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Appellate Court Records

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, *ex rel.* ELLEN F. ROSENBLUM, in her official capacity as Attorney General for the State of Oregon, Plaintiff-Appellant, Cross-Respondent, Petitioner on Review, v. LIVING ESSENTIALS, LLC, a Michigan limited liability company, and INNOVATION VENTURES, LLC, a Michigan limited liability company, Defendants-Respondents, Cross-Appellants, Respondents on Review.	Multnomah County Circuit Court Case No. 14CV09149 CA A163980 SC S068857

BRIEF ON THE MERITS OF RESPONDENTS ON REVIEW

Review of the Decision of the Court of Appeals
on Appeal from a Judgment of the Circuit Court for Multnomah County
Honorable Kelly Skye, Judge

Opinion Filed: July 14, 2021
Author of Opinion: Devore, J.
Before: Lagesen, P.J., Devore, J., and James, J.

Listing of Counsel Next Page March 2022

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INTRODUCTION

This appeal concerns two main issues: (1) whether ORS 646.608(1)(b) and (e) of the Unlawful Trade Practices Act ("UTPA") required the state to prove Defendants Living Essentials, LLC ("Living Essentials") and Innovations Ventures, LLC's ("Defendants") representations would materially affect consumer purchasing decisions;[1] and (2) whether Defendants are entitled to mandatory attorney fees under ORS 646.632(8). The Court of Appeals answered both questions in the affirmative, and this court should affirm that decision.

FIRST QUESTIONS PRESENTED[2]

A. Did the Court of Appeals properly hold that ORS 646.608(1)(b) and (e) required the state to prove that Defendants' representations would materially affect consumer purchasing decisions?

B. If not, are ORS 646.608(1)(e) and the "approval" or "certification" provisions of ORS 646.608(1)(b) nonetheless unconstitutional?

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[1] If this court reverses on materiality, it should affirm nonetheless because ORS 646.608(1)(b) and (e) are unconstitutional.

[2] Defendants disagree with the state's questions presented and proposed rules of law for the reasons stated herein, and instead propose their own.

FIRST PROPOSED RULES OF LAW

A. For its claims under ORS 646.608(1)(b) and (e), the state must prove materiality; that is, that the representation would materially affect consumer purchasing decisions.

B. With no materiality requirement, ORS 646.608(1)(e) and the "approval" and "certification" provisions of ORS 646.608(1)(b) violate Article I, section 8 of the Oregon Constitution and the First Amendment of the U.S. Constitution.

SECOND QUESTION PRESENTED

Did the Court of Appeals properly hold that Defendants are entitled to mandatory attorney fees under ORS 646.632(8)?

SECOND PROPOSED RULE OF LAW

Under ORS 646.632(8), if the prevailing defendant, prior to the institution of the state's suit, submitted in good faith to the prosecuting attorney a satisfactory assurance of voluntary compliance ("AVC"), then the court must award defendant its reasonable attorney fees and costs both at trial and on appeal. The trial court (or appellate court on appeal) shall make its own independent determination whether the AVC was satisfactory, irrespective of the prosecuting attorney's reasons for rejecting the AVC.

STATEMENT OF MATERIAL FACTS

In 2004, Living Essentials developed and began distribution of 5-hour ENERGY®. The product was the first of its kind, an "energy shot" that has four calories and no sugar, contained in a 1.93-ounce bottle. 5-hour ENERGY® contains less caffeine than an 8-ounce cup of the leading premium coffee, as well as non-caffeine ingredients. At the time of trial, Living Essentials sold more than 9 million bottles per week nationwide. The majority of purchasers are repeat buyers. (Tr 1751:5–6, 1753:1–3, Ex 860 at 19.)

Before the state filed this lawsuit, it served Defendants with a notice of alleged unlawful trade practices ("Notice") pursuant to ORS 646.632(2). The state contended that Defendants violated the UTPA; namely, by allegedly making claims that "were either unsubstantiated by competent and reliable scientific evidence, or were outright false." (SER-26.)[3] The state threatened to sue if Defendants did not offer an AVC within 10 days. The Notice stated that if the state filed suit, it would seek an order requiring Defendants to pay: "(1) Civil penalties of up to $25,000.00 for each violation; (2) Restitution to anyone harmed by [Defendants'] acts; and (3) [the state's] reasonable attorney's fees, costs and disbursements." (*Id.*)

[3] Unless otherwise specified, "SER" refers to Defendants' Supplemental Excerpts of Record from their Answering Brief.

In response, under ORS 646.632(2), Defendants submitted in good faith a satisfactory AVC, thereby triggering Defendants' right to attorney fees under ORS 646.632(8) in the event Defendants prevailed at trial. (SER-28.) In the AVC, Defendants promised to obey the UTPA *in its entirety* and to *not engage in any of the allegedly wrongful conduct set forth in the state's Notice.* (SER 31–34 ¶¶ 11–20.) Defendants further offered to pay $250,000 to be used as restitution or as the state otherwise saw fit. (SER-34.)

Without providing its own proposed AVC, the state rejected Defendants' AVC, contending it: (1) provided an "inadequate" payment; (2) did "not provide restitution to Oregon consumers"; and (3) did "not provide sufficient assurances that your clients will not re-offend." (SER-42–44.)

The state then filed suit, asserting multiple UTPA violations in 13 counts. The representations that the state put at issue were an "Ask Your Doctor" advertisement and representations regarding the product's non-caffeine ingredients—for example, that B-vitamins provide energy. They included statements such as:

- "It's simple *** caffeine with vitamins and nutrients. It's the combination that makes it great." (ER-29, Ex 133.)
- "Its blend of B-vitamins, amino acids and enzymes helps you feel bright, alert, and focused." (ER-26, Ex 106.)

The trial court dismissed six of the counts before trial. After trial, the court entered judgment for Defendants on all remaining claims, finding (among other rulings)[4] that the state failed to prove "materiality"; namely, that the alleged wrongful conduct would influence consumers' purchasing decisions. The court based its finding in part on Defendants' survey evidence, which demonstrated that "the majority of [5-hour ENERGY®] purchasers are repeat purchasers who are satisfied with their experience with the product." (ER-68.) The survey demonstrated that consumers of 5-hour ENERGY® purchased for a variety of reasons unrelated to the representations at issue here, including product effectiveness, taste, convenience, and price. (*Id*.)

Nevertheless, the trial court denied Defendants' petition for an award of attorney fees pursuant to ORS 646.632(8). (SER-46.) At issue is the provision in ORS 646.632(8) that provides for a mandatory award of fees on the ground that Defendants in good faith offered pre-suit a "satisfactory" AVC. (SER-15–16.)

The state appealed the judgment in favor of Defendants, and Defendants cross-appealed the decision denying fees and limiting costs. The Court of Appeals

[4] Significantly, the trial court found that the state was required, but failed, to prove that any of the representations were false as alleged and failed to prove that the Ask Your Doctor advertisement caused a likelihood of confusion or misunderstanding. (ER-63–67.)

affirmed the general judgment, reversed the denial of Defendants' fees, and remanded for determination of the amount of attorney fees.

SUMMARY OF ARGUMENT

The Court of Appeals correctly determined that the state is required to prove materiality to prevail on its UTPA claims under ORS 646.608(1)(b) and (e). Claims based on conduct that is immaterial to consumers do not advance the UTPA's legislative purpose of protecting consumers. This case highlights the importance of a materiality requirement because not one Oregon consumer complained to the state about Defendants' marketing representations and there was no evidence—even after the state's lengthy investigation and a two-week trial—that any consumers suffered any harm whatsoever. The Court of Appeals' decision is supported by the text and context of ORS 646.608(1)(b) and (e), legislative history, the absurd-results maxim, and the constitutional avoidance canon. If this court reverses, it should nonetheless affirm the general judgment for Defendants because ORS 646.608(1)(b) and (e) improperly infringe on speech under Article I, section 8 of the Oregon Constitution and the First Amendment to the U.S. Constitution.

The Court of Appeals also correctly determined that Defendants presented a "satisfactory" AVC and thus are entitled to mandatory attorney fees pursuant to ORS 646.632(8). The purpose of ORS 646.632(8) is to deter the prosecution of unjustified claims, like those at issue here. Nevertheless, the state advocates for the

ability to expend Oregon taxpayer dollars to pursue advertising representations that are immaterial to Oregon consumers without the consequence of paying the prevailing defendant's fees. If this court were to reverse the Court of Appeals, it would create a dramatic shift in the environment in which prosecuting attorneys in the usual course operate and in the state's powers, allowing the state to pursue baseless claims with no recourse for innocent merchants. Moreover, it would be an egregious injustice to these prevailing Defendants and other merchants who may, in the future, be subjected to the same treatment and the unchecked powers of the state.

ARGUMENT

A. Materiality Is Required to Find a Violation Under ORS 646.608(1)(b) and (e).

The Court of Appeals properly held that the state was required, but failed, to prove materiality; that is, that the alleged representations would materially affect consumer purchasing decisions. In construing ORS 646.608(1)(b) and (e), the court must first examine the text and context. *See State v. Gaines*, 346 Or 160, 171, 206 P3d 1042 (2009). Next, the court examines pertinent legislative history, "even if the court does not perceive an ambiguity in the statute's text ***." *Id.* at 172. "If the legislature's intent remains unclear ***, the court may resort to general maxims of statutory construction to aid in resolving the remaining uncertainty." *Id.*

1. Text and context

a. ORS 646.608(1)(b) and (e) require materiality.

The "Ask Your Doctor" advertisement is the only representation at issue in the state's ORS 646.608(1)(b) claim, which provides:

> "A person engages in an unlawful practice if in the course of the person's business *** the person *** [c]auses likelihood of confusion or of misunderstanding as to the *** approval, or certification of *** goods ***."

The Court of Appeals examined the plain and ordinary definitions of "cause," "confusion," and "misunderstanding" and correctly found:

> "for a seller's unlawful trade practice to 'bring into existence' or 'effect by authority' a 'state of being discomfited, disconcerted, chagrined, or embarrassed' or a 'lack of certainty' or 'power to distinguish, choose, or act decisively' with respect to its product, the unlawful conduct *necessarily* must be material to the consumer's decision to buy the product."

State ex rel. Rosenblum v. Living Essentials, LLC, 313 Or App 176, 187, 497 P3d 730 (2021) (emphasis in original). The facts here illustrate this point. At trial, the state had to prove by a preponderance of the evidence that Defendants' Ask Your Doctor advertisement caused likelihood of confusion or of misunderstanding as to approval or certification of 5-hour ENERGY®. If the advertisement was, as Defendants proved at trial, *immaterial* to consumer purchasing decisions, "it is unlikely to create a state of discomfort, chagrin, or uncertainty, or affect the

consumer's power to distinguish, choose, or act decisively" with respect to 5-hour ENERGY®. *Id.*

Pointing to *Daniel N. Gordon, P.C. v. Rosenblum*, 361 Or 352, 393 P3d 1122 (2017), the state contends that materiality is not an "element" of an ORS 646.608(1)(b) claim. (State Br 11–12.) However, the court in *Gordon* was not asked to determine whether materiality is an element of a (1)(b) violation or otherwise required by (1)(b). Moreover, the court recognized that, for a (1)(b) violation, "the person must '*cause*[]' the likelihood of confusion or misunderstanding *experienced by the other person*" and "the causal relationship must '*arise out of* transactions which are at least indirectly connected with the ordinary and usual course of [the person's] business, vocation or occupation.'" *Gordon*, 361 Or at 369 (emphasis added) (quoting *Wolverton v. Stanwood*, 278 Or 341, 345, 563 P2d 1203 (1977)). Here the "transaction" is the Ask Your Doctor advertisement, so this is just another way of stating that a showing of materiality (*i.e.*, that the representation affected the decision to purchase) is required to state a (1)(b) claim.

The state also argues that the text of ORS 646.608(1)(b) does not support a materiality requirement because whether a business caused likelihood of confusion is distinct from whether that confusion is material to the decision to purchase the product. (State Br 12.) The state contends that this "added requirement" suggests

proof of causation or reliance is required. However, the Court of Appeals did not find that the state was required to prove—through consumer testimony or otherwise—that any individual consumer was confused or relied on the representation in purchasing; rather, the state must prove "that the unlawful practice is one that *would* materially affect consumers' buying decisions." *Living Essentials*, 313 Or App at 197 (emphasis added). Thus, a materiality requirement does not create an added requirement of proof of causation or reliance.[5]

As pertinent here, a violation of ORS 646.608(1)(e) occurs when a business "[*r*]*epresents* that" goods have "approval," "characteristics," "uses," "benefits," or "qualities" that the goods do not have. (Emphasis added.) The "crux" of a (1)(e) violation is a misleading representation about "various attributes that, by their nature, *can* have the potential to affect a purchasing decision ***." *Living Essentials*, 313 Or App at 188 (emphasis in original). As the Court of Appeals noted, whether the statute applies to misrepresented characteristics material to purchasing decisions or whether it applies to *every* misrepresented characteristic, no matter how innocuous, "the plain text does not foreclose the former interpretation." *Id.*

[5] The state's argument ignores the broader context of this case. Here, the state sought restitution to past purchasers of Defendants' products. (ER-23.) Moreover, the trial court weighed the parties' competing evidence regarding materiality and found Defendants proved that the representations at issue were not material. (ER-68.) It is unclear, then, to whom restitution could be awarded.

In support of its construction, the state cites *Searcy v. Bend Garage Co.*, 286 Or 11, 16, 592 P2d 558 (1979), which involved an alleged violation of (1)(f), not (1)(e). (State Br 13–14.) *Searcy* did not address whether materiality is required to prove a violation of (1)(e) and did not perform the statutory interpretation analysis that the Court of Appeals undertook here. Rather, the court merely found that the trial court did not err in rejecting a proposed jury instruction defining "representation" as requiring a concealed fact to be material under (1)(f). *Searcy*, 286 Or at 16. Accordingly, *Searcy* has no bearing on whether materiality is required by (1)(e).[6]

The state argues that the text of the statute does not contain a materiality requirement because the word "material" does not appear in either subsection or the definition of "representation."[7] (State Br 13.) However, "there are times when the

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[6] Even if the state's argument had merit, *Searcy*'s holding is limited to concealed facts, not affirmative representations as in this case. *See also Sanders v. Francis*, 277 Or 593, 598–99, 561 P2d 1003 (1977) (no reliance necessary in UTPA action based on failure to disclose as it would be "artificial" to require plaintiff to prove reliance on undisclosed information).

[7] Oregon Consumer Justice's ("OCJ") related argument that the legislature "clearly and intentionally" omitted materiality because it included "material" in ORS 646.608(1)(t) and other provisions it subsequently enacted (OCJ Br 10–14) ignores the fact that (1)(t) was enacted six years *after* (1)(b) and (e). *See Stull v. Hoke*, 326 Or 72, 79–80, 948 P2d 722 (1997) (subsequent legislation cannot provide contextual support for legislative intent). As discussed *infra*, section A.2.a., the legislature derived (1)(b) and (e) from the UDTPA, intending a materiality requirement for advertising representations consistent with then-existing unfair competition law.

legislature's choice of words naturally implies a requirement that is not otherwise expressly stated in the text." *Living Essentials*, 313 Or App at 186. For example, it is undisputed that puffery is not actionable under the UTPA, even though the UTPA does not contain the word "puffery." In fact, the state argued this very point below: "Although the UTPA does not mention puffery, the plain text and this court's case law make clear that only statements of fact are actionable." Court of Appeals Opening Br at 29.

Similarly, in *Pearson v. Philip Morris, Inc.*, 358 Or 88, 126, 361 P3d 3 (2015), this court found that proof of reliance was required "[a]s a function of logic, not statutory text" for a consumer seeking a purchase price refund based on an alleged misrepresentation. Here too, logic dictates that ORS 646.608(1)(b) and (e) claims require proof of materiality to effectuate the UTPA's intent to protect consumers in the sale-of-goods context.

b. The UTPA envisions that the acts to be restrained are those that affect Oregon consumers.

The UTPA's broader context, which elucidates the legislative intent to restrain acts that affect Oregon consumers, compels the conclusion that the state must show materiality to prove a violation under ORS 646.608(1)(b) and (e). *See Stevens v. Czerniak*, 336 Or 392, 401, 84 P3d 140 (2004) (courts consider text in context, not in isolation).

ORS 646.632(1) authorizes "a prosecuting attorney who has probable cause to believe that a person is engaging in, has engaged in, or is about to engage in an unlawful *trade* practice" to bring suit to restrain the alleged "unlawful *trade* practice." (Emphasis added.) As the Court of Appeals recognized, "trade" is defined in the introductory definitions of the UTPA as "directly or indirectly *affecting* the people of this state." ORS 646.605(8) (emphasis added). The plain and ordinary definition of "affect" is "to act upon" or "*to produce a material influence upon* or alteration in." *Webster's Third New Int'l Dictionary* 35 (unabridged ed 2002) (emphasis added). Thus, the UTPA envisions that the trade practice must produce a "material influence upon" consumers or cause consumers to act. Within the context of (1)(b) and (e), that means the alleged misrepresentations must "materially bear on consumer purchasing choices." *Living Essentials*, 313 Or App at 189; *see also Millikin v. Green*, 283 Or 283, 285, 583 P2d 548 (1978) (a material misrepresentation "would be likely to affect the conduct of a reasonable man").

The Court of Appeals also correctly noted that the statute's equitable relief provision, ORS 646.636, further supports a materiality requirement. *Living Essentials*, 313 Or App at 189. It provides:

> "'The court may make such additional orders or judgments as may be necessary to *restore* to any person in interest any moneys or property, real or personal, of which the person *was deprived* by means of any practice declared to be unlawful in ORS 646.607 or 646.608, or as may be

> necessary to ensure cessation of unlawful *trade* practices.'"

Id. (quoting ORS 646.636 (emphasis in *Living Essentials*)). Notably, while not included in the language highlighted by the Court of Appeals, the statute limits the relief available to those harmed "by means of" the alleged unlawful practice. ORS 646.636. The consumer cannot be "deprived" of "money" "*by means of*" the marketing representation if that consumer's purchase was not influenced by it.

Nevertheless, the state advocates for a lesser "tendency or capacity to influence consumer behavior" standard,[8] arguing that the legislature's "broad concern with preventing harm" that follows from the array of harms listed in (1)(a)-(u) does not support the imposition of a materiality requirement because a purchasing decision is only one type of consumer behavior. (State Br 15–16.) Such a broad, strict liability standard ignores the context of this case—sale of goods to consumers—and would allow the state to pursue virtually any representation, even in the absence of any impact on Oregon consumers. It would allow the state to prosecute, for example, an Oregon craft brewer for inadvertently representing on its

[8] The state appears to borrow this standard from the Federal Trade Commission's ("FTC") three elements—*which include materiality*—for proving deception: (1) the act or practice must have a tendency or capacity to deceive; (2) the reaction of only the targeted audience must be evaluated; *and* (3) the act or practice must be *material*. *FTC Policy Statement on Deception* at 1–2 (1983). The FTC has stated that "a material representation or practice is one which is *likely to affect a consumer's choice of or conduct regarding a product*." *Id.* at 5 (emphasis added).

beer cans a "brewed on" date as "Monday, March 15, 2022," when, in fact, March 15, 2022, was a Tuesday. The representation is false, but immaterial to any consumer's purchasing decision.

Moreover, neither this case nor the Court of Appeals' holding implicates all of the subsections identified by the state, but rather (1)(b) and (e)—subsections derived from the model Uniform Deceptive Trade Practices Act ("UDTPA") involving representations that would influence consumer purchasing decisions.[9] *See State ex rel. Rosenblum v. Johnson & Johnson*, 275 Or App 23, 33–34, 362 P3d 1197 (2015) ("The sweep and scope of [(1)(b) and (e)]—both with respect to the form and content of misrepresentations—manifests the legislature's intent to broadly prohibit misrepresentations *materially bearing on consumer purchasing choices*.") (emphasis added). This case does not concern, for example, ORS 646.608(1)(m), which prohibits a person from "[p]erform[ing] service on or dismantl[ing] any goods" if the owner "does not authorize the service or dismantling" because (1)(m) does not involve marketing representations. Likewise, this case does not concern

[9] OCJ also argues that the Court of Appeals' holding requires every plaintiff seeking relief from unlawful conduct proscribed by any of the ORS 646.608(1) subsections to prove materiality. However, it applies only to (1)(b) and (e). *See Living Essentials*, 313 Or App at 194 ("In light of the clear purpose behind the UTPA to protect consumers, it is likely that the legislature intended a similar materiality requirement to be implicit in the subsections drawn from the UDTPA, including ORS 646.608(1)(b) and (e).").

ORS 646.608(1)(w), which makes it an unlawful trade practice to "[m]anufacture[] mercury fever thermometers." Materiality is not required to prove a violation of (1)(w) because the harm from which the consumers need protection is mercury poisoning, not material marketing representations.

Oregon Trial Lawyers Association ("OTLA") similarly argues that requiring materiality "does not align with the scope of injuries against which" ORS 646.608(1)(b) and (e) exist to protect because those subsections "protect not only consumers, but also the market ***." (OTLA Br 10–11.) However, the legislature intended for the UTPA to protect consumers, not businesses or the "market" generally. *See, e.g.*, *Denson v. Ron Tonkin Gran Turismo, Inc.*, 279 Or 85, 90 n 4, 566 P2d 1177 (1977); *Pearson*, 258 Or at 115.[10]

Ultimately, the trial court must be given latitude to assess materiality by applying the specific facts of each case, including the product at issue and the alleged unlawful conduct. *See Johnson & Johnson*, 275 Or App at 34 n 4 ("[T]he assessment and determination of materiality can, and will, vary in different circumstances, depending on the nature of the product and the likelihood and severity of the risk.");

[10] *Denson* cited meeting minutes summarizing Senator Willner's statements that the legislature deleted the language "unfair methods of competition" from a draft version of the UTPA because "the bill seeks to protect consumers rather than businesses." 279 Or at 90 n 4 (quoting Senate Consumer Affairs Committee Meeting Minutes, February 17, 1971).

Feitler v. Animation Celection, Inc., 170 Or App 702, 710, 13 P3d 1044 (2000) (applying facts of case to determine that representation of "how or when" seller paid supplier was "legally immaterial" and therefore not actionable). Indeed, the state took the same position as applied to marketing representations in its opening brief in *Johnson & Johnson*: "*In the context of a UTPA misrepresentation claim*, a risk of product defect is *material* if it is sufficient to negatively affect the monetary value or commercial attractiveness of the product, and thus *affect a consumer's buying decision*." *State v. Johnson & Johnson*, No A153226, 2013 WL 8700468 at *26 (Or App) (July 31, 2013) (emphasis added).

In sum, after examining the broader context of the UTPA and its stated purpose, it would be contrary to the legislative intent to hold businesses liable for marketing representations that are immaterial to consumer purchasing decisions and to allow the state to expend taxpayer dollars to pursue such innocuous representations.

c. The state and OCJ's remaining text and context arguments are unavailing.

The state argues that the differences between public and private actions support its construction of ORS 646.608(1)(b) and (e)—first, the legislature's decision not to require proof of ascertainable loss in public actions (as opposed to private actions); second, that it need not prove "actual confusion or misunderstanding" in a public action (citing ORS 646.608(3)); and third, that it has

broad authority to seek prospective relief in a public action (citing ORS 646.632(1)). (State Br 16–17.) These differences are inconsequential—requiring the state to prove materiality is not the same as requiring the state to prove harm to specific consumers.[11] Materiality (or the lack thereof) in a public action can be shown, for example, through expert testimony or survey evidence, as both sides did here. Similarly, the state can prove that a representation would be material to future consumer purchasing decisions through expert testimony or survey evidence.[12] Moreover, had the state sought only prospective injunctive relief, the result would have been the same—the parties would have presented their respective evidence regarding materiality and the court would have properly determined there was no materiality and dismissed the claims.

On the other end of the spectrum, OCJ argues that the Court of Appeals' construction imposes an additional "objective materiality" requirement on *private* actions; that is, that private plaintiffs are now required to prove that other consumers find the misrepresentation at issue relevant to their purchasing decisions. (OCJ

[11] While the state need not prove that any individual consumer suffered ascertainable loss as required in a private action, nothing prevents the state from offering consumer testimony to prove materiality.

[12] For example, the state could demonstrate through survey evidence before any sale that a misrepresentation that American flags slated for sale at a "Made in USA" rally were made in the United States when they actually were made in China, would be material to a rally attendee's purchasing decision.

Br 33.) OCJ has accurately described what the *state* must prove in a *public* action. The Court of Appeals did not opine on materiality in a private action. However, it is only logical to conclude that a private plaintiff need only prove the representation was material to that plaintiff's own purchasing decision. This does not create an additional burden for a private plaintiff because (1)(b) and (e) already require proof of reliance.[13] If a consumer relied on a representation in deciding to purchase, the representation necessarily was material to *that individual's* purchasing decision. Thus, OCJ's concern that the Court of Appeals' opinion imposes a new burden on private UTPA plaintiffs is unfounded.

Finally, OCJ argues that because materiality is an element of common law fraud, it is not required to prove a UTPA violation. (OCJ Br 18.) While all elements of common law fraud are not required to prove a UTPA violation, some violations necessarily require proof of *certain* elements of fraud. For example, a "representation" is also an element of fraud, but is absent from the text of (1)(b); by

[13] Where "the alleged [UTPA] violations are affirmative misrepresentations, the causal/'as a result of' element requires proof of reliance-in-fact by the consumer." *Feitler*, 170 Or App at 708 (quoting *Sanders*, 277 Or at 598 ("when plaintiff claims to have acted on a seller's express representations" reliance is the "requisite cause of any loss")). OCJ cites the *Pearson* concurrence to argue reliance on a representation is not required to establish causation in a private action. (OCJ Br 17 n 7, 34–36.) However, *Pearson* held that reliance is required under a "refund of purchase price" theory of loss, 358 Or at 125–26, did not alter the existing law requiring reliance, and did not need to reach plaintiffs' other theory of loss, *id.* at 125 n 21.

OCJ's logic, the state would not have been required to prove a "representation" to state a violation of (1)(b), notwithstanding the fact that the state's case was based entirely on affirmative representations.

Neither of the cases OCJ cites supports its position. *State ex rel. Redden v. Disc. Fabrics, Inc.*, 289 Or 375, 384, 615 P2d 1034 (1980), does not address materiality; it addresses the difference between reliance in common law fraud and private UTPA claims. The court noted that "whether reliance was a necessary element [of a private UTPA claim] depended upon the type of violation alleged." *Id.* So too here, whether materiality is required and its "contours" depends upon the type of violation alleged. *See Johnson & Johnson*, 275 Or App at 34 n 4.[14] Likewise, *Raudebaugh v. Action Pest Control, Inc.*, 59 Or App 166, 171, 650 P2d 1006 (1982), did not address materiality, but rather to whom a representation could be made. Thus, the fact that materiality is also an element of a common law fraud claim does not demonstrate legislative intent to omit a materiality requirement here.

2. Legislative history

After examining text and context, the court must consider any relevant legislative history. *See Gaines*, 346 Or at 165–66, 172. Here, the UDTPA (which

[14] As discussed *supra*, section A.1.a., OCJ's argument that a materiality requirement is indistinguishable from the reliance requirement rejected in *Redden* (OCJ Br 18–19.)—*i.e.*, the fact that the state does not need to prove individual causation or reliance in a public UTPA action—is meritless.

provided a remedy to businesses *and* consumers alike) and pre-1971 unfair competition law are instructive. *See Living Essentials*, 313 Or App at 191–92. The Court of Appeals correctly held that, consistent with the UDTPA and the unfair competition law from which it was derived, "[a]n allegation that an unlawful practice 'causes likelihood of confusion' [under (1)(b)] or involves misrepresentation [under (1)(e)] requires proof that the unlawful practice is one that would materially affect consumers' buying decisions." *Living Essentials*, 313 Or App at 192–94, 197.

a. The Court of Appeals properly relied upon the UDTPA and unfair competition law to construe (1)(b) and (e).

When the legislature adopts terminology from a model act, courts "assume that the legislature contemplated that that term[inology] would reflect its national understanding" and consult "for their persuasive value, judicial interpretations of that term[inology] that would have been available to the legislature" at the time of enactment. *Wright v. Turner*, 354 Or 815, 825, 322 P3d 476 (2014). Courts likewise presume that the legislature intended such terminology to "be interpreted and applied in the same manner as intended by the drafters of" the model act. *Meyer v. Ford Indus., Inc.*, 272 Or 531, 541, 538 P2d 353 (1975); *accord Figueroa v. BNSF Ry. Co.*, 361 Or 142, 160, 390 P3d 1019 (2017) (relying upon comments to model act).

The legislature combined provisions in HB 1088 and SB 50 to create the 1971 UTPA. Both bills included the violations now in ORS 646.608(1)(b) and (e), which track nearly verbatim the language taken from UDTPA § 2(a)(2) and (5),

respectively. (App-1, 3–5.) Indeed, the file for HB 1088 contains pages from the Uniform Law Commission's Annotations to the UDTPA ("Annotations"), which include the legislature's typewritten notes showing that the legislature adopted (1)(b) and (e) from UDTPA § 2(a)(2) and (5) and reviewed the comments to those violations.[15]

David Shannon, a leading expert on Oregon consumer protection laws, testified about how the words in SB 50's nearly identical provisions "were chosen." Audio Recording, Senate Consumer Affairs Committee Hearing, SB 50, February 3, 1971, Tape 1, Side A & B, Part 1 & 2 ("2/3/71 Senate Hearing") at 14:11–15:00, 17:58–19:14, http://records.sos.state.or.us/ORSOSWebDrawer/Record/7359889#:~:text=Title,ARCLEG/20/373. Mr. Shannon repeatedly explained that the violations targeted conduct prohibited under unfair competition law using uniform terminology so Oregon courts could rely upon prior judicial interpretations of similar terminology in unfair competition cases.[16] *Id.* at 43:02–43:45, 49:36–50:25; *id.* at 38:53–39:05.

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[15] The legislature noted in typewriting that "[m]arginal letters relate to those subsections of HB 1088, § 3, which were taken from the Uniform Act." (App-9–11 (from HB 1088 file).) The legislature added typewritten marginal letters next to the Annotations labeled "(b)" and "(e)," which correspond to UDTPA § 2(a)(2) and (5)). (*Compare id. with id.* 4–5 (UDTPA comments to § 2(a)(2) and (5)).)

[16] In addition to the UDTPA, SB 50 was based upon the Unfair Trade Practices and Consumer Protection Law that the FTC and Council of State Governments published in 1970 ("UTPCPL") and the National Consumer Act ("NCA"). 2/3/1971 Senate

In response to Senator McPherson's question regarding whether the entire Subsection 3 (the enumerated violations) contained "brand new wording that we would be looking at very critically," Mr. Shannon responded that Subsection 3 came "primarily out of the common law causes of unfair competition," not "consumer legislation," and that regarding "likelihood of confusion" (*i.e.*, (1)(b)), "[w]e have lots of case law on this kind of competition in question."[17] *Id.* at 49:38–50:25. Likewise, Mr. Shannon explained that the legislature used model language for (1)(e) "because there's more case law under the uniform language." *Id.* at 38:45–39:02.

As discussed below, the Court of Appeals properly held that the sources from which the UDTPA was derived, including Lanham Act case law and the Restatement (Second) of Torts, Tent. Draft No. 8 (1963) ("Restatement"), "are consistent with what the text and context [of the UTPA] suggest ***, that the legislature would have understood unlawful trade practices to be ones that *** materially bear on

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Hearing at 10:43–11:47, 35:51–36:03. Those model acts copied their violations from the UDTPA. (App-6–7, UTPCPL at 142 (introductory comments, stating the UTPCPL "prohibits the twelve specific types of deceptive practice enumerated in the [UDTPA]."); App-7–8, NCA, at 68–69, cmt 2 (commentary following list of violations: "Many of the prohibited practices are already prohibited under the [FTC] Act ***. What this Article does is provide *the consumer* with a remedy under state law.") (emphasis added).

[17] Senator Willner then explained that Section 3 uses the same terminology as the model acts, including the 1967 version of the UTPCPL. 2/3/71 Senate Hearing at 50:26–50:50.

consumer purchasing choices." *Living Essentials*, 313 Or App at 193. In so finding, the court quoted the comment to UDTPA § 2(5), which states that the Lanham Act § 43(a) "authorizes similar private actions." *Id.* at 192–93.

The Court of Appeals also considered a Yale Law Journal article written by Professor Dole, a consultant to the committee that drafted the UDTPA who also served on the committee for the revised UDTPA ("RUDTPA"). *Id*. *See* Richard F. Dole, Jr., *Merchant and Consumer Protection: The Uniform Deceptive Trade Practices Act*, 76 Yale L J 485, 487 n d1 (1967); App-5–6 (listing 1966 RUDTPA committee members). Notably, he concluded that, although the UDTPA uses "unqualified language" to describe its deceptive marketing violations, federal court opinions interpreting similar violations under the Lanham Act suggest that UDTPA violations require "deception" that "is likely to make a difference in the purchasing decision." Dole, 76 Yale L J at 489; *see id.* at 490-91 ("A requirement that a false representation be likely to affect the purchasing decision of consumers is axiomatic. The law has little need to suppress irrelevant misrepresentation."). The Court of Appeals correctly held that given "the clear purpose behind the UTPA to protect consumers, it is likely that the legislature intended a similar materiality requirement to be implicit in the subsections drawn from the UDTPA, including ORS 646.608(1)(b) and (e)." *Living Essentials*, 313 Or App at 194.

Professor Dole's conclusion is further supported by the Restatement, which is cited in the UDTPA's commentary to § 2(a)(2) and (5). (App-4–5.) Specifically, the comment to UDTPA § 2(a)(5) (now (1)(e)) cites Restatement § 712, which states: "One falsely markets goods under the rule stated in § 711 [prohibiting false marketing] if, in the marketing process, he makes any *material* false representation which is likely to induce persons to purchase * * *." (App-12–13) (emphasis added).

Despite Professor Dole's role in preparing the UDTPA, OCJ argues that his analysis does not account for UDTPA § 3, which allows injunctive relief only for a "person likely to be damaged" by a violation, because such damage requirement is unnecessary if UDTPA violations require materiality. (OCJ Br 27–28) (emphasis omitted). OCJ further argues that the Oregon legislature adopted the UDTPA's "format" because the UTPA includes remedies provisions separate from the violations; the UTPA ascertainable loss requirement for private actions is a "modified version of the 'likelihood of damage' requirement[;]" and the legislature would have included a similar requirement for public actions if they required materiality. *Id.* at 29–31.

However, it is clear that the legislature drafted the UTPA *remedies* provisions based upon the *UTPCPL's* similar provisions, and *not the UDPTA*, and it relied upon the UDTPA *solely to identify the specific actionable violations*. *Compare* 1971 UTPA §§ 11, 15, 17 *with* UTPCPL §§ 5, 8, 15 (remedies provisions). *See* Ralph

James Mooney, *The Attorney General as Counsel for the Consumer: The Oregon Experience*, 54 Or L Rev 117, 119 n 13, 124 n 43 (1975) (legislature relied upon UTPCPL). Further, Professor Dole explains that "likely to be damaged" is a *standing requirement* for seeking injunctive relief under *all* UDTPA violations. 76 Yale L J at 498-99. Such a damage (or ascertainable loss) requirement is qualitatively different than a materiality requirement for violations based upon marketing representations.

Accordingly, the Court of Appeals properly relied upon the UDTPA and Lanham Act law to hold that (1)(b) and (e) claims based upon marketing representations require proof of materiality.

b. The state and OCJ's remaining legislative history arguments are unavailing.

The state and OCJ argue that the Court of Appeals improperly considered the UDTPA and unfair competition law because the UTPA protects consumers, and the UDTPA protects businesses. (State Br 19–21; OCJ Br 25–26.) However, in holding that ORS 646.608(1)(b) and (e), like UDTPA §§ 2(2) and (5), include an implicit materiality requirement, the Court of Appeals correctly reasoned that it is "difficult to imagine how making actionable *immaterial* misrepresentations" accomplishes the "the purpose of the UTPA to prevent consumers from harm" because "[t]here is no need to provide a remedy for misrepresentations that are irrelevant to consumers'

purchasing decisions to *** protect[] consumers."[18] *Living Essentials*, 313 Or App at 194 (emphasis in original).

In fact, the UDTPA provided a remedy *to consumers and businesses alike*. Dole, 76 Yale L J at 486. Moreover, the UDTPA Annotations, Senate hearing on SB 50, and UTPCPL and NCA commentary reveal that the legislature adopted the specific language of the UDTPA *violations* because they protected consumers and were well-defined under unfair competition law. *See supra*, section 2.a., n 16 & n 17.

The state further argues that the court should not consider the UDTPA and unfair competition law because the final version of the 1971 UTPA omitted an "interpretation provision" proposed in SB 50 that would have *required* courts to consider *future* law under the FTC Act. (State Br 21–22.) However, the interpretation provision was unnecessary because of the presumption that statutes are construed consistent with existing law and model acts from which they were derived. *Supra*, section A.2. In fact, in response to Senator Mahoney's concern that the language "likelihood of confusion" in (1)(b) was so "loose" that "any good

[18] OCJ cites the court's statement in a footnote in *Denson* that the UDTPA was "of limited value" for interpreting the UTPA because the legislature ultimately decided to protect consumers, not businesses. 279 Or at 90 n 4. However, without analyzing the full history of the legislature's reliance on the UDTPA, *Denson* found that the UDTPA had some value, and a close examination of the legislative history reveals the UDTPA has much more value than the court recognized.

lawyer could drive a coach and a car through" it, Mr. Shannon responded: "I have *two* points [(1)] we have the benefit of – of past case history, *and* [(2)] we *also* have the interpretation section[.]" 2/3/71 Senate Hearing at 42:47–43:53 (emphasis added). Mr. Shannon's separate reference to case history demonstrates legislative intent to construe (1)(b) and (e) violations consistent with unfair competition law as of 1971, irrespective of an interpretation provision.

Finally, the state argues that, contrary to a 1969 memorandum from the Attorney General regarding a proposed consumer protection statute ("CPA Proposal"), a materiality requirement makes a case more difficult to prove and improperly focuses on consumer purchasing decisions. (State Br 19–20.) However, the CPA Proposal states: "The paramount purpose of [the UTPA] should be to protect the consumer rather than punish the merchant." CPA Proposal at 4. Without a materiality requirement, the UTPA would punish merchants without protecting consumers. Further, where, as here, the alleged violations are based upon marketing representations, it only makes sense to focus on consumer purchasing decisions.

The state also quotes the CPA Proposal remark that "it is only necessary for the state to prove that a deceptive trade practice occurred in order to bring an injunction suit." (State Br 19–20) (quoting CPA Proposal at 5). However, that language does not specify what *constitutes* a "deceptive trade practice" under each of the UTPA's specifically circumscribed violations. Absent materiality, the state

cannot establish that Defendants committed a deceptive trade practice under (1)(b) or (e) in the first place.

3. Maxims of statutory construction

a. Without materiality, ORS 646.608(1)(b) and (e) would lead to "absurd results."

The legislative intent to require proof of materiality for claims under ORS 646.608(1)(b) and (e) is clear from an inquiry into text and context and the legislative history. To the extent the court finds both the state's and Defendants' interpretations of legislative intent are plausible, the absurd-results maxim further supports Defendants' interpretation. *See State v. Vasquez-Rubio*, 323 Or 275, 282–83, 917 P2d 494 (1996) (stating the absurd-results maxim is "best suited for helping the court to determine which of two or more plausible meanings the legislature intended").

"When *** a literal application of the language produces an absurd or unreasonable result, it is the duty of the court to construe the act, if possible, *so that it is a reasonable and workable law* and not inconsistent with the general policy of the legislature." *Fox v. Galloway*, 174 Or 339, 347, 148 P2d 922 (1944) (emphasis added). If ORS 646.608(1)(b) and (e) are actionable on the basis of merely innocuous representations, then they do not serve the legislative intent of consumer protection and would lead to an unreasonable and unworkable result. *See Living Essentials*, 313 Or App 176 at 196 n 19.

b. The constitutional avoidance canon is properly invoked here.

The Court of Appeals also correctly applied the canon of constitutional avoidance. Where there are competing plausible constructions of a statute, if one construction is even "arguably" unconstitutional, the court must select the other construction. *Westwood Homeowners Ass'n, Inc. v. Lane Cnty*, 318 Or 146, 160–61, 864 P2d 350 (1993). As discussed below, the absence of a materiality requirement would create at least a "serious constitutional difficulty" here and, therefore, the ambiguity should be resolved in favor of requiring materiality. *State v. Duggan*, 290 Or 369, 373, 622 P2d 316 (1981).

B. ORS 646.608(1)(b) and (e) Are Unconstitutional Under Article I, Section 8 of the Oregon Constitution.[19]

If this court holds that materiality is required, it need not decide whether ORS 646.608(1)(b) and (e) violate the free speech protections of the Oregon and federal constitutions. Otherwise, it should hold that (1)(b) and (e) are unconstitutional on their face or as applied.

Article I, section 8 of the Oregon Constitution "prohibits lawmakers from enacting restrictions that focus on the content of speech or writing, either because that content itself is deemed socially undesirable or offensive, or because it is

[19] The Court of Appeals did not reach these issues, which were preserved and raised as the second and third cross-assignments of error on appeal. *Living Essentials*, 313 Or App at 178 n 1.

thought to have adverse consequences." *State v. Robertson*, 293 Or 402, 416, 649 P2d 569 (1982). This fundamental principle guards against government intrusion into the freedom of expression that all speakers in this state—including businesses—enjoy, and it bars the state from using ORS 646.608(1)(b) or (e) to punish speech.

This court's framework for Article I, section 8 divides laws in three categories. In Category 1 are laws "written in terms directed to the *substance* of any 'opinion' or any 'subject' of communication." *Id.* at 412 (emphasis added). Category 2 laws are content-neutral but proscribe speech as a means of causing a forbidden effect. *Id.* at 417–18. Finally, Category 3 laws focus only on forbidden effects without referring to speech at all. *Id.* at 417. Crucially, in *none* of these three categories can the legislative goal or the supposed danger posed by the speech be balanced against the speech's value. *See State v. Stoneman*, 323 Or 536, 542, 920 P2d 535 (1996) (balancing approach "cannot be countenanced" and "a state legislative interest, no matter how important, cannot trump a state constitutional command."). Here, the provisions of ORS 646.608(1)(b) and (e) at issue[20] cannot survive the applicable tests for constitutionality.

[20] All arguments regarding ORS 646.608(1)(b) in section B of this brief refer only to its "approval" and "certification" provisions.

1. ORS 646.608(1)(e) is facially unconstitutional.

a. ORS 646.608(1)(e) is a Category 1 law and does not fall within a historical exception.

ORS 646.608(1)(e) is a Category 1 law. It is "written in terms directed to the substance of" an opinion or subject, *Robertson*, 293 Or at 412, because it expressly prohibits speech with specified content—namely, a representation that goods have attributes that they do not have. As such, the state has the "heavy burden" of demonstrating that it falls within a historical exception. *Moser v. Frohnmayer*, 315 Or 372, 376, 845 P2d 1284 (1993). The state's arguments that (1)(e) falls within the historical exceptions for fraud and trademark infringement fail.

ORS 646.608(1)(e) does not fall within the historical exception for fraud—it is undisputed that the UTPA does not require all the elements or the standard of proof of a fraud claim. *See Redden*, 289 Or at 386. Nor is (1)(e) a contemporary variant that comes sufficiently close to fraud for purposes of Category 1. *Robertson*, 293 Or at 433–34 (variant must "remain [] true to the initial principle"); *see, e.g.*, *State v. Hirschman*, 279 Or App 338, 352–53, 379 P3d 616 (2016) (declining to extend historical exception for crime of solicitation to statute prohibiting offer to purchase a ballot).

Although the state contends that (1)(e) "focus[es] on preventing the harmful economic effects of false representation" (State Br 25), if (1)(e) were interpreted to lack a materiality requirement, then it would punish speech that is immaterial, which

by definition *has no harmful economic effects*. Thus, under the state's construction, the statute would not even share this purported high-level similarity with fraud.

Furthermore, the state ignores other key characteristics of fraud that (1)(e) lacks. First, proof of economic loss is not required in a public action. *Pearson*, 358 Or at 116 & n 17. Not requiring any proof of harm contradicts both the state's characterization of the core historic principle of fraud—protection against economic harm—as well as the historic elements of fraud. *See Rolfes v. Russel*, 5 Or 400, 402 (1875) ("The gist of the action is fraud in the defendants, and damage to the plaintiff.") (quoting *Lord v. Goddard*, 54 US 198, 211, 14 L Ed 111 (1851)).

Moreover, unlike fraud, (1)(e) does not require proof that the representation is *knowingly* false and thus imposes liability for even inadvertent error. That is irreconcilable with the historic understanding of fraud, which punishes only culpable speech. *See id.* at 401–02 ("'[I]f the party honestly stated his own opinion, believing at the time that he stated the truth, he is not liable in this form of action, although the representations turned out to be entirely untrue.'") (emphasis and citation omitted).

Indeed, Defendants are unaware of any case in which an Oregon court upheld a statute prohibiting speech that was not *knowingly* false.[21] Even in the context of

[21] Perhaps excluding the distinct historical exceptions of fraud-on-the-electorate or false communications in public records. *See State v. Moyer*, 348 Or 220, 236–38, 230 P3d 7 (2010).

fraud on voters by creating false public records, this court either presumed that the speaker was knowingly falsifying prior speech,[22] or specifically distinguished between knowing and innocent misrepresentations for constitutional purposes. *See Moyer*, 348 Or at 236, 241 n 9. Furthermore, the statute at issue in *Vannatta* regulated speech that *necessarily* was material to some voters. That statute could be violated only by a candidate filing a declaration that she would limit campaign expenditures and then later falsifying it by exceeding the limit. (State Br 27–28 n 4) (quoting Or Laws 1995, ch 1, § 13(3)). Thus, *Vannatta* and *Moyer* do not satisfy the state's burden to establish that a statute lacking several central elements of economic fraud—knowing falsity, materiality (according to the state), and harm—would be wholly within the historic exception for fraud.

The state also cites trademark infringement as a historic exception, but this effort fares no better. Significantly, the state *does not contend* that (1)(e) fits wholly within a historic exception for trademarks. (State Br 29–31.) Nor would any such argument be viable, because (1)(e) sweeps far more broadly than false representations about the source of goods. The statute therefore is not "wholly confined" within a historical exception. *Robertson*, 293 Or at 412. The state also

[22] *Vannatta v. Keisling*, 324 Or 514, 544 n 28, 931 P2d 770 (1997), *abrogated on other grounds by Multnomah Cnty v. Mehrwein*, 366 Or 295, 462 P3d 706 (2020) ("*decid[ing]* to ignore" promise was fraud on voters) (emphasis added).

does not point to any precedent for bootstrapping a narrow exception for trademark infringement into an extremely expansive purported historic exception for *all* "false representations about a product." (State Br 30.) Historic trademark law therefore cannot satisfy the state's "heavy burden." *Moser*, 315 Or at 376. Furthermore, contrary to the state's argument (State Br 29), in *Duniway Pub. Co. v. Northwest P. & Pub. Co.*, 11 Or 322, 324, 8 P 283 (1884), this court noted that trademark law is *not* aimed at protecting consumers. Conversely, the state's backup argument that both trademark law and (1)(e) protect other businesses fails because *that is not the UTPA's purpose*. *Supra*, section A.2. A statute that is neither animated by the same principle as the historic exception nor shares its scope cannot be shielded from constitutional infirmity by that historic exception.

b. ORS 646.608(1)(e) is not a Category 2 law, but it would fail even under that standard.

A Category 2 law is facially unconstitutional if it "potentially reaches substantial areas of communication that would be constitutionally privileged and that cannot be excluded by a narrowing interpretation." *State v. Moyle*, 299 Or 691, 701–02, 705 P2d 740 (1985). Apparently recognizing the statute's vulnerability in the absence of a historic exception, the state argues that ORS 646.608(1)(e) may be a Category 2 law. It is not, but (1)(e) would not survive review under Category 2 either.

For a law to come within Category 2, the "'harm' that legislation aims to avoid must be identifiable from legislation itself, not from social debate and competing studies and opinions." *Vannatta*, 324 Or at 539. Thus, either (1) the targeted effect must be "expressed in the statute," or (2) the targeted effect must necessarily occur to constitute a violation of the statute. *Moyer*, 348 Or at 229, 232 n 4.[23] Here, the text of (1)(e) does not identify any adverse effect the legislature sought to prevent. Even if the text standing alone was ambiguous, the state does not point to any context or legislative history that specifies a targeted adverse effect. (State Br 32.)

The state argues that the harmful effects targeted by (1)(e) are "the risk to consumers from false advertising being permitted in the marketplace, which will always undermine the marketplace and threaten consumer confidence." (State Br 32–33.) However, this court held that the statute at issue in *Moyer* was a Category 1 law because "the law is violated whether or not the recipient of the contribution or the public actually is misled about the identity of the contributor," *even though there was presumably always a risk to the public from false identification of political donors*. 348 Or at 232 n 4. Accepting *arguendo* the state's construction, (1)(e) is

[23] Contrary to the State's mischaracterization of *Moyer*, that case did *not* "place[] laws in category 1 when the law does not expressly target a harmful effect and the implied harmful effects of speech will not always occur." (State Br 32.) Rather, *Moyer* noted a targeted harm could be determined from contextual analysis *where the harm necessarily occurred with every instance of the prohibited speech*. 348 Or at 229–30.

likewise violated whether or not any consumer is actually misled by a representation, making it a Category 1 law under *Moyer*.

To the extent the state argues that the risk of false advertising is assumed to create an omnipresent secondary risk of diminished consumer confidence or an undermined marketplace, that speculative theory is insufficient to demonstrate that the legislature intended to target those secondary harms. (State Br 32–33.) This court "repeatedly has rejected such attempts to find expression harmful by association." *State v. Ciancanelli*, 339 Or 282, 322 n 31, 121 P3d 613 (2005); *see also City of Portland v. Tidyman*, 306 Or 174, 188, 759 P2d 242 (1988) (Article I, section 8 precludes use of "unproven effects" as cover for speech suppression). Thus, (1)(e) cannot be classified as a Category 2 law.

Nevertheless, even under the Category 2 analysis, (1)(e) would be unconstitutional because it "potentially reaches substantial areas of communication that would be constitutionally privileged" and cannot be salvaged by a narrowing interpretation. *Moyle*, 299 Or at 701–02. Here, (1)(e) is substantially overbroad because, as interpreted by the state, it punishes a broad swath of protected commercial speech that is immaterial to purchasing decisions, only inadvertently false, or causes no loss.

The state's sole argument against overbreadth is the conclusory assertion that "false representations about a business's goods necessarily result in harm." (State

Br 33.) Under the state's logic, no statute placed in Category 2 (*i.e.*, where the harm is an element or necessarily occurs) would *ever* be deemed overbroad. Furthermore, just because speech is harmful does not mean it is unprotected. *See Moyle*, 299 Or at 705 ("[H]yperbole, rhetorical excesses, and impotent expressions of anger or frustration *** can be privileged even if they alarm the addressee."). There *is* a constitutional privilege to make good faith, immaterial statements—even if doing so risks some harm.[24]

The state argues that the court could save the statute from overbreadth without requiring materiality by instead requiring a showing that "the unlawful practice has the *tendency or capacity* to influence consumer behavior."[25] (State Br 36–37) (emphasis added). But as the state interprets the phrase, the state admits that it would not narrow the statute's reach at all. (*Id.* at 38 (arguing that speech proscribed by (1)(b) or (e) "will always," "very nearly" always, or "invariably" have capacity).) It thus fails as a "*narrowing*" construction.

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[24] Although the overbreadth would be reduced by a narrowing construction that recognizes materiality implicit in (1)(e), even as so construed, (1)(e) would remain unconstitutionally overbroad because it would still lack knowledge and loss elements and would therefore punish a speaker for even inadvertent inaccuracy that causes no injury.

[25] The "tendency or capacity to deceive" standard cited by the state is not a materiality element. *See supra*, section A.1.d. n 8 (representations are actionable under FTC law only if they have a tendency and capacity to deceive *and* are material).

The state also criticizes the Court of Appeals' construction that (1)(e) requires proof that the speech "would materially affect consumers' buying decisions." (State Br 37) (quoting *Living Essentials*, 313 Or App at 197). Although the state argues that buying decisions are only "one aspect of consumer behavior," (State Br 37), no other aspect is at issue in the present case. And "buying decisions" encompass virtually everything that (1)(e) could be targeted at, including decisions about whether, what, why, when, where, at what price, on what terms, for what use, and how often to buy a good.

Furthermore, requiring that the speech "materially affect" decisions is consistent with the UTPA's goal of protecting consumers from harm. As the Court of Appeals correctly noted, that purpose is not served by prohibiting immaterial speech. *Living Essentials*, 313 Or App at 194. Moreover, it is consistent with Oregon law, which has long defined a material misrepresentation as one "*likely to affect* the conduct of a reasonable [person] with reference to a transaction." *Millikin*, 283 Or at 285 (emphasis added).

2. The pertinent portion of ORS 646.608(1)(b) is unconstitutional.

As pertinent here, ORS 646.608(1)(b) makes it unlawful to cause a likelihood of confusion or misunderstanding as to the "approval" or "certification" of goods.[26] The state contends that (1)(b) is not subject to facial challenge at all—*i.e.*, is not within Category 1 or 2—because it does not, "by its terms, restrict expression." (State Br 34.) However, "creative wording that does not refer directly to expression, but which could *only* be applied to expression, would be scrutinized under the first two categories of *Robertson*." *State v. Babson*, 355 Or 383, 403, 326 P3d 559 (2014) (emphasis in original). And here, *some form* of expressive communication is the only way that a person could cause confusion as to goods' approval or certification.

The state argues that a person could cause misunderstanding as to a product's *source* without speech, by designing it to look identical to a product from another source. Such a design *would* be an expressive (albeit nonverbal)[27] communication. In any event, the "source" provision of (1)(b) is not at issue in this litigation. And the state points to no way that the provision actually at issue here can be violated without communication. *Some* underlying message about the goods' approval or certification must be conveyed in order for a consumer to *mis*understand their

[26] The portion of (1)(b) relating to the "source" and "sponsorship" of goods is inapplicable here. The state never alleged likelihood of confusion as to source or sponsorship.

[27] Article I, section 8 protects nonverbal expression. *Ciancanelli*, 339 Or at 311.

approval or certification. As such, the relevant provisions of (1)(b) are properly subject to facial challenge under Category 1 or 2.

a. ORS 646.608(1)(b) is a Category 1 law that is not wholly within the historic exception for fraud.

The pertinent portion of ORS 646.608(1)(b) is a Category 1 law because it is drafted in terms directed to substance—namely, communication that is insufficiently clear about the approval or certification of goods. *Robertson*, 293 Or at 412. It is not a Category 2 law because no adverse effect need occur to violate the statute.

The state asserts that (1)(b) falls within the historic exception for fraud (State Br 36 n 6), but this position fails for the same reasons discussed above. If (1)(b) were interpreted as lacking a materiality requirement, then it would punish immaterial speech, which—unlike fraud—has no harmful economic effect. Also, unlike fraud, (1)(b) does not require "knowing" falsity. Indeed, in a stark departure from fraud, it requires *no falsity at all*. According to the state, speaking the *truth* with insufficient clarity, without materiality or any harm, would violate the statute, stretching the historic analogue to fraud far past its breaking point. Thus, the pertinent provisions of (1)(b) are unconstitutional under Category 1.

b. Even if ORS 646.608(1)(b) were a Category 2 law, it would be unconstitutionally overbroad.

Even if evaluated as a Category 2 law, ORS 646.608(1)(b) would still be unconstitutional. It is substantially overbroad because a significant amount of

privileged speech—*truthful* speech, made with no knowledge that it may cause confusion, no intent to mislead, no harm to a consumer, or, according to the state, no materiality—is subject to punishment.

The state contends that the statute cannot be overbroad because it prohibits only speech that causes the harmful effect. (State Br 35–36.) But the speech need not actually cause a harmful effect to constitute a violation—(1)(b) makes it unlawful merely to cause a likelihood of confusion or misunderstanding. Truthful and immaterial speech that does not confuse the hearer is assuredly protected by Article I, section 8. Furthermore, even speech with harmful effect is constitutionally protected. *See supra*, section B.1.b.

Finally, the overbreadth of (1)(b) cannot be cured by a narrowing construction for the same reasons discussed *supra*, section B.1.b.

3. ORS 646.608(1)(b) and (e) are unconstitutional as applied.

Even if a statute "proscribes protected conduct only at its margins," it may still be subject to an as-applied challenge. *State v. Illig-Renn*, 341 Or 228, 232, 142 P3d 62 (2006). Even if ORS 646.608(1)(b) and (e) were Category 3 laws, the state sought to apply them in such a way as to burden protected expression. Specifically, it sought to punish speech that, on this record, was immaterial, not proven to be false as alleged, and harmless. (ER-63–70.) At a minimum, therefore, (1)(b) and (e) are unconstitutional as applied.

C. ORS 646.608(1)(b) and (e) Are Unconstitutional Under the First Amendment.[28]

Finally, innocent misrepresentations are protected under the federal First Amendment. Thus, ORS 646.608(1)(b) and (e), as the state seeks to apply them here, violate federal free speech protections.

Although statements that are *knowingly* false or made with reckless disregard of the truth do not enjoy First Amendment protection, "[a]bsent from those few categories where the law allows content-based regulation of speech is any general exception to the First Amendment for false statements." *United States v. Alvarez*, 567 US 709, 718 132 S Ct 2537, 183 L Ed 2d 574 (2012) (plurality). "[F]alsity alone may not suffice to bring the speech outside the First Amendment. The statement must be a knowing or reckless falsehood." *Id.* at 719. Indeed, even where fraud was alleged in a commercial context,[29] it was of "prime importance" that a "[f]alse statement alone" does not subject a speaker to liability. *Illinois, ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 US 600, 620–21, 123 S Ct 1829, 155 L Ed 2d 793 (2003).

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[28] The Court of Appeals did not reach this issue, which was raised in the trial court and presented on appeal as the fourth cross-assignment of error and an alternative basis to affirm the trial court's judgment.

[29] In *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 US 748, 771, 96 S Ct 1817, 48 L Ed 2d 346 (1976), the United States Supreme Court made clear that the First Amendment extends to commercial speech.

Requiring the state to prove that speech is a knowing lie, and not merely inaccurate, guards against the danger that the state "be the arbiter of truth," *Alvarez*, 567 US at 751–52, even if untruthful speech is not protected for its *own* sake. Such requirements, which create "sufficient breathing room for protected speech," *Madigan*, 567 US at 620, are missing from the statute here and were not proven by the state.

D. Defendants Are Entitled to Attorneys' Fees.

The trial court ruled that it could not find that the AVC was "satisfactory" under ORS 646.632(8) because the prosecuting attorney acted "reasonably" and within his "prosecutorial discretion" in rejecting the AVC. (State SER-69–78 at 36:13–14, 36:25–37:3.) The Court of Appeals correctly determined that Defendants' AVC was, in fact, satisfactory and that the trial court erred in denying Defendants reasonable attorney fees. *Living Essentials*, 313 Or App at 218.

1. Statutory interpretation of "satisfactory"

a. Text and context

The purpose of an AVC is to provide assurances of the actions "the person charged intends to take with respect to the alleged unlawful trade practice," precluding the need for a lawsuit. *See* ORS 646.632(2). Under ORS 646.632(8), if the defendant prevails and "in good faith submitted to the prosecuting attorney a satisfactory assurance of voluntary compliance prior to the institution of the suit,"

then the court "*shall* award [defendant] reasonable attorney fees at trial and on appeal." (Emphasis added.)

To give effect to this mandatory fee provision, the trial court must make its own assessment after entering judgment as to whether the AVC was satisfactory. *Living Essentials*, 313 Or App at 210. If the state's decision to reject an AVC and proceed to litigation were sufficient to prevent an award of fees, then ORS 646.632(8) would be "meaningless surplusage" because a prevailing defendant would *never* be awarded fees. *See State v. Stamper*, 197 Or App 413, 418, 106 P3d 172 (2005) (courts assume the legislature "did not intend any portion of its enactments to be meaningless surplusage").

Other than the mandatory fee provision, the only UTPA provision that addresses a satisfactory AVC is ORS 646.632(3). Pursuant to that section, the prosecuting attorney may reject as "unsatisfactory" an AVC on either or both of two statutory bases, as applicable:

> "(a) [An AVC] [w]hich does not contain a promise to make restitution in specific amounts or through arbitration for persons who suffered any ascertainable loss of money or property as a result of the alleged unlawful trade practice; or
>
> "(b) [An AVC] [w]hich does not contain any provision *** which the prosecuting attorney reasonably believes to be necessary to ensure the continued cessation of the alleged unlawful trade practice, if such provision was included in a proposed assurance attached to the notice served pursuant to this section."

ORS 646.632(3). Thus, the term "satisfactory" refers to whether an AVC (a) provides restitution or (b) contains compliance-related terms, but *only if* the state had proposed such terms. Nothing in ORS 646.632(3) supports a reasonableness standard, and the state has properly abandoned its arguments under that subsection.

Moreover, the plain and ordinary meaning of "satisfactory" confirms that the prosecuting attorney's reasonableness is not the standard. *Webster's* defines "satisfactory" as "sufficient to meet a condition or obligation"; "adequate to meet a need or want"; or "having all the necessary qualities for effective use." *Webster's* at 2017. Notably, "satisfactory" does not mean "ideal" or "desired" or "everything one wants." The legislature's use of the word "satisfactory" evidences its intent that the prosecuting attorney accept AVCs that are "sufficient," "adequate," or having "necessary qualities"—*i.e.*, good enough to protect consumers.

The legislature did not intend for the state to reject *adequate* AVCs and go to trial—diverting taxpayer money and the state's resources away from halting other UTPA violations—merely in a bid for marginal additional relief. By making the mandatory fee award hinge on the term "satisfactory," the legislature intended to *deter* the prosecuting attorney from proceeding in that fashion, even if he has other motives or might reasonably believe the state could improve on the AVC at trial. As the Court of Appeals properly noted, the trial court must make its own assessment, *independent of the prosecuting attorney's subjective reasons*, as to whether the AVC

was satisfactory. Otherwise, "defendant's attorney fees would be a matter of prosecutorial fiat." *Living Essentials*, 313 Or App at 210.

Additionally, compelling statutory context confirms Defendants' interpretation of the mandatory fee provision. If reasonably possible, courts must give "effect to every section, clause, phrase or word." *Blyth & Co. v. City of Portland*, 204 Or 153, 159, 282 P2d 363 (1955); *see also Lane Cnty v. Land Conservation & Dev. Comm'n*, 325 Or 569, 578, 942 P2d 278 (1997) (courts do not consider "one subsection of a statute in a vacuum[,]" but instead construe each part together to produce a "harmonious whole"). Moreover, "when the legislature uses different terms within the same statute, normally it intends those terms to have different meanings." *Atkinson v. Bd. of Parole & Post-Prison Supervision*, 341 Or 382, 388, 143 P3d 538 (2006).

Pertinent here is the context that demonstrates that the legislature knows how to make "reasonableness" the standard, but chose not to in the mandatory fee provision. First, *within the same subsection (8)* of ORS 646.632, the legislature provided for prevailing defendant fees where "the prosecuting attorney, in a suit brought under subsections (5) [prior AVC entered] and (6) [TROs] of this section [neither applicable here], did not have *reasonable grounds to proceed* under those subsections." *Living Essentials*, 313 Or App at 209 (emphasis added). Further, ORS 646.632(8) refers to the *defendant's* "good faith" in submitting the AVC, with no

corollary "good faith" provision regarding the prosecuting attorney's decision to reject the AVC. Accordingly, the court evaluates whether the AVC *itself* is "satisfactory" without reference to what the prosecuting attorney believed.

Second, ORS 646.632(8) also authorizes a discretionary award of prevailing party fees which, pursuant to ORS 20.075(1)(b), (e) and (f), entails consideration of the "reasonableness" of the parties. Thus, a fee award is already available to a prevailing defendant if the prosecuting attorney proceeds unreasonably. In contrast, in the mandatory fee provision, the legislature did not make reasonableness in rejecting an AVC a factor, but it provided a mechanism akin to offers of judgment under ORCP 54E, where it is *irrelevant* whether the party rejecting the offer acted reasonably. *Atkinson*, 341 Or at 388.

Finally, the legislature provided for discretionary fees to prevailing defendants in private UTPA actions "only if the court finds that an *objectively reasonable basis* for bringing the action *** *did not exist*." ORS 646.638(3) (emphasis added).

In stark contrast to these other UTPA statutory fee provisions, the legislature chose the term "satisfactory" rather than "reasonable" for ORS 646.632(8). Moreover, various other provisions within the UTPA—but not the mandatory fee provision—allow for consideration of the prosecuting attorney's state of mind. *See* ORS 646.618 (regarding Civil Investigative Demands, "*when it appears to the*

prosecuting attorney that a person has engaged in" unlawful conduct, the prosecuting attorney may issue a Civil Investigative Demand) (emphasis added); ORS 646.632(2) ("*If the prosecuting attorney is satisfied with* the [AVC], it may be submitted to an appropriate court.") (emphasis added); ORS 646.632(3)(b) (prosecuting attorney may include in an AVC provisions "*which the prosecuting attorney reasonably believes"* are necessary to stop the conduct) (emphasis added); ORS 646.632(6) (prosecuting attorney may institute an action immediately if he "*has reason to believe*" delay would cause harm) (emphasis added).

Thus, this court should give effect to the legislature's intent and should not read into ORS 646.632(8) the "reasonable grounds" standard advanced by the state.

b. Legislative history

The Court of Appeals properly noted that the legislative history confirms the purpose of the mandatory fee provision is to deter the state from pursuing unnecessary litigation. *Living Essentials*, 313 Or App at 212. As then-Attorney General Lee Johnson explained in the committee meeting and in a statement:

> "HB 1088 *** *provides for payment of attorney's fees of the defending party when the defendant prevails in such actions. This provision would reduce the possibility that an irresponsible prosecutor might bring an unjustified action against an individual or firm.*" [Meeting Minutes]
>
> "***
>
> "*The purpose of [the AVC] is to reduce unnecessary litigation and protect the merchant against an*

> *irresponsible prosecutor who might bring a suit solely for publicity purposes.* The merchant has 10 days in which to file an assurance of voluntary compliance. *If the prosecuting attorney then proceeds to prosecute and the court finds that the merchant had in good faith complied with the law, then the merchant can obtain attorney's fees against the state.*" [Statement]

Id. (emphasis in *Living Essentials*) (citations to legislative history omitted). Notably, the legislature has since amplified its intent of preventing unnecessary litigation by amending the fee provision to include fees on appeal to the prevailing defendant. *Id.* at 211 n 30.

2. The AVC was satisfactory.

Here, the state did not have grounds to reject Defendants' AVC as "unsatisfactory" under either ORS 646.632(3)(a) or (b). First, the restitution offered ($250,000) vastly exceeded the amount of the only sale in Oregon of Decaf 5-hour ENERGY® proven by the state—$302.40 (*see* Ex 358)[30]—and the state has abandoned its restitution arguments. Second, the state concedes (3)(b) does not apply because the prosecuting attorney did *not* provide Defendants with a proposed AVC containing the provisions the "prosecuting attorney reasonably believe[d] to be necessary to ensure the continued cessation of the alleged unlawful trade practice." (State Br 40.)

[30] At trial, the state sought restitution only for the Decaf counts. (ER-23.)

In fact, Defendants' AVC contained provisions beyond those required to meet the "satisfactory" standard. It assured the state that Defendants would: (a) refrain from *all* of the conduct alleged by the state in the Notice;[31] (b) refrain from *additional* conduct ; (c) refrain from making unsubstantiated claims, although "substantiation" is not even required under Oregon law (as held by the trial court in its unchallenged dismissal of the state's claims for lack of substantiation (SER-1)); and (d) comply with *all* provisions of the UTPA going forward (SER-31–34). Defendants provided these assurances even though the state had received *no consumer complaints* about 5-hour ENERGY®. (*See* Pltf's Resp to Defs' First Requests for Admission, Nos. 9–10 ("State admits that it is not aware of any Oregon consumer complaints made to the Oregon Department of Justice regarding any alleged false or misleading advertising claims in the Amended Complaint.").)

The trial court erred in ignoring these facts and instead considering whether the prosecuting attorney acted "reasonably" or within his "prosecutorial discretion" and in denying Defendants mandatory attorney fees. (State SER-69–78 at 36:13–14, 36:25–37:3) ("That's not to say that there isn't a circumstance in which [the

[31] Defendants agreed in the AVC not to make false statements (SER-31 ¶ 12); not to run Ask Your Doctor ads (SER-32 ¶ 14); not to utilize unreliable survey data (SER-32 ¶ 15); not to use "crash" language (SER-33 ¶ 18); and not make representations without first possessing "competent and reliable scientific evidence" (SER-31–32 ¶ 13). None of these additional promises detract from Defendants' commitment to comply with the *entire* UTPA.

prosecuting attorney] could be *unreasonable in exercising [her] prosecutorial discretion, I just don't find that this was it*.") (emphasis added). The court also erred in making the following additional findings: (1) Defendants did not offer to admit wrongdoing (when ORS 646.632(2) states that an AVC "shall not be considered an admission of a violation for any purpose"); (2) the state reasonably believed it could prevail at trial (which will always be so when the state chooses to litigate); (3) there were contested legal issues (yet, there are contested legal issues in any UTPA case); and (4) an award of fees would deter good faith UTPA claims by the state (when the section's whole purpose is to deter litigation—even in good faith—in the face of a satisfactory AVC). (State SER-69–78 at 37:4–9, 33:8–9, 34:20–22, 35:25–36:1, 37:15–21, and 36:6–7, respectively.)

3. The state's arguments that the AVC was unsatisfactory are without merit.

The state argues that the AVC was unsatisfactory because it included terms that conflict with the UTPA by holding Defendants to a "lower standard than the UTPA requires" (State Br 46), but in fact, the AVC's injunctive terms are more expansive than required by the UTPA. First, Paragraph 11 of the AVC required Defendants to "obey" the *entire* UTPA. (SER-31.) That should put to rest any concerns that the AVC conflicted with the UTPA. Moreover, as discussed below, if the prosecuting attorney had accepted the AVC and believed that Defendants were

applying it in conflict with the UTPA, then the state had recourse under AVC Paragraph 35 and ORS 646.642(2). (SER-37.)

Second, Defendants agreed to not make any statement "that contains material representations that are false." (SER-31 ¶ 12.) This simply reiterates the conduct prohibited by ORS 646.608(1)(e). They further agreed not to make any statement "that contains material representations that *** mislead consumers acting reasonably to their detriment." (SER-31 ¶ 12.) This *expands* the UTPA's requirements. As determined by the trial court (which the state does not challenge), a representation violates ORS 646.608(1)(e) if it is objectively *false*. (SER-1.) If a statement is merely misleading but not false, the statement nonetheless would have been prohibited by this provision if it misleads consumers to their detriment. Thus, the AVC required *more* of Defendants than what would be required under (1)(e).[32]

Finally, as pertinent here, Defendants agreed not to make any statement that "omits material information such that the *** statement *** deceives consumers acting reasonably to their detriment." (SER-31 ¶ 12.) Again, by prohibiting

[32] Below, the state cited TCF 4366–67; Resp to Fee Pet 6–7, where the prosecuting attorney's email (SER-42–44) quotes an Iowa attorney who takes issue with "the language employing a 'consumers acting reasonably to their detriment' test." (Court of Appeals State Reply Br at 36.) However, this Iowa lawyer was reviewing the *Ohio AVC*, and that AVC did not contain a provision comparable to Paragraph 11 of the Oregon AVC, which required compliance with the entire Oregon UTPA. (SER-31 ¶ 11.)

omissions that mislead consumers but are not false, this provision provides *more* than the UTPA requires. As discussed below, if the prosecuting attorney believed otherwise, he could have invoked the AVC's severability clause and the available statutory procedure to resolve the disagreement.

Before this court, the state abandons its previous arguments and now argues that the AVC was unsatisfactory because the prosecuting attorney did not believe acceptance of the AVC would "end the dispute." (State Br 42.) The state, in effect, contends that every defendant must acquiesce to its view of the law, or otherwise be sued with no opportunity for mandatory fees upon prevailing at trial. Surely the legislature did not intend this absurd result, as the defendant could never be awarded fees.

And while the AVC obligated Defendants to obey the entire UTPA, the state goes even further and argues that it "cannot [even] submit an AVC for court approval" if the AVC—in the prosecuting attorney's mind—does not end the dispute, concluding that an "AVC cannot be satisfactory *** if the state would have to file suit to determine what terms were enforceable." (State Br 44–45.)

That argument reflects a fundamental misunderstanding of the statute and the enforcement process provided therein; the circuit court in fact retains jurisdiction to modify and enforce accepted AVCs, and it is not the job of every accepted AVC in all cases to "end the dispute." Both this AVC and the statute provide as much.

Paragraph 29 of the AVC contained a severability clause that provided a mechanism for the circuit court to determine the enforceability of any disputed provision of the AVC. (*See* SER-36 ¶ 29 ("[I]f any provision herein is found to be legally insufficient or unenforceable, the remaining provisions shall continue in full force and effect.").) Defendants' AVC simply tracked the ordinary process set forth in ORS 646.632(2)—the prosecuting attorney files the accepted AVC with the circuit court; it is entered in the record; it creates a lien; and "thereupon constitute[s] a judgment in favor of the State of Oregon *and may be enforced as provided in ORS chapter 18*." ORS 646.632(2) (emphasis added). ORS 18.082, then, provides that "[u]pon entry of a judgment, the judgment:"

> "(a) Becomes the exclusive statement of the court's decision in the case and governs the rights and obligations of the parties that are subject to the judgment;
>
> "(b) *May be enforced in the manner provided by law*;
>
> "* * * * *
>
> "(e) *May be* set aside or *modified* only by the court rendering the judgment[.]

ORS 18.082(1) (emphasis added).

The state also argues the AVC was unsatisfactory because it "included elements that are not in the UTPA." (State Br 48.) Even if that were the case, the prosecuting attorney simply could have accepted and filed the AVC and, if necessary, requested a hearing under ORS 18.082 regarding any disputed terms.

Instead, he chose to reject the AVC (without offering his own terms) and engage in years of litigation in the trial and appellate courts at the taxpayers' expense. And he did so in the face of a commitment by Defendants to comply with the *entire* UTPA, the severability clause in Paragraph 29, and Paragraph 35 of the AVC, which provided a reasonable and cost-effective process for resolving any remaining disputed matter.[33]

As the Court of Appeals properly noted, the state applies to the circuit court for civil penalties when it believes a violation of an accepted AVC has occurred, *see* ORS 646.642(2), and it may bring a contempt action in the same circumstances, *see* ORS 646.632(4). In both cases, the state can recover its attorney fees if it prevails. *See* ORS 646.642(2). This prosecuting attorney chose not to proceed with this more efficient, less costly, and less risky option of pursuing modification and enforcement under the statutory procedure. A prosecuting attorney's need to utilize the available statutory procedure cannot render the AVC "unsatisfactory."

Moreover, while a prosecuting attorney's "reasonableness" in rejecting the AVC is not a proper consideration, this prosecuting attorney was not acting

[33] Paragraph 35 of the AVC provided for pre-litigation notice by the state of any perceived violation; provided an opportunity to Defendants to respond in an attempt to resolve any dispute and avoid litigation; and allowed the state to take any legal action provided under the statute, including to seek penalties and attorney fees if the state believed the Defendants were in violation of the UTPA.

reasonably. If he "reasonably believe[d]" there were terms that would "ensure the continued cessation of the alleged unlawful trade practice" under ORS 646.632(3)(b), he should have served his own AVC with those terms, rejected Defendants' AVC as "unsatisfactory," and cut off Defendants' right to mandatory fees. Even though the statute clearly gave him that option, *this prosecuting attorney chose not to take it*. Because he did not, Defendants cannot be denied their fees on the basis that the terms of Defendants' AVC were insufficient to "end the dispute." Otherwise, the final clause of ORS 646.632(3)(b) ("if such provision was included in a proposed assurance") would be "meaningless surplusage."

Finally, citing no authority, the state argues that it was not required to accept the AVC because by doing so, it would have effectively conceded that materiality is required. (State Br 44–45.) However, until perhaps this case, the state itself had been pursuing conduct "material" to the consumer's purchasing decisions and recognizing materiality as a requirement in consumer sales cases. In fact, in *Johnson & Johnson*, the state assumed the burden of proving materiality and argued as much at the Court of Appeals. *See supra*, section A.1.d. (citing state's brief). Accordingly, the state already has recognized that preventing *material* misrepresentations is satisfactory for purposes of protecting consumers.

Here, the state's decision to take a different tack leaves it advocating for unbridled powers to pursue immaterial conduct with no judicial oversight and no

recourse for the innocent merchant, when ORS 646.632 in fact is designed to protect merchants from unnecessary and costly litigation. The only provision within the statute that operates as a check against the state to protect merchants from unnecessary litigation is the mandatory fee provision. Defendants' AVC provided all this prosecuting attorney needed to efficiently and cost-effectively ensure cessation of any alleged unlawful conduct, so Defendants must be awarded fees.

CONCLUSION

This court should affirm the Court of Appeals' decision on both the state's appeal (materiality) and on Defendants' cross-appeal (mandatory attorney fees) and remand for a determination of the amount of Defendants' attorney fees and costs.

If this court reverses on materiality, it should affirm Defendants' judgment because ORS 646.608(1)(b) and (e) are unconstitutional.

If this court reverses on materiality and holds that ORS 646.608(1)(b) and (e) are constitutional, it should remand to the Court of Appeals for further proceedings.

RESPECTFULLY SUBMITTED this 28th day of March, 2022.

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APPENDIX

ORS 646.608(1)(b) and (e)

(1) A person engages in an unlawful practice if in the course of the person's business, vocation or occupation the person does any of the following:

* * * * *

(b) Causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of real estate, goods or services.

* * * * *

(e) Represents that real estate, goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, quantities or qualities that the real estate, goods or services do not have or that a person has a sponsorship, approval, status, qualification, affiliation, or connection that the person does not have.

ORS 646.632(1)-(4), (8)

(1) Except as provided in ORS 646.633, a prosecuting attorney who has probable cause to believe that a person is engaging in, has engaged in, or is about to engage in an unlawful trade practice may bring suit in the name of the State of Oregon in the appropriate court to restrain such person from engaging in the alleged unlawful trade practice.

(2) Except as provided in subsections (5) and (6) of this section, before filing a suit under subsection (1) of this section, the prosecuting attorney shall in writing notify the person charged of the alleged unlawful trade practice and the relief to be sought. Such notice shall be served in the manner set forth in ORS 646.622 for the service of investigative demands. The person charged thereupon shall have 10 days within which to execute and deliver to the prosecuting attorney an assurance of voluntary compliance. Such assurance shall set forth what actions, if any, the person charged intends to take with respect to the alleged unlawful trade practice. The assurance of voluntary compliance shall not be considered an admission of a violation for any purpose. If the prosecuting attorney is satisfied with the assurance of voluntary compliance, it may be submitted to an appropriate court for approval and if approved shall thereafter be filed with the clerk of the court. If an approved assurance of voluntary compliance provides for the payment of an amount of money,

as restitution or otherwise, and if the amount is not paid within 90 days of the date the court approves the assurance, or, if the assurance of voluntary compliance requires periodic payments and if any periodic payment is not paid within 30 days of the date specified in the assurance of voluntary compliance for any periodic payment, then the prosecuting attorney may submit that portion of the assurance of voluntary compliance which provides for the payment of money to the court with a certificate stating the unpaid balance in a form which fully complies with the requirements of ORS 18.038 and 18.042. Upon submission of an assurance of voluntary compliance under this subsection, the court shall sign the assurance of voluntary compliance and it shall be entered in the register of the court and the clerk of the court shall note in the register that it creates a lien. The assurance of voluntary compliance shall thereupon constitute a judgment in favor of the State of Oregon and may be enforced as provided in ORS chapter 18. The notice of the prosecuting attorney under this subsection shall not be deemed a public record until the expiration of 10 days from the service of the notice.

(3) The prosecuting attorney may reject as unsatisfactory any assurance: (a) Which does not contain a promise to make restitution in specific amounts or through arbitration for persons who suffered any ascertainable loss of money or property as a result of the alleged unlawful trade practice; or (b) Which does not contain any provision, including but not limited to the keeping of records, which the prosecuting attorney reasonably believes to be necessary to ensure the continued cessation of the alleged unlawful trade practice, if such provision was included in a proposed assurance attached to the notice served pursuant to this section.

(4) Violation of any of the terms of an assurance of voluntary compliance which has been approved by and filed with the court shall constitute a contempt of court.

* * * * *

(8) The court may award reasonable attorney fees to the prevailing party in an action under this section. If the defendant prevails in such suit and the court finds that the defendant had in good faith submitted to the prosecuting attorney a satisfactory assurance of voluntary compliance prior to the institution of the suit or that the prosecuting attorney, in a suit brought under subsections (5) and (6) of this section, did not have reasonable grounds to proceed under those subsections, the court shall award reasonable attorney fees at trial and on appeal to the defendant.

House Bill 1088, Section 3(2)(b) and (e)

OREGON LEGISLATIVE ASSEMBLY-1971 REGULAR SESSION

House Bill 1088

Sponsored by Representatives YOUNG, PYNN, MARTIN, COLE, CROTHERS, ELLIOTT, GRAHAM, HASS, INGALLS, LEIGH JOHNSON, KENNEDY, MARKHAM, STATHOS, Senators ATIYEH, CARSON, HARTUNG, HOYT (at the request of the Attorney General)

* * * * *

SECTION 3. * * *

(2) A person engaged in a deceptive trade practice when, in the course of his business, vocation or occupation, he:

* * * * *

(b) Causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services;

* * * * *

(e) Represents that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, qualification, affiliation, or connection that he does not have; * * *.

Senate Bill 50, Section 3(1)(b) and (e)

OREGON LEGISLATIVE ASSEMBLY-1971 REGULAR SESSION

Senate Bill 50

Sponsored by Senator WILLNER, Representative HANSELL, Senators BOE, BROWNE, COOK, EIVERS, FADELEY, HALLOCK, HARTUNG, JERNSTEDT, ROBERTS, Representatives ANUNSEN, AuCOIN, CRAIG, DENSMORE, EYMANN, FADELEY, MACPHERSON, RIEKE, ROBERTS, SKELTON (at request of Oregon Consumer League)

* * * * *

SECTION 3. (1) The following unfair methods of competition and unfair or deceptive acts or practices undertaken by a person are hereby declared to be unlawful:

* * * * *

(b) Causing likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services;

* * * * *

(e) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that he does not have;

Uniform Deceptive Trade Practices Act, 1964 Act

§ **2. [Deceptive Trade Practices]**

(a) A person engages in a deceptive trade practice when, in the course of his business, vocation, or occupation, he:

* * * * *

(2) Causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services;

COMMENT

The "likelihood of confusion" test is referred to in the Restatement (Second), Torts § 729, comment a (Tent. Draft No. 8, 1963) as "a phrase which has long been used in statutes, Federal and State, and in court opinions. . ." In encompassing probable confusion as to commercial source, approval, endorsement, or certification of goods or services caused by trademarks, service

E.g., Triangle Pub. Inc. *v.* Rohrlich, 167 F.2d 969 (2d Cir.1948); L.E. Waterman Co. *v.* Gordon, 72 F.2d 272 (2d Cir.1934); James Burrough, Ltd. *v.* Ferrara, 8 Misc.2d 819, 169 N.Y.S.2d 93 (Supp.Ct.N.Y.County 1957). See Restatement (Second), Torts § 717 & comments (Tent.Draft No. 8, 1963); Comment, "The Anti-Competitive Aspects of Trade Name Protection and

marks, certification marks, or collective marks likely to be associated with preexisting trade symbols, this subsection reflects the trend of authority.

the Policy Against Consumer Deception," 29 U.Chi.L.Rev. 371, 373-75 (1962).

* * * * *

(5) represents that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that he does not have;

COMMENT

This subsection deals with false advertising of goods, services or businesses. It includes false representations that a person is the representative, successor, associate, or affiliate of another, e.g., Alaska Sales and Service, Inc. *v.* Rutledge, 128 F.Supp. 1 (D.Alaska 1955) (false representation of automobile dealership franchise) false representations that goods or services were designed, approved, or sponsored by another, e.g., Parkway Baking Co. *v.* Freihofer Baking Co., 255 F.2d 641 (3d Cir.1958) (false representation of trademark license), and false representations concerning goods of which another is truthfully represented as the commercial source, e.g. false representations by a retailer concerning "Arrow" shirts. See Restatement (Second), Torts § 712, comment d (Tent.Draft No. 8, 1963). Section 43(a) of the Lanham Act § 43(a), 60 Stat. 441 (1946), 15 U.S.C. § 1125(a) (1958), and Idaho Code Ann. § 48-412 (Supp. 1963) authorize similar private actions.

Revised Uniform Deceptive Trade Practices Act, 1966

REVISED UNIFORM DECEPTIVE TRADE PRACTICES ACT

Drafted by the
NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

* * *

ANNUAL CONFERENCE

MEETING IN ITS SEVENTY-FIFTH YEAR
MONTREAL, CANADA
JULY 30 - AUGUST 5, 1966

* * *

The Committee which acted for the National Conference of Commissioners on Uniform State Laws in preparing the Revised Uniform Deceptive Trade Practices Act was as follows:

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1970 Suggested State Legislation, Unfair Trade Practices and Consumer Protection Law

Introductory Comments (page 142)

Alternative Form No. 3, like the 1967 draft, prohibits the twelve specific types of deceptive practice enumerated in the Uniform Deceptive Trade Practices Act as promulgated by the National Conference of Commissioners on Uniform Laws in 1964.

* * * * *

Section 2, Alternative Form No. 3

The following unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared to be unlawful:

* * * * *

(2) causing likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services;

* * * * *

(5) representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that he does not have; * * *

National Consumer Act, First Final Draft, Official Text With Comments

Section 3.201 [UNLAWFUL SALES PRACTICES]

(1) The following unfair methods of competition and unfair or deceptive acts or practices undertaken by a merchant are hereby declared to be unlawful and prohibited:

* * * * *

(b) Causing likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services;

* * * * *

(e) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that he does not have; * * *.

Section 3.201, Comment 2

Subsection (1) contains an exhaustive list of deceptive sales and trade practices. The list is not exclusive, and a consumer may establish in court other unfair and deceptive practices. The Administrator is also entitled to establish such practices by rule or regulation. Many of the prohibited practices are already prohibited under the Federal Trade Commission Act and under State

deceptive practices acts. What this Article does is provide the consumer with a remedy under State law.

HB 1088, Bill File, Annotations of Uniform Law Commission to Uniform Deceptive Trade Practices Act of 1964

Annotations of Uniform Law Commission to the deceptive trade practices prohibited by the Uniform Deceptive Trade Practices Act of 1964

405.
1088

(5) knowingly makes a false representation as to the characteristics, ingredients, uses, benefits or quantities of goods or services or a false representation as to the sponsorship, approval, status, affiliation, or connection of a person therewith;

(6) represents that goods are original or new if they are not;

(7) represents that goods or services are a particular standard, quality, or grade, or that goods are a particular style or model, if they are another;

(8) disparages the goods, services, or business of another by false or misleading representation of fact;

(9) advertises goods or services which differ from those offered for sale in the advertisements;

(10) advertises goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity;

(11) makes false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions.

(b) Evidence that a person has engaged in a deceptive trade practice shall be prima facie evidence of intent to injure competitors and to destroy or substantially lessen competition.

(c) The deceptive trade practices listed in this section are in addition to and do not limit the types of unfair trade practices actionable at common law or under other statutes of this state. 78 O.S.Supp.1965, § 53.

Marginal letters relate to those subsections of HB 1088, section 3, which were taken from the Uniform Act.

Commissioners' Note

(a) Passing off has been said to be "a convenient name for the doctrine that no one should be allowed to sell his goods as those of another." Vogue Co. v. Thompson-Hudson Co., 300 Fed. 509, 512 (6th Cir.1924). Passing off originally denominated unauthorized use of trade identification but today the term is also applied to covert substitution of a different brand of goods for the one requested by a customer. E.g., Coca-Cola Co. v. Foods, Inc., 220 F.Supp. 101 (D.S.D.1963).

(b) The "likelihood of confusion" test is referred to in the Restatement (Second), Torts § 729, comment a (Tent.Draft No. 8, 1963) as "a phrase which has long been used in statutes, Federal and State, and in court opinions. . . ." In encompassing probable confusion as to commercial source, approval, endorsement, or certification of goods or services caused by trademarks, service marks, certification marks, or collective marks likely to be associated with preexisting trade symbols, this subsection reflects the trend of authority. E.g., Triangle Pub. Inc. v. Rohrlich, 167 F.2d 969 (2d Cir.1948); L. E. Waterman Co. v. Gordon, 72 F.2d 272 (2d Cir.1934); James Burrough, Ltd. v. Ferrara, 8 Misc.2d 819, 169 N.Y.S.2d 93 (Sup.Ct.N.Y.County 1957). See Restatement (Second), Torts § 717 & comments (Tent.Draft No. 8, 1963); Comment, "The Anti-Competitive Aspects of Trade Name Protection and the Policy Against Consumer Deception," 29 U.Chi.L.Rev. 371, 373–75 (1962).

(c) This subsection concerns likelihood of confusion caused by misleading trade names, e.g., Visser v. Macres, 214 Cal.App.2d 249, 29 Cal.Reptr. 367 (1963) (defendant opened up a competing florist shop with the same name as plaintiff's at plaintiff's former location after the latter had moved across the street).

(d) This subsection applies to deceptively misdescriptive representations and designations of geographic origin. If geographic terms or symbols are used in a non-geographic sense and are unlikely to be considered descriptive, e.g., "Everest" as a trademark

for wrist watches, the subsection is inapplicable. Section 43(a) of the Lanham Trademark Act contains an analogous provision. § 43(a) 60 Stat. 441 (1946), 15 U.S.C. § 1125(a) (1958); Federal-Mogul-Bower Bearings, Inc. v. Azoff, 201 F.Supp. 788 (N.D. Ohio 1962) reversed on other grounds, 313 F.2d 405 (6th Cir. 1963).

(e) This subsection deals with false advertising of goods, services or businesses. It includes false representations that a person is the representative, successor, associate, or affiliate of another, e.g., Alaska Sales and Service, Inc. v. Rutledge, 128 F.Supp. 1 (D.Alaska 1955) (false representation of automobile dealership franchise) false representations that goods or services were designed, approved, or sponsored by another, e.g., Parkway Baking Co. v. Freihofer Baking Co., 255 F.2d 641 (3d Cir.1958) (false representation of trademark license), and false representations concerning goods of which another is truthfully represented as the commercial source, e.g. false representations by a retailer concerning "Arrow" shirts. See Restatement (Second), Torts § 712, comment d (Tent.Draft No. 8, 1963). Section 43(a) of the Lanham Act, § 43(a), 60 Stat. 441 (1946), 15 U.S.C. § 1125(a) (1958), and Idaho Code Ann. § 48-412 (Supp.1963) authorize similar private actions.

(f) The conduct referred to in this subsection has been condemned both at common law, e.g., Champion Spark Plug Co. v. Sanders, 331 U.S. 125 (1947) (alternative holding) (requiring disclosure that spark plugs were repaired); see Restatement (Second), Torts § 714 (Tent.Draft No. 8, 1963), and by a few state statutes, e.g., Cal.Bus. & Prof.Code § 17531.

(g) The conduct referred to in this subsection has been condemned both at common law, e.g., Burlington Mills Corp. v. Roy Fabrics, Inc., 91 F.Supp. 39 (S.D.N.Y.), aff'd per curiam, 182 F.2d 1020 (2d Cir.1950) (semble) (forbidding sale of second grade materials as first grade); see Restatement (Second), Torts § 714 (Tent. Draft No. 8, 1963); and by a few statutes, e.g., Idaho Code Ann. § 48-412 (Supp.1963).

(h) This subsection reflects the trend of authority allowing businessmen to enjoin disparagement by competitors, e.g., Maytag Co. v. Meadows Mfg. Co., 35 F.2d 403 (7th Cir.1929), cert. den., 281 U.S. 737 (1930) (bad faith assertions of patent infringement); accord, Royer v. Stoody Co., 192 F.Supp. 949 (W.D.Okla.1961) (false assertion of product inferiority stated cause of action); H. E. Allen Mfg. Co. v. Smith, 224 App.Div. 187, 229 N.Y.Supp. 692 (4th Dep't 1928) (false claims of product inferiority), and noncompetitors, e.g., Carter v. Knapp Motor Co., 243 Ala. 600, 11 So.2d 383 (1943) (dissatisfied customer enjoined from attempting to coerce auto dealer into giving him another automobile by driving vehicle with white elephant painted on it); accord, Menard v. Houle, 298 Mass. 546, 11 N.E.2d 436 (1937) (dissatisfied customer enjoined from continuous, malicious campaign designed to convince public that automobile dealer had sold him a worthless vehicle); Mayfair Farms, Inc. v. Socony Mobil Oil Co., 68 N.J.Super. 188, 172 A.2d 26 (1961) (allegation that Mobil Travel Guide had arbitrarily given plaintiffs' establishments unjustified low ratings stated a cause of action for an injunction).

(i) (j) Subsections 2(a)9 and 2(a) (10) deal with "bait advertising," a practice by which a seller seeks to attract customers through advertising at low prices products which he does not intend to sell in more than nominal amounts. When prospective buyers respond to the advertisement, sale of the "bait" is discouraged through various artifices including disparagement and exhaustion of a minuscule stock in order to induce purchase of unadvertised goods on which there is a greater markup. A bait advertising scheme which involved disparagement has been held enjoinable at common law by the manufacturer of the "bait." Electrolux Corp. v. Val-Worth, Inc., 6 N.Y.2d 556, 161 N.E.2d 197, 190 N.Y.S.2d 977 (1959). A Connecticut statute similarly authorizes private parties to enjoin bait advertising. Conn.Gen. Stat.Ann. § 42–115(a) (Supp.1962). Odd lot or clearance sales in which bargains are offered in limited quantities will not run afoul of the proposed statute as long as disclosure is made of the limited stock. Cf. ibid.

(k) This subsection applies to spurious "fire" and "liquidation" sales as well as to fictitious price cuts. Hawaii Rev.Laws §§ 289–14 and 289–15 (1955) and Mich.Stat.Ann. §§ 28.79(7) and (8) (1962) authorize similar private actions.

(n) This subsection permits the courts to block out new kinds of deceptive trade practices. The broad language of Cal.Civ.Code § 3369 (Supp.1963) has been interpreted as creating the analogous general standard of "likelihood of public deception." People v. National Research Co., 201 Cal.App.2d 765, 20 Cal.Rptr. 516 (1962).

This subsection removes the enumerated factors as absolute bars to relief.

This subsection is intended to ensure that enactment of the Uniform Deceptive Trade Practices Act will not inhibit future development of the law of unfair trading.

§ 3. [Remedies]

(a) A person likely to be damaged by a deceptive trade practice of another may be granted an injunction against it under the principles of equity and on terms that the court considers reasonable. Proof of monetary damage, loss of profits, or intent to deceive is not required. Relief granted for the copying of an article shall be limited to the prevention of confusion or misunderstanding as to source.

(b) [The court in exceptional cases may award reasonable attorneys' fees to the prevailing party.] Costs [or attorneys' fees] may be assessed against a defendant only if the court finds that he has wilfully engaged in a deceptive trade practice.

(c) The relief provided in this section is in addition to remedies otherwise available against the same conduct under the common law or other statutes of this state.

Restatement (Second) of the Law of Torts (Tent. Draft No. 8 1963)

The American Law Institute

RESTATEMENT OF THE LAW
SECOND
TORTS

Submitted by the Council to the Members for Discussion at the
Fortieth Annual Meeting May 22, 23, 24 and 25, 1963.

Tentative Draft No. 8

* * *

Many unfair trade practices cases do not to-day constitute "passing off" in its original sense, for the actor and the other may not be competitors selling the same kind of goods or services and there would be no actual diversion of custom. The term continues to be used, however, to refer to those cases where the actor's conduct is of a nature which gives him an unfair commercial advantage to the detriment of another.

The marketing of goods with an unprivileged imitation of the physical appearance of the goods of another may be injurious to the other, either by reason of "passing off" in the original sense of of creating a false association or trade connection between two commercial entities.

The relief given in each of the several situations may differ , and the varied situations are therefore treated separately.

§ 711. GENERAL PRINCIPLE.

One who falsely
(a) ~~fraudulently~~ markets ~~his~~ goods or services ~~as those of another~~, or
(b) infringes another's trade-mark, ~~or trade-~~ for goods or services, collective mark, certification mark
name, or
(c) markets goods with an unprivileged imitation of the physical appearance of another's goods
is subject to liability ~~liable to the other~~ for the relief appropriate under the rules stated in §§ 744–748, except to the extent that the other has by his own conduct disabled himself from claiming such relief.

* * *

FALSE
TOPIC 1. ~~FRAUDULENT~~ MARKETING

§ 712. GENERAL PRINCIPLE.

~~(1) One fraudulently markets his goods as~~ those of another under the rule stated in § 711 if he makes a fraudulent misrepresentation that he is the other or the other's agent or successor, or that the goods which he markets are produced, processed, designed or distributed by the other,

(a) for the purpose of inducing persons to purchase the goods which he markets, and

(b) under such circumstances that reliance thereon by such persons to the commercial detriment of the other is likely.

~~(2) One fraudulently markets his services as~~ those of another if, for the purpose of inducing persons to purchase his services and under the circumstances stated in Clause (b) of Subsection (1), he makes a fraudulent misrepresentation that he is the other or the other's agent or successor, or that the services which he offers are the services rendered by the other.

One falsely markets goods or services under the rule stated in §711 if, in the marketing process, he makes any material false representation which is likely to induce persons to purchase, to the commercial detriment of another, the goods or services which he markets.

COMBINED CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH REQUIREMENTS AND CERTIFICATES OF FILING AND SERVICE

Brief length: I certify that the foregoing BRIEF ON THE MERITS OF RESPONDENTS ON REVIEW complies with the word-count limitation in ORAP 5.05 and 9.17(3)(c), and its word count is 13,824 words. I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes.

Filing: I certify that on March 28, 2022, I filed the foregoing BRIEF ON THE MERITS OF RESPONDENTS ON REVIEW with the Appellate Court Administrator by using the Court's eFile system.

Service: I hereby certify that on March 28, 2022, I caused to be served the foregoing BRIEF ON THE MERITS OF RESPONDENTS ON REVIEW on the following persons via the Oregon Appellate Courts' eFile system:

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