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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
NORTHERN DIVISION

PROCTER & GAMBLE; THE PROCTER &
GAMBLE DISTRIBUTING COMPANY,

Plaintiffs,

vs.

RANDY L. HAUGEN, ET AL.,

Defendants.

**MEMORANDUM IN SUPPORT OF MOTION FOR
JUDGMENT AS A MATTER OF LAW**

Civil No. 1:95-CV-94-TDS

Judge Ted D. Stewart
Magistrate Paul Warner

I. Introduction

P &G has now rested. Defendants move for judgment as a matter of law under Fed. R. Civ. P. 50(a). A reasonable jury would not have a legally sufficient evidentiary basis to find for P&G. To satisfy its burden, P&G must prove the following:

- The Amvox message was commercial advertisement or promotion, *Procter & Gamble Co. v. Haugen*, 222 F.3d 1262, 1270, 1273-74 (10th Cir. 2000), which includes the following sub-elements:

1. The Defendants, as opposed to Amway, were in commercial competition with P&G at the time the Defendants forwarded the Amvox Message; and

2. The Defendants themselves, as opposed to Amway distributors generally, used the Amvox Message for the purpose of influencing consumers to buy Defendants' goods or services; and

3. The Defendants themselves, as opposed to Amway distributors generally, sufficiently disseminated the Amvox Message to the relevant purchasing public to constitute "advertising" or "promotion" within the consumer goods industry; and

- The Amvox Message deceived or was likely to deceive a substantial segment of the relevant purchasing public. *Decorative Center of Houston, L.P. v. Direct Response*

Publications, Inc., 264 F. Supp. 2d 535, 551 (S.D. Tex. 2003); *Porous Media Corp. v. Pall Corp.*, 173 F.3d 1109, 1121 (8th Cir. 1999).

- The Amvox Message was a substantial factor in causing the relevant purchasing public not to do business with P&G. *Seven Up v. Coca Cola*, 86 F.3d 1379, 1387 (5th Cir. 1996).
- P&G has been damaged as a result of the Amvox Message. *Sally Beauty Co., Inc. v. Bautyco, Inc.*, 304 F.3d 964, 980 (10th Cir. 2002).
- Defendants acted intentionally or in bad faith. Even indifference, if proven, is insufficient to support plaintiff's claim for an accounting for Defendants' profits. *Western Diversified Services, Inv. v. Hyundai Motor America, Inc.*, 427 F.3d 1269, 1272-74 (10th Cir. 2005).

II. Facts

When Defendants passed Roger Patton's Amvox message to their "front lines," they made an innocent mistake. Randy Haugen believed the rumor, just as P&G's expert said he was likely to do.¹ That is, he believed that P&G's President had appeared on national television and indicated that his company donated money to the Church of Satan. It sounds improbable now, when exposure to Internet rumors has made us all more jaded. But, as the evidence has shown, in 1981-82, 1984-85, and 1990, the rumor spread—principally among religious people—and was, at least to some

¹ According to P&G's marketing expert, Dr. John Hauser, 83% of people who hear the rumor either believe it or probably believe it. TT 731.

extent, believed.² Hundreds of thousands (perhaps millions) of people had been taken in by it between 1980 and April 20, 1995.³

This was not willful or bad faith conduct by any defendant. The uncontroverted evidence that Randy Haugen sent at least 2 retractions (though the timing has been debated, reasonable minds cannot differ that the April 20, 1995 message was sent by Mr. Haugen, followed by two recorded retractions on or before April 26, 1995). Additionally, both Messrs. Walker and Bybee sent retractions within hours of forwarding the original message. P&G's case lacks any plausible evidence of bad faith, therefore, P&G cannot satisfy their damages burden by merely offering evidence of defendants' profits.⁴

The 1995 outbreak lasted only a few months, from March to September of 1995.⁵ P&G has produced no evidence that connects the defendants to the spread of the rumor during the months preceding April 20, 1995. Prior to Haugen ever receiving the message from Patton, P&G had already been notified of others who were disseminating the rumor and had even begun the process of contacting people who passed on the

² D. Ex. H-107, P&G 000609. "The completely ridiculous and false story that the President of The Procter & Gamble Company appeared on a talk show to discuss the Company's connection to Satanism has been resurfacing in your area . . . It is a variation of the lie that was spread in 1980-81, 1984-85, 1990, and again recently."

³ By 1985, P&G had "answered more than 100,000 calls and letters about the rumors during the past four years." D. Ex. H-107, P&G 000633. By 1995, that number had grown to 200,000 calls. D. Ex. H-107, P&G 000638.

⁴ The only evidence P&G has offered that even remotely touches on the issue of any Defendant's intent is the deposition of Barbara Charboneau, who clearly failed to tie her connection to the Satan rumor to any of the Defendants. Not only is the flyer from which she was working a different version of the rumor than the one that formed the basis of the Amvox message, Ms. Charboneau clearly stated that she did not know or know of any Amvox message, and certainly did not know Randy Haugen, Randy Walker, Steve Bybee or Steve Brady.

⁵ D. Ex. E-16.

rumor, including Gene Todd, the pastor of a 400 person church⁶, Jason Hagler, a student at the University of Washington who had posted the rumor on the Internet⁷, members of the United States Air Force who had passed the rumor by email⁸, Jamie Hollingshead, a student at BYU⁹, Charles Marean, the author of an editorial on the rumor¹⁰, the Pastor of the Christ Temple Pentecostal Church in Kansas City, Missouri¹¹, and hundreds, if not thousands of others. Plaintiffs—who claim damages over a four-year period—have produced call volume data that the rumor Haugen passed on had died out before the end of the year.¹² P&G had also solicited retractions from a number of religious figures and a talk show host before April 20.¹³ These contacts had the same effect as they had during previous outbreaks. That is, not long after P&G began contacting those who had spread the rumor, complaints to P&G’s call center began to decline.¹⁴ By August, the complaints had receded to the “background” level that P&G had been experiencing for years.¹⁵

The difference between P&G’s statements at the time of the outbreak and its statements at trial is difficult to miss. On March 31, 1995, three full weeks before Roger Patton recorded the rumor message at issue here, P&G’s spokesperson, Elaine

⁶ D. Ex. H-62.

⁷ D. Ex. H-63.

⁸ D. Ex. H-69.

⁹ *Id.*

¹⁰ D. Ex. H-77.

¹¹ D. Ex. H-79.

¹² *Id.*

¹³ D. Ex. H-107, P&G 000614-000619 Donahue 3/5/95; Archbishop of Cincinnati 3/22/95; Liberty University 4/95; Southern Baptist Convention 4/20/95; Bishop of Southern Ohio 3/23/95; Billy Graham Evangelistic Association 4/3/95.

¹⁴ D. Ex. E-16.

¹⁵ *Id.*

Plummer, was quoted as saying that the rumor comes back every Spring and had already cropped up on college campuses, where it was being spread over the Internet.¹⁶ The Internet problem in advance of April 20, 1995 was extensive: Dave Levin, the person tasked by P&G to track the electronic spread of the rumor, remarked on March 31, 1995 that there had been “a significant increase in the Satanism rumors spreading over the public internet.”¹⁷ When Cherrie Crawford, another P&G investigator, learned that the rumor was spreading in Houston area churches, she glibly remarked, “Surprise!”¹⁸ On April 27, 1995, Dave Levin sent a follow-up to his earlier message concerning the Internet outbreak, this time noting, “The telephone calls to our 800 number lines re our trademark have increased dramatically (>300%) in the last two months. We believe this is the result of the Satanism internet messages.”¹⁹ How extensive was the Internet outbreak? “While I have seen the names of hundreds of recipients, I am sure this message has ***been sent to thousands, if not tens of thousands of people.***”²⁰ There is no evidence that any of the defendants had anything to do with the spread of the rumor over the Internet. Similarly, the defendants themselves have not been connected with the spread of the rumor to churches, where it was clearly proliferating through churches well before April 20, 1995.

P&G’s position in this litigation is simply this: The entire 1995 outbreak is traceable to the Defendants. But, as P&G’s own internal documents indicate, Haugen

¹⁶ D. Ex. H-107, P&G 000620.

¹⁷ D. Ex. H-66.

¹⁸ D. Ex. H-70.

¹⁹ D. Ex. E-11.

²⁰ *Id.*

and others forwarded Roger Patton's rumor message "a few days" before April 25, 1995.²¹ The message itself is plainly date-stamped April 20, 1995.²² That is more than three weeks *after* P&G determined that it had a "significant" problem with "a new extensive outbreak of the Satanism rumor" and more than two weeks after P&G's trademark rumor management team had met to form a plan of action.²³ If candor was ever called for, it is called for here: P&G's back-loaded damages model—which shifts in amount from day to day, depending on the weather—is so improbable that to call it evidence would pervert the meaning of that word.

III. Standard for Granting JMOL

This Court may grant a motion for judgment as a matter of law "when the facts are sufficiently clear that the law requires a particular result." *Alfred v. Caterpillar, Inc.*, 262 F.3d 1083, 1089 (10th Cir. 2001) (quoting *Weisgram v. Marley Co.*, 528 U.S. 440, 448 (2000)). Judgment as a matter of law is appropriate when a reasonable jury could not find in the plaintiff's favor based on the evidence presented. *Alfred v. Caterpillar, Inc.*, 262 F.3d 1083, 1089 (10th Cir. 2001). The test is not whether the plaintiff has presented *any* evidence, but rather, whether the plaintiff has provided adequate evidence on which a reasonable jury could base a verdict in its favor. *Herrera v. Lufkin Industries, Inc.*, 474 F.3d 675, 685 (10th Cir. 2007). Accordingly, judgment of a matter of law may be appropriate even when the plaintiff has presented some evidence in support of its claim. See *id.* Federal Rule of Civil Procedure 50(a) authorizes the Court

²¹ P. Ex 46.

²² D. Ex. Q-9.

²³ D. Ex. H-66 ("significant"); Ex. H-67 ("plan").

to grant such motions at its discretion. *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 981 (2006) (applying Tenth Circuit law).

IV. Arguments & Authorities

A. Commercial Advertisement or Promotion

“Advertising” is generally understood to consist of widespread communication through print or broadcast media; “promotion” may take other forms of publicity used in the relevant industry, such as displays at trade shows and sales presentations to buyers. *Fashion Boutique of Short Hills, Inc. v. Fendi USA, Inc.*, 314 F.3d 48, 57 (2d Cir. 2002). “Advertising is a form of promotion to anonymous recipients, as distinguished from face-to-face communication.” *First Health Group Corp. v. BCE Emergis Corp.*, 269 F.3d 800, 804 (7th Cir. 2001). “In normal usage, an advertisement read by millions (or even thousands in a trade magazine) is advertising, while a person-to-person pitch by an account executive is not.” *Id.* “Advertising is a subset of persuasion and refers to dissemination of prefabricated promotional material.” *Id.* “The level of circulation required to constitute advertising or promotion varies from industry to industry.” *Sports Unlimited, Inc. v. Lankford Enters.*, 275 F.3d 996, 1005 (10th Cir. 2002); *American Needle & Novelty, Inc. v. Drew Pearson Marketing, Inc.*, 820 F. Supp. 1072, 1078 (N.D.Ill. 1993). However, there must be some level of public dissemination of information. *Sports Unlimited, Inc.*, 275 F.3d at 1005; *American Needle*, 820 F. Supp. at 1077-78.

A reasonable jury would not have a legally sufficient evidentiary basis to find that Defendants forwarding of the rumor message constituted a commercial advertisement

or promotion. See *Fashion Boutique of Short Hills, Inc.*, 314 F.3d at 57; *First Health Group Corp*, 269 F.3d at 804. In order for representations to constitute “commercial advertising or promotion” under Section 43(a)(1)(B) of the Lanham Act, the representations must be: “(1) commercial speech; (2) by a defendant who is in commercial competition with plaintiff; (3) for the purpose of influencing consumers to buy defendant's goods or services.” *Procter & Gamble Co. v. Haugen*, 222 F.3d 1262, 1273-1274 (10th Cir. 2000). The representations must also be (4) “disseminated sufficiently to the relevant purchasing public to constitute ‘advertising’ or ‘promotion’ within that industry. *Id.* Although Defendants believe none of the elements have been satisfied here, there clearly has been **no** showing that:

- The rumor message was an advertisement or promotion.
- The rumor was spread for the purpose of influencing consumers to buy defendants’ goods.
- Defendants spread the rumor sufficiently to the relevant purchasing public to constitute advertising or promotion in that industry.

Here, Defendant Randy Haugen forwarded Patton’s message to nineteen or twenty people personally known to him as his friends and business acquaintances.²⁴ These people were not Haugen’s employees—they were, at most, independent contractors²⁵ and people for whom defendants cannot be held vicariously liable. Moreover, since the people Haugen forwarded the message to were already Amway

²⁴ TT at 274 to 276.

²⁵ TT at 268 to 270.

distributors, they were already buying Amway products (to the exclusion of P&G products); they needed no “influence” to buy products from themselves.

P&G would have the court believe that Defendants are responsible for all acts of any Amway distributor at any time following (or even in the chronological proximity of) the recording of the Amvox message by Roger Patton. Just as the Tenth Circuit affirmed the dismissal of Amway from this litigation on the grounds that Amway cannot be held responsible for the actions of its distributors, the defendants cannot be held responsible for the actions of other independent Amway distributors. Defendants can only be held responsible for their own actions or the actions of their employees. Plaintiff has produced absolutely no evidence that any person to whom these defendants sent the Amvox message changed his or her buying habits in even the smallest way.

Defendants Steven Brady, Stephen Bybee, and Randy Walker sent the message to fewer people than Haugen did. Like him, they sent the message only to other Amway distributors, individuals for whose actions defendants cannot be held vicariously liable.

P&G is a global corporation that sells products worldwide.²⁶ Its market is a billion people or more.²⁷ Haugen and the other Defendants directly forwarded the message to fewer than fifty people. This is not enough to constitute sufficient dissemination to be an advertisement or promotion. *See Fashion Boutique of Short Hills, Inc.*, 314 F.3d at 58 (twenty-seven statements in a market of thousands was not sufficient).

²⁶ TT at 741; TT at 842 to 847 (repeated references to “worldwide” earnings).

²⁷ TT at 741.

B. Substantial Factor Causing Relevant Purchasing Public not to do Business with P&G.

Defendants forwarded Patton's rumor message to less than fifty people.²⁸ P&G has not produced and cannot point to a single lost sale attributable to any of these recipients. The truth is that, like P&G's own marketing expert, Defendants briefly exposed a small number of people to the rumor, then retracted it. One of the retractions stated:

Hey gang. We sent a message down a while back to do with Procter & Gamble. It cannot be substantiated, that it happened (drop out on tape) so I'm going to assume that it didn't actually happen. Um, please do not call Phil Donahue and please do not call Procter & Gamble and just drop it and don't talk about it anymore. We'd just appreciate that a whole bunch. We do not think that it happened. Thank you. Good-bye.²⁹

A later retraction stated:

Hello guys. This message is going out to all of Valerie and I's frontline and also to every diamond in the organization. Uh, we had an Amvox that came down that talked about Procter & Gamble. A lot of you I understand did not get this Amvox, uh, but if you didn't get it, still pay attention to this because if this rumor ever comes up again you need to stamp it out. Uh, it was rumored that on a television show, on the Phil Donahue show, and it is rumored on other talk shows, that uh, the CEO or officers from Procter & Gamble Company went onto the show and told them that their symbol represents Satanism, the symbol on all their products, and also that they practice Satanism. I'm going to read you a statement here and see if we can get this rumor cleared up because I know a lot of you would like to know the truth and it is very important that you understand this. False rumors: Unfortunately this familiar trademark has been subjected to prosperous, excuse me, preposterous unfounded rumors since 1980-81. The rumors falsely allege that the trademark is a symbol of Satanism or devil worship. Typically the story reports a Procter & Gamble executive

²⁹ D. Ex. Q-9.

discussed Satanism on a national televised talk show. Another story maintains that the trademark is a result of Procter & Gamble being taken over by the Moonies, followers of Reverend Sun Yung Moon and his Unification Church. The rumors are, of course, totally false. Their trademark originated in 1851 as a symbol for their Star brand candle. Later it was designed to show a man in the moon looking over a field of 13 stars commemorating the original American colonies. It represents only Procter & Gamble. So if you hear any rumors saying anything to the effect that they are practicing Satanism and their symbols on their products, uh, are satanic, then it is absolutely 100% false. Uh, we don't want any bad rumors about any competitors or non-competitor, any company anywhere ever going out from us. So if anybody you hear talking about this in the organization anywhere at all brings this up, it is absolutely not true. Not only is not just substantiated, but is not true, period. Amway Corporation does not endorse spreading false and malicious rumors against Procter & Gamble or any other company. Please do your part as independent distributors by not spreading this rumor any farther or nipping it if you hear it from anybody else. We appreciate that a whole lot, uh, so let's crush that, if you're hearing any kind of stuff anywhere let's get rid of it and let's go on and build us a huge business and not have any of this kind of junk and that's a good lesson to be very, very, very, careful about putting anything down on Amvox that's not substantiated, and if anybody could take the blame on this, I can take it. So, uh, we just don't want anything to do with it and it was a mistake. It did go out to a few people.³⁰

Because (1) Defendants quickly issued retractions to a larger group than they had originally forwarded the message to, and (2) there has been absolutely no evidence that any of the people on Defendants' distribution lists used P&G products, P&G has failed to raise a fact issue on the question of whether Defendants actions had an effect on the relevant purchasing public. Certainly, P&G has not produced any evidence that someone contacted by the Defendants refused to do business with P&G as a result of the rumor.

³⁰ D. Ex. Q-9.

C. Proximate Causation & Damages P&G must prove a causal link between a Defendant's false advertising and the damages P&G claims it has suffered. *Brunswick Corp. v. Spinit Reel Co.*, 832 F.2d 513, 525 (10th Cir. 1987). Likelihood of deception is insufficient to establish a causal link, actual consumer deception is required. *Xoom, Inc. v. Imageline, Inc.*, 323 F.3d 279, 286 (4th Cir.2003); *Brunswick Corp.*, 832 F.2d at 525. P&G has the burden of proving by a preponderance of the evidence that a Defendant's Amvox Message caused actual deception resulting in actual damages. *Brunswick Corp.*, 832 F.2d at 525.

During P&G's alleged damage period, it reported the following information to its shareholders:

Year	Net Earnings	EPS
1995	\$2,645,000,000 ³¹	\$3.71 ³²
1996	\$3,046,000,000 ³³	\$4.29 ³⁴
1997	\$3,415,000,000 ³⁵	\$2.43 (after 2:1 split) ³⁶
1998	\$3,780,000,000 ³⁷	\$2.74 ³⁸

³¹ TT at 840.

³² TT at 840.

³³ TT at 840.

³⁴ TT at 841.

³⁵ TT at 844-45.

³⁶ TT at 845-46.

³⁷ TT at 848.

³⁸ TT at 848.

During that period, P&G never disclosed its alleged loss of hundreds of millions of dollars to its shareholders or the government.³⁹ Obviously, P&G was growing steadily from 1995 through 1998; nothing in its annual reports would suggest a loss of hundreds of millions of dollars. However, to the extent that P&G could have grown even more rapidly, other factors could explain this far more readily than Defendants forwarding of a fifteen-year-old rumor at a time when many others were spreading the same rumor over the Internet. P&G has acknowledged that it faced the following challenges to its performance in the 1995-1998 time period:

- (1) Boycotts by animal rights activists.⁴⁰
- (2) Lack of innovation in P&G's diaper business.⁴¹
- (3) Lack of innovation in P&G's toothpaste business.⁴²
- (4) Product shortages.⁴³

While P&G has produced an expert, Harvey Rosen, willing to testify that P&G has suffered damages caused by an event on April 20, 1995, Rosen's testimony should not be considered evidence of proximate causation or damages.⁴⁴ In order to offer an opinion on causation, an expert must exclude alternative causes. *Michaels v. Avitech*,

³⁹ TT at 849.

⁴⁰ TT at 855-56; P's Ex. 99.

⁴¹ TT at 862.

⁴² TT at 866-67; D's Ex. K-37.

⁴³ TT at 871-72.

⁴⁴ Rosen conceded that his testimony does not concern causation. TT 983.

Inc., 202 F.3d 746, 753 (5th Cir. 2000); *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717, 757, 759 n.27 (3rd Cir. 1994). Rosen made no attempt to exclude these alternative causes for slow growth. His testimony proves nothing with respect to these Defendants.

Even if the Court were to accept P&G's argument that it was damaged in some way by the 1995 outbreak of the Satanism rumor, P&G has not provided evidence sufficient to raise a fact issue on the amount of such damages that resulted from Defendants' actions.⁴⁵ Defendants did not initiate the spread of the rumor in 1995. Instead, they were a small blip among a surge in Internet rumor activity.⁴⁶ Before Defendants forwarded the Amvox message:

- Doug Pepper, son of P&G's CEO, had received an email version of the rumor.⁴⁷
- Jason Hagler, a student at the University of Washington who had posted the rumor on the Internet.⁴⁸
- Six Air Force Cadets had been identified as spreading the rumor by email.⁴⁹ A single copy of one such email included distribution lists totaling approximately fifty email accounts.⁵⁰

⁴⁵ See TT at 983 (Rosen's number not tied to a particular event or actor).

⁴⁶ See D Ex. E-11 (concluding that the surge in calls in March and April of 1995 was due to Internet repetitions of the rumor).

⁴⁷ TT at 886; D. Ex. F-5.

⁴⁸ D. Ex. H-63.

- Approximately sixty students at colleges all around the country had been forwarded an email version of the rumor.⁵¹

P&G has made absolutely no attempt to trace these versions of the rumor to their origins, nor has it provided the court with any mechanism to determine which portions of its alleged damages are attributable to these and other concurrent sources of rumor spreading.⁵²

Recognizing the immense burden that P&G carries in the case to prove causation, P&G previously has urged that this Court apply the concurrent causation and burden shifting principles outlined in *Northington v. Marin*, 102 F.3d 1564 (10th Cir. 1996). These principles are not applicable to this case. P&G cites to no authority to support extension of *Northington* to the Lanham Act. Indeed, at least one court has refused to extend *Northington* outside of the context of a 42 U.S.C. § 1983 action. See, e.g., *Wynn v. Nat'l Broadcasting Co., Inc.*, 234 F. Supp. 2d 1067, 1091 n. 14 (C.D. Cal. 2002). Defendants are aware of no case that has extended *Northington* to the Lanham Act. Moreover, *Northington* relies on Restatement (Second) of Torts § 433B(2). The comments to that section explain that the principles discussed in *Northington* only apply only in situations involving a very small number of defendants. Restatement (Second) of Torts § 433B(2) cmt. e (1979). Comment e explains that it would be unjust to apply

⁴⁹ H-69; F-4.

⁵⁰ F-4.

⁵¹ H-65.

⁵² TT at 983.

concurrent causation in situations involving a large number of defendants, each of which contributed in an insubstantial way to the injury caused:

[T]here may be so large a number of actors, each of whom contributes a relatively small and insignificant part to the total harm, that the application of the rule may cause disproportionate hardship to defendants. Thus if a hundred factories each contribute a small, but still uncertain, amount of pollution to a stream, to hold each of them liable for the entire damages because he cannot show the amount of his contribution may perhaps be unjust. Such cases have not arisen possibly because in such cases some evidence limiting the liability always has been in fact available.

Id.; see also *MTBE Products Liability Litigation*, 379 F.Supp.2d 348, 372 & n.69, 378 & n.108, 405 & n.284 (S.D.N.Y. 2001) (declining to apply concurrent causation principles in a case involving a large number of defendants).

P&G also no doubt will seek to have the jury draw an inference of causation based on the temporal relationship between an event and an injury. Courts have been clear that, in a Lanham Act case, it is not reasonable for a jury to make an inference of causation based merely on a chronology of events. *Decorative Center of Houston v. Direct Response Pubs., Inc.*, 264 F. Supp. 2d 535, 555-56 (D. Tex. 2003); *Seven Up Co. v. Coca-Cola Co.*, 86 F.3d 1379, 1389 (5th Cir. 1996).

Because P&G has not provided competent testimony on causation and damages, Defendants are entitled to judgment as a matter of law.

D. Willfulness or Bad Faith

“[A]n award of profits under the Lanham Act is truly an extraordinary remedy and should be tightly cabined by principles of equity.” *Western Diversified Services, Inv. v. Hyundai Motor America, Inc.*, 427 F.3d 1269, 1274 (10th Cir. 2005). The award is not automatic, but requires a showing of willfulness or bad faith. *Id.* at 1272-73. According to the Tenth Circuit, this showing is a “critical requirement” for establishing entitlement to an accounting of Defendant’s profits. *Id.* at 1272. Rejecting the more lenient standards adopted in other circuits for establishing willfulness, the Tenth Circuit has defined willful conduct to mean “a conscious desire.” *Id.* at 1274. In so doing, the Court explained that “a conscious desire” requires something more than an “aura of indifference to the plaintiff’s rights” or a mere “connection between a defendant’s awareness of its competitors and its actions at those competitors’ expense.” *Id.* (quoting rejected standards).

P&G has failed to present any evidence from which the jury could find that and Defendant acted with willfully or in bad faith, i.e. with “a conscious desire” to bring any harm to P&G. Knowing this, P&G’s premise for intentional conduct is based solely on its assertion that Defendants failed to investigate the contents of the Amvox Message before passing it along. P&G has failed to cite a single case under the Lanham Act holding that the Defendants; failure to investigate (a theory that sounds in negligence) constitutes willful conduct under the Lanham Act. A failure to investigate certainly does not amount to “a conscious desire” under the Tenth Circuit standard.

As discussed above, the unrefuted evidence with respect to each Defendant is that they acted in good faith. Defendants passed the Amvox Message on because they found it interesting. However, once they learned that the statements about P&G in the Amvox Message were untrue, they acted to contain it.

V. CONCLUSION

For the foregoing reasons, Defendants (individually and collectively) are entitled to Judgment as a Matter of Law under Fed. R. Civ. P. 50(a).

DATED this 14th day of March, 2007.

Respectfully submitted,

/s/Ryan J. Schriever

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Certificate Service

The undersigned hereby certifies that on the 14th day of March, 2007, a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF MOTION FOR JUDGMENT AS A MATTER OF LAW** was sent using the CM/ECF system which sent notification of such filing to the following:

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