ex. 19.) Indeed, King testified that his web master was in the midst of replacing all of the Adblade units with Broadspring units, but when he received the Lens, he immediately ordered his web master to reverse course. (*Id*.) The

jury is entitled to credit King's testimony about why he took down Broadspring's units over Defendants' speculation about his motives.[10]

At any rate, even without monetary damages, Broadspring would still be entitled to seek injunctive relief and attorneys' fees. *Johnson & Johnson v. Carter-Wallace, Inc.*, 631 F.2d 186, 191 (2d Cir. 1980) (plaintiff's "inability to point to a definite amount of sales lost to [defendant] (a failure which would bar monetary relief) does not preclude injunctive relief. Likelihood of competitive injury sufficient to warrant a § 43(a) injunction has been found in the absence of proof of actual sales diversion in numerous cases."); *Neuros Co., Ltd. v. KTurbo, Inc.*, 691 F.3d 514, 520-21 (7th Cir. 2012) (false advertising plaintiff may still obtain injunctive relief and attorneys' fees "in the absence of provable injury").

As for disgorgement damages, Defendants once again misstate the law when they assert that "Plaintiff possesses no evidence showing that Congoo earned any profits as a result of alleged wrongful conduct." (Def. Mem., 22.) Broadspring's sole burden is to prove Congoo's gross sales, *see* 15 U.S.C. § 1117(a), and it can easily carry that burden by introducing Congoo's financial records. (Katz Dec., Ex. 40, 41.) (Notably, those records show that Congoo's revenues spiked in conjunction with the Squidoo Lens.) Defendants have the burden of identifying and proving any revenues not attributable to the false advertising, which they have utterly failed to do. *See Myplaycity, Inc. v. Conduit Ltd.*, 2013 U.S. Dist. LEXIS 115598, *7 (S.D.N.Y. Aug. 12, 2013); *Rexall Sundown, Inc. v. Perrigo Co.*, 707 F. Supp. 2d 357, 359 (E.D.N.Y. 2010).

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[10] Considering that Cosentino admitted he used false identities to post information online more times than he can even remember (Alex. Dec., Ex. 3, p. 297:12-15), it is disingenuous for Defendants to suggest that King might have dropped Broadspring because of his "independent internet research."

## IV. Defendants Tortiously Interfered with Broadspring's Relationship with Geology

Defendants' motion for summary judgment on the tortious interference claim rests on the incorrect premise that Broadspring alleges Defendants caused Geology.com to breach an existing contract with Broadspring. Defendants even casually remark that while Broadspring's relationship with Geology.com "may be the subject of an action for tortious interference with prospective business relationship, that cause of action and its associated requirement of interference by wrongful means are not alleged." Def. Mem. 24.)

But this is precisely what Broadspring alleges: "As a result of [Defendants'] actions, Geology.com chose not to enter into contracts with Broadspring." (ECF No. 27 ¶ 28.) This unmistakably alleges tortious interference with a prospective business relationship. *See, e.g., Strapex Corp. v. Metaverpa N.V.*, 607 F. Supp. 1047, 1050 (S.D.N.Y. 1985) ("Interference with a plaintiff's business relations with a third party can be found if the plaintiff had a reasonable expectancy of a contract with the third party, which can result from mere negotiations.") (quotations omitted).

"[T]o state a claim for tortious interference with prospective economic advantage, the plaintiff must allege that (1) it had a business relationship with a third party; (2) the defendant knew of that relationship and intentionally interfered with it; (3) the defendant acted solely out of malice, or used dishonest, unfair, or improper means; and (4) the defendant's interference caused injury to the relationship." *Kirch v. Liberty Media Corp.*, 449 F.3d 388, 400 (2d Cir. 2006) (quotation omitted). The evidence is more than sufficient to support a verdict for Broadspring on each of these elements.

King testified that he much preferred Broadspring's advertising units over Congoo's. (Katz Dec., Ex. 19, pp. 70:8-71:23.) Indeed, he testified not only that he was happier with the revenues Broadspring's units generated, but also that Broadspring's user interface was superior and the advertisements themselves were much "cleaner" than Congoo's. (*Id*.) King further testified that the "disturbing information" he read in the Squidoo Lens was the reason he abruptly reversed course and replaced his Broadspring ad units with Adblade units. (*Id*., 80:3-81:22.) And Defendants' use of an intentionally deceptive and misleading web site plainly constitutes "dishonest, unfair, or improper means." *Kirch*, 449 F.3d at 400. Accordingly, there is more than enough evidence to support a verdict for Broadspring.

**V. Congoo's Request for Summary Judgment on its Counterclaim is Frivolous**

Congoo's request for summary judgment on its common law unfair competition counterclaim is vexatious, frivolous and a waste of time. As explained in Broadspring's pending motion with respect to this counterclaim for summary judgment or, alternatively, judgment on the pleadings—which Broadspring hereby incorporates by reference—Congoo's common law unfair competition is completely meritless and should be summarily dismissed.

Moreover, there are numerous additional reasons why Congoo would not be entitled to summary judgment on the unpled advertising disclosure claim. First, the arguments in Congoo's motion for summary judgment reveal that, at its core, Congoo's claim is an attempt to use state unfair competition law to create a private right of action out of the FTC's guidelines. It is settled, however, that "no private right of action arises under [the FTC Act]." *Naylor v. Case & McGrath, Inc.*, 585 F.2d 557, 561 (2d Cir. 1978). Although state law may simultaneously regulate conduct within the FTC's purview, it may not supply a private right of action solely to

enforce a federal law that is not privately enforceable. *See Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 348, 353 (2001) (state law may not create private claims for fraud on the FDA); *In re Bayer Corp. Combination Aspirin Prods. Mktg. & Sales Practices Litig.*, 701 F. Supp. 2d 356, 369-70 (E.D.N.Y. 2010) ("a state law claim only endures if it manages to incorporate, but not depend entirely upon, a [federal statutory] violation"). That principle applies with particular force here, because the FTC has made clear that the guidelines "do not have the force and effect of law." (Katz Dec., Ex. 42.) Consequently, any state-created private right of action would directly contravene the FTC's considered policy judgment about the legal effect of its guidelines.

Second, Broadspring does not control the disclosures on the advertising units the publishers host. Although Broadspring makes recommendations, the ultimate decision-making authority rests with the publishers. (Alex. Dec., Ex. 4, pp. 202:12-215:11.) A jury accordingly should find that the required element of bad faith is absent here. *See Jeffrey Milstein, Inc. v. Greger, Lawlor, Roth, Inc.*, 58 F.3d 27, 35 (2d Cir. 1995) (for common law unfair competition, "there must be some showing of bad faith").

Finally, many of Congoo's advertising units contain no more disclosures than Broadspring's. (Markiles Dec. ¶ 13, Ex.1.) In other words, Congoo is talking out of both sides of its mouth. Obviously, Congoo cannot recover on an unfair competition theory if it engages in the same conduct.

## CONCLUSION

Defendants' motion for summary judgment should be denied in its entirety.

Dated: New York, New York
January 8, 2014

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