

## Trade Disparagement

PLF claims DFT made false statement[s] about [his/her/its] product[s] that caused financial harm. To succeed on this claim, PLF must prove it is more likely than not that:

1. DFT made false statement[s] to a third party;
2. The statements were about PLF's product[s] [services];
3. DFT knew that the statements were false or made the statements with reckless disregard for whether they were true or false;
4. DFT made the false statements in order to cause PLF financial harm; and
5. DFT's false statements caused PLF financial harm.<sup>1</sup>

I will now discuss each of these items in more detail.

### (a) False Statements

First, PLF must prove, more likely than not, that DFT's statements were false.<sup>2</sup> However, a statement is not false if it is merely an opinion that DFT had a better product [service].<sup>3</sup>

---

<sup>1</sup> *HipSaver, Inc. v. Kiel*, 464 Mass. 517, 522–23 (2013); see also 37 J. Nolan & L. Sartorio, Massachusetts Practice § 7.16 (3d ed. 2014); *Hi-Tech Pharma., Inc. v. Cohen*, 277 F. Supp. 3d 236, 249–50 (D. Mass. 2016).

<sup>2</sup> *HipSaver, Inc. v. Kiel*, 464 Mass. 517, 523 (2013); see also *Bose Corp. v. Consumers Union of U.S., Inc.*, 508 F. Supp. 1249, 1259 (D. Mass. 1981), rev'd on other grounds, 692 F.2d 189 (1st Cir. 1982), aff'd, 466 U.S. 485 (1984); Restatement (Second) of Torts § 629 (1979). Two federal district courts have stated that trade disparagement also must "impute to the corporation fraud, deceit, dishonesty, or reprehensible conduct." *First Act Inc. v. Brook Mays Music Co., Inc.*, 429 F. Supp. 2d 429, 433 n.3 (D. Mass. 2006) (quoting *Picker Int'l, Inc. v. Leavitt*, 865 F. Supp. 951, 964 (D. Mass. 1994)). However, the seminal Supreme Judicial Court decision on trade disparagement does not include that requirement. See *HipSaver, Inc. v. Kiel*, 464 Mass. 517, 523 (2013).

<sup>3</sup> *HipSaver, Inc. v. Kiel*, 464 Mass. 517, 523 (2013).

<fact vs. opinion- from defamation instruction<sup>4</sup> >

DFT's statement must be factual and not purely a matter of opinion. Everyone has a constitutional right to express an opinion. No one is liable for stating a pure opinion even if it is harmful or offensive.

In some cases, though, a statement that sounds like an opinion may also communicate a fact. PLF must prove that a reasonable person could have understood DFT's statement as making a statement of fact, rather than a pure opinion.

In deciding how a reasonable person would have understand the statement, you should consider all the circumstances and ask yourselves questions like these:

- Was it possible to verify the statement? Generally, it is possible to verify a statement of fact, but not an opinion.
- Where and how did DFT make the statement? Sometimes the location or method of making a statement is more appropriate to stating facts; other methods and places may be more likely for expression of opinions.
- Who was the audience?
- What did the rest of the DFT's statements say?
- Did DFT include any cautions to the audience that might lead a reasonable person to think that the statements were matters of opinion? Or, did DFT communicate in some way that s/he/it was asserting facts?

You should consider the statement's context carefully, because a statement of fact in one context can be a statement of opinion in another. For example, if the audience can expect speakers [writers] to try to persuade listeners [readers] through fiery rhetoric or emotional language, people

---

<sup>4</sup> The judge should submit the question of fact versus opinion to the jury if a reasonable person could have understood the statement as either an opinion or a statement of fact. See *Phelan v. May Dept't Stores Co.*, 443 Mass. 52, 57 (2004); *Aldoupolis v. Globe Newspaper Co.*, 398 Mass. 731, 733-734 (1986).

might understand a statement to be a matter of opinion, even though in a different context, the audience would consider it a statement of fact. Based upon all the circumstances, you must decide whether the PLF has proven that a reasonable listener would consider DFT's statement(s) to be statements of fact, not just pure opinion.

PLF must also prove that the statement was false. To be false, a statement must be substantially untrue. If the statement's gist, or basic substance, is accurate, the statement is not false. Minor inaccuracies do not make a statement false if the listener's [reader's] understanding of the basic truth remains unchanged. I

**(b) About PLF's product**

Second, PLF must prove the statement either expressly identified PLF's product [service] or would lead a reasonable person to believe the statements were about PLF's product [service].<sup>5</sup> PLF's belief that the statements put [his/hers/its] product in a bad light is no substitute for proof that the statement was actually about PLF's product.

**(c) Knowledge that Statements were False**

Third, PLF must prove that DFT knew that the statements were false or had serious doubts about whether they were true or not.

**(d) Intended to Cause Harm**

Fourth, PLF must prove that DFT intended the statements to cause financial harm to PLF or reasonably should have known the statements were likely to cause economic harm.

< *Insert when there is no direct evidence of state of mind* > If there is no direct evidence of DFT's [intent, state of mind, knowledge, etc.], PLF may prove DFT's [intent, state of mind, knowledge, etc.] by indirect evidence. It is obviously impossible to look directly into a person's mind. But, in our

---

<sup>5</sup> *HipSaver, Inc. v. Kiel*, 464 Mass. 517, 529 (2013).

everyday activities, we often must decide a person's state of mind from what they do and don't do. You should look at all of the circumstances including what DFT did and said at the time as well as what DFT did and said before and after the event. You may also consider what DFT did not do and say.

A person acts "intentionally" when s/he acts on purpose and voluntarily. You should ask whether DFT meant to perform the act. An act is not intentional if it occurred by accident or by carelessness. In addition, PLF must prove that DFT acted with the purpose of causing economic harm or reasonably should have known that his/her/its actions would cause such harm.

### **(e) Financial Harm and Damages**

Finally, PLF must prove that DFT's statements caused financial harm to PLF's business.<sup>6</sup> PLF cannot recover for less tangible harm such as harm to PLF's reputation.

To prove financial harm, PLF must identify specific losses due to DFT's statements by producing evidence of particular customers and specific lost sales unless PLF shows the statements were widely communicated. If the evidence shows the statements reached a broad and general audience, PLF may prove financial harm by showing lost profits or a loss of market share. In either case, PLF must also prove that DFT's statements caused the financial harm.<sup>7</sup> If PLF proves financial harm, it will be up to you to calculate the amount based on the evidence and reasonable inferences, but not on speculation.

---

<sup>6</sup> *HipSaver, Inc. v. Kiel*, 464 Mass. 517, 536 (2013) (citing Restatement (Second) of Torts § 633(2)(a) & cmt. c (1977)); *Advanced Tech. Corp. v. Instron, Inc.*, 66 F. Supp. 3d 263, 276 (D. Mass. 2014); *Bose Corp. v. Consumers Union of U.S., Inc.*, 508 F. Supp. 1249, 1259 (D. Mass. 1981) (citing *Dooling v. Budget Publ'g Co.*, 144 Mass. 258 (1887)), rev'd on other grounds, 692 F.2d 189 (1st Cir. 1982), aff'd, 466 U.S. 485 (1984).

<sup>7</sup> *HipSaver, Inc. v. Kiel*, 464 Mass. 517, 538-540 (2013); *Bose Corp. v. Consumer Union of U.S., Inc.*, 529 F. Supp. 357, 361 (1981).