Your Store Is Gross! How Recent Cases, the FTC, and State Consumer Protection Laws Can Impact a Franchise System's Response to Negative, Defamatory, or Fake Online Reviews

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Online reviews drive business. They have a powerful, lasting impact but people are more likely to share their negative reviews. While 45 percent of people use social media to share bad customer service experiences, only 30 percent use social media to share good customer service experiences.[1] In one survey, 90 percent of people who recalled reading online reviews claimed that positive online reviews influenced their buying decisions, while 86 percent of people said negative online reviews influenced their buying decisions.[2] These statistics explain why a franchise system and its franchisees would use any and all available resources to ensure that their brands, products, and services are above reproach. The Internet can be a harsh and unforgiving forum for even the most respected brands and products. Franchise systems are particularly vulnerable to negative online press because one location with a negative online profile can taint an entire system and potentially impact revenues across the country with a speed and scope that were unfathomable ten years ago. Unfortunately, not even impeccable customer service and flawless products guarantee a problem-free online presence. The impact that online reviews now have on consumer habits has spurred a new headache for businesses: defamatory and fraudulent reviews.

A franchisor or franchisee victimized by a defamatory post has limited legal remedies, even with the massive impact that bad online reviews may

1. Dimensional Research, *Customer Service and Business Results: A Survey of Customer Service from Mid-Sized Companies* (Apr. 2013), https://d16cvnquvjw7pr.cloudfront.net/resources/whitepapers/Zendesk_WP_Customer_Service_and_Business_Results.pdf.
2. *Id.*

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have. In addition, a franchise system must ensure that its elected remedy does not violate state or federal consumer protection laws.

Part I of this article discusses the legal theories under which businesses have sued online review sites and the hurdles they face in holding these sites responsible for defamatory reviews. Part II of this article discusses cases involving businesses asserting claims directly against individual online reviewers. Part III provides recommendations to minimize risk while staying within the confines of state and federal law.

I. Lawsuits Against Online Review Websites

The legal theories under which businesses assert claims against online review sites are fairly broad and include violations of state unfair competition laws, civil extortion, defamation, and invasion of privacy. Despite this assortment of available legal theories, businesses tarnished by online reviews generally do not succeed in litigation against online review sites.

A. *Federal Communications Decency Act*

Section 230 of the Federal Communications Decency Act of 1996 (CDA)[3] will, in many instances, bar claims against online review sites based on defamatory statements from third-party reviewers who are not affiliated with the review site.[4] The law's umbrella immunity extends to protect sites from claims for trade libel, slander, invasion of privacy, and misappropriation.[5] The CDA provides that "no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[6] The CDA grants immunity so long as

> (1) the defendant is a provider or user of an interactive computer service, (2) the asserted claims treat the defendant as a publisher or speaker of information, and (3) the challenged communication is information provided by another content provider.[7]

Under the CDA, an

> "interactive computer service" means "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions."[8]

3. 47 U.S.C. § 230 (1996).
4. Carafano v. Metrosplash.com, 339 F.3d 1119, 1122 (9th Cir. 2003).
5. Doe v. Myspace, 474 F. Supp. 2d 843 (W.D. Tex. 2007); *see also* Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1101 (9th Cir. 2009).
6. 47 U.S.C. § 230.
7. Batzel v. Smith, 333 F.3d 1018, 1037 (9th Cir. 2003) (quoting 47 U.S.C. § 230(c)(1)).
8. 47 U.S.C. § 230(f)(2).

The CDA provides protection to all forms of interactive computer services, including social media websites, online review sites, blogs, forums, and list-servs. For example, Amazon.com, Inc., an online market that allows users to review books and other products sold on its site, has successfully invoked immunity under the CDA in a number of cases over the past decade to avoid liability for third-party product reviews posted on its site.[9] CDA's immunity provision extends even to editorial acts.[10] "Lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred."[11] In short, the CDA provides a nearly airtight defense to prevent a franchise from successfully suing an online review site for false or defamatory content in a third-party review. Because the CDA bars most actions against online review sites, plaintiffs must find alternative methods for successfully suing online review sites.

B. *Cases Against Yelp and TripAdvisor*

Recent cases attempting to circumvent the CDA show that legal recourse through the court system remains unlikely. For example, Yelp, a well-known online review site, has faced a barrage of lawsuits.[12] Individual users post comments on and rate businesses ranging from restaurants to dog salons. Over the years, businesses, especially small businesses, have accused Yelp of unsavory practices.[13] Last year, the *Wall Street Journal* received a Freedom of Information Act[14] response from the Federal Trade Commission (FTC), stating that the FTC received 2,046 complaints against Yelp between 2008 and 2014.[15]

The Ninth Circuit recently issued an opinion in the highly publicized case, *Levitt v. Yelp*.[16] In *Levitt*, a group of small businesses alleged that the site attempted to extort advertising payments from them by manipulating user reviews and writing negative reviews about the plaintiffs.[17] The court distinguished the facts in *Levitt* from prior cases preempted by the CDA because the issue was not the content of the reviews but Yelp's business

9. Corbis Corp. v. Amazon.com, Inc., 351 F. Supp. 2d 1090, 1118 (W.D. Wash. 2004); *see also* Schneider v. Amazon, 31 P.3d 37 (Wash. App. Ct. 2001).

10. *Schneider*, 31 P.3d at 40.

11. *Id.* at 41.

12. *See* Reit v. Yelp, Inc., 907 N.Y.S.2d 411 (N.Y. Sup. Ct. 2010) (determining that Yelp's business acts did not constitute deceptive acts and practices in violation of the New York General Business Law); Kimzey v. Yelp, 21 F. Supp. 3d 1120 (W.D. Wash. 2014) (granting Yelp immunity under the CDA for alleged violations of the Racketeer Influenced and Corrupt Organizations Act, Washington Unfair Practices and Unfair Competition Act, and malicious libel and libel per se); Levitt v. Yelp Inc., 2014 WL 4290615 (9th Cir. Sept. 2, 2014).

13. Angus Loten, *Yelp Reviews Brew a Fight over Free Speech vs. Fairness*, WALL ST. J., Apr. 2, 2014, http://online.wsj.com/news/articles/SB10001424052702303847804579477633444768964.

14. Freedom of Information Act, 5 U.S.C.A. § 552 (West 2009).

15. Loten, *supra* note 13.

16. Levitt v. Yelp, 765 F.3d 1123 (9th Cir. 2014).

17. *Id.* at 1125.

practices.[18] According to the plaintiffs, after they refused to purchase advertising on the website, Yelp deleted their positive reviews and highlighted their negative ones.[19] Yelp did not deny that its automated filtering software system ranked reviews based on the reviewer's involvement nor did it deny that the system might rearrange both good and bad reviews so that comments from more active reviewers were more conspicuous and prominent under a business's profile.[20] Yelp claimed that the system was "entirely automated to avoid human bias" and "affects both positive and negative reviews."[21] The plaintiffs argued that Yelp created negative reviews and deliberately manipulated the ratings to induce the plaintiffs to purchase advertising, constituting extortion and attempted extortion in violation of the California Unfair Competition Law (CAUCL).[22]

The Ninth Circuit held that even if Yelp manipulated user reviews, it was not extortion and not a violation of the CAUCL.[23] According to the court, "unless a person has a preexisting right to be free of the threatened economic harm, threatening economic harm to induce a person to pay for a legitimate service is not extortion."[24] In *Levitt*, the court held that the plaintiffs had no preexisting right to have positive reviews appear on Yelp's website, and Yelp had no obligation to provide them.[25] Thus, even assuming Yelp did remove positive reviews, the court held that it could not amount to economic extortion because the business had no right to such reviews under any agreement with Yelp or under any law.[26]

Prior to the decision in *Levitt*, another court also had found that the practices of the well-known travel review website TripAdvisor were not actionable.[27] In *Seaton v. TripAdvisor LLC*, Kenneth Seaton, the owner of Grand Resort Hotel and Convention Center in Pigeon Forge, Tennessee, sued TripAdvisor for ranking the establishment as one of its "2011 Dirtiest Hotels."[28] As did the plaintiff in *Levitt*, Seaton did not base his lawsuit on the substance of the third-party reviews but on TripAdvisor's use of the reviews to compile its "Dirtiest Hotels" list. Seaton alleged defamation and false light invasion of privacy, claiming that the website used an improper method

18. *Id.* at 1131.
19. *Id.* at 1127–28.
20. *Id.* at 1125.
21. *Id.*
22. CAL. BUS. & PROF. CODE § 17200 (West 2008). The CAUCL prohibits "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." *Levitt*, 765 F.3d at 1131 (citing CAL. BUS. & PROF. CODE § 17200).
23. *Levitt* at 1130. The court did not address the plaintiff's claim that Yelp wrote negative reviews because it found that the plaintiffs pled insufficient facts to establish a plausible claim. *Id.*
24. *Id.* (citing United States v. Vigil, 523 F.3d 1258, 1265 (10th Cir. 2008)).
25. *Id.* at 1133. The Ninth Circuit also found that the plaintiffs did not allege facts sufficient to support a claim that Yelp authored fake negative reviews. *Id.* at 1135.
26. *Id.* at 1133.
27. Seaton v. TripAdvisor, LLC, 728 F.3d 592 (6th Cir. 2013). Seaton also moved to amend his complaint to include claims for tortious interference with prospective business relationships and trade libel but the court denied the motion. *Seaton*, 728 F.3d at 595.
28. *Id.*

to compile its list and relied on unverifiable data.[29] The district court granted TripAdvisor's motion to dismiss Seaton's suit.[30] The Sixth Circuit upheld the district court decision, ruling that the "Dirtiest Hotels" list was the protected and subjective opinion of TripAdvisor's users and incapable of being defamatory.[31] The court found that the list could not reasonably be interpreted as asserting that Seaton's hotel was, in fact, the dirtiest hotel in America "because the list employed loose hyperbolic language with a general tenor undermining any assertion that the list was anything more than opinion."[32] According to the court, readers would clearly understand that the list was compiled with users' opinions and experiences—not an actual fact that the plaintiff was one of the dirtiest hotels in America.[33] The court also pointed to the language on the webpage where the list was located: "Dirtiest Hotels—United States as reported by travelers on TripAdvisor." The court held that language was further evidence that readers would "discern that TripAdvisor did not conduct a scientific study to determine which ten hotels were objectively the dirtiest in America."[34] As a result, Seaton's argument that TripAdvisor used flawed methodology or an improper system to compile the data did not support a claim for defamation.[35]

The CDA insulates websites from lawsuits by businesses for publishing third-party false and defamatory reviews. Moreover, the *Levitt* and *TripAdvisor* decisions certainly will make it more difficult to hold online review sites accountable for their methods and practices related to publishing, summarizing, and utilizing third-party reviews. If this is true, are there any protections for franchisees and franchise systems that suffer economic loss from defamatory reviews? The *Levitt* decision garnered its fair share of critics who feared that the decision might open the door to allow online review sites free rein to commit any and all unsavory practices. Critics may have exaggerated that fear. First, the court in *Levitt* emphasized that it was not holding that "no cause of action exists that would cover conduct such as that alleged, if adequately pled."[36] The court specifically limited its holding to disallow only a cause of action for extortion or unfair practices under the CAUCL. Thus, the door remains open for potentially successful claims against Yelp and other online review sites.

If a business owner can present sufficient facts to establish that it suffered a tangible injury to its reputation or income, the possibility of a successful breach of contract, trade libel, or violation of state unfair competition law claim remains. For example, in *Levitt*, the court seems to suggest that if the plaintiff had alleged a contractual right to positive Yelp reviews, instead

29. *Id.*
30. *Id.*
31. *Id.* at 596.
32. *Id.*
33. *Id.* at 598.
34. *Id.* at 598–99.
35. *Id.* at 600–01.
36. Levitt v. Yelp, 765 F.3d 1123, 1137 (9th Cir. 2014).

of alleging only that she knew they could be "tweaked," she may have been able to assert a viable breach of contract claim.[37] The case also leaves open the potential for a trade libel claim if a plaintiff can connect its reputational harm to a specific allegation of wrongful conduct.[38] Finally, the plaintiffs failed to demonstrate a violation of California's unfair competition law because none were able to show that Yelp "violated any 'legislatively declared policy,'" alleging only generally that Yelp's conduct harmed competition.[39] A well-pleaded complaint may survive dismissal where a plaintiff points to a specific action by Yelp that significantly threatens or harms competition in violation of a state unfair competition law.[40]

The case of *Small Justice LLC v. XCentric Ventures, LLC*[41] may provide an additional avenue for beleaguered businesses. In *Small Justice*, an attorney, Richard A. Goren, sued XCentric Ventures, LLC, the company that owns and operates the website "Ripoff Report."[42] Ripoff Report solicits victims of defamatory reports to participate in a program it offers to achieve positive search engine listings for a fee.[43] After the site refused to remove a defamatory report about him, Goren obtained a default judgment against the author of the report for libel and tortious interference. The court transferred ownership of the copyright of the libelous report to Goren and appointed Goren as attorney-in-fact for the author, including the power to execute on any assignment of the copyright.[44] Although Ripoff Report successfully invoked the CDA to shield itself from Goren's claims for libel or intentional interference with prospective contractual relationships,[45] he successfully defended against Ripoff Report's motion to dismiss his claim for violation of Massachusetts's Consumer Protection Act (MCPA).[46] The MCPA provides a private cause of action to

> [a]ny person who engages in the conduct of any trade or commerce and who suffers any loss of money or property, real or personal, as a result of the use or employment by another person who engages in any trade or commerce of an unfair method of competition or an unfair or deceptive act or practice.[47]

Goren alleged in his complaint that Ripoff Report violated the MCPA by refusing to take down a libelous and defamatory report "while simultaneously advertising services by which Goren can pay XCentric to restore

37. *Id.* at 1134 ("[I]t may be that by manipulating Chan's ratings to induce her to increase her advertising dollars, Yelp 'breached [its] duties under the contract.'").
38. *Id.*
39. *Id.* at 1136.
40. *Id.* at 1137
41. Civil Action No. 13-cv-11701 (D.C. Mass. Mar. 24, 2014), Memorandum and Order, http://www.dmlp.org/threats/small-justice-llc-et-al-v-xcentric-ventures-llc.
42. *Id.* at 2.
43. *Id.* at 15.
44. *Id.*
45. *Id.* at 14.
46. Mass. Gen. Laws Ch. 93A, § 11 (2004).
47. *Small Justice*, Civil Action No. 13-cv-11701, at 14.

its reputation."[48] The Massachusetts trial court denied XCentric's motion to dismiss, finding that Goren sufficiently pleaded that Ripoff Report's actions were within the " 'penumbra' of 'unfairness,' or they are 'immoral, unethical, oppressive or unscrupulous,' or they interfered with trade or commerce."[49] Thus, the holdings in *Small Justice* and *Levitt* do appear to leave the door open for potential claims by business owners.[50]

II. Lawsuits Against Reviewers

Businesses have had mixed success in suing the third-party reviewers who post on online review sites. The practical considerations are a significant motivator for businesses, and, in most cases, the potential negative publicity when a business sues one of its own customers is far worse than a bad review itself. National or large regional franchisors with recognizable brands do not wish to alienate the online community by suing every reviewer who leaves negative commentary.

Moreover, many individual reviewers post anonymously or with screen names, making it time consuming and difficult to identify and locate the authors. For example, Yelp claims that it receives approximately six subpoenas each month, many of which seek the names of anonymous reviewers.[51] A recent, publicized attempt to uncover an anonymous online reviewer involved the famous New York restaurant Sparks Steak House.[52] Sparks made news when it filed a petition with the Supreme Court of New York demanding that Yelp disclose the true name of an account user going by the name Besfort S.[53] Besfort S. had written a review on Yelp, claiming that he was an employee at Sparks, that he frequently spit in guests' food, and that Sparks did not pass a New York City health code inspection.[54] Sparks alleged that the comments were defamatory, that a person with the name Besfort S. never worked at Sparks, that a person named Besfort Shala interviewed with Sparks but was never hired, and that Besfort Shala filed a police report once he learned that someone was using his name online.[55] Although Yelp took down the offending post and banned the offender from its site, the petition likely gave this review more publicity than it otherwise would have received.[56]

48. *Id.* at 16.
49. *Id.* at 17.
50. As discussed in Part III below, businesses may also get some relief from government agencies. The FTC and similar state agencies charged with enforcing consumer protection laws have made combatting the root of the problem, i.e., fake online reviews, a priority. Until businesses can establish a clear route to a site's liability, however, they will continue to seek other avenues, including asserting claims directly against the individual reviewers.
51. Loten, *supra* note 13.
52. Cetta d/b/a Sparks Steak House v. Yelp, Inc., Petition for Pre-Action Disclosure, No. 652732 (N.Y. Sup. Ct. Sept. 8, 2014).
53. *Id.* at 1.
54. *Id.* at 3.
55. *Id.* at 1; Exh. C.
56. *Id.* at 2, fn. 1.

Another consideration for a business contemplating filing a lawsuit against an online reviewer is the potential for an anti-SLAPP suit in response. Anti-SLAPP laws, i.e., strategic lawsuits against public participation, exist in twenty-nine states and the District of Columbia to ensure that a speaker's First Amendment rights are not stifled.[57] Although state laws vary, anti-SLAPP statutes generally permit a defendant to file a motion to strike or dismiss all or some portion of a complaint to limit meritless, costly, or vexatious litigation strategically aimed to suppress free speech.[58] These statutes traditionally have applied to "lawsuits targeting persons communicating on public concern" or in connection with an issue of public interest.[59] If a party can establish that a claim arises from the exercise of free speech and a reasonable probability exists that it will not succeed on its merits, a court may grant a motion to strike or dismiss and potentially award attorney fees based on an anti-SLAPP law.[60]

Further increasing the difficulty for a business to protect its online reputation by suing reviewers who post defamatory comments is the judicially expanded definition of an "issue of public interest," which may now include online reviews and derogatory statements made on websites like RipoffReport.com and ScamFraudAlert.com.[61] In *AR Pillow Inc. v. Payton*, the U.S. District Court for the Western District of Washington granted a motion to strike a complaint filed against a website for unfair competition, defamation, and tortious interference.[62] The defendant website reviewed infant health and safety products and posted a review critical of the plaintiff's product.[63] The court granted the review site's anti-SLAPP motion and dismissed the suit, ruling that the review might assist others in addressing infant health

57. *See* Ariz. Rev. Stat. Ann. §§ 12-751–12-752 (2012); Ark. Code Ann. §§ 16-63-501–16-63-508 (2005); Cal. Civ. Proc. Code §§ 425.16–425.18 (2004); Del. Code Ann. tit. 10, §§ 8136–8138 (1992); D.C. Code §§ 16-5501–5505 (2013); Fla. Stat. Ann. §§ 720.304, 768.295 (2000); Ga. Code Ann. § 9-11–11.1 (1996); Haw. Rev. Stat. Ann. §§ 634F-1-4 (2002); 735 Ill. Comp. Stat. Ann. 110/1–110/99 (2007); Ind. Code Ann. §§ 34-7-7–34-7-10 (1998); La. Code Civ. Proc. Ann. art. 971 (1999); Me. Rev. Stat. Ann. tit. 14, § 556 (1995); Md. Code Ann., Cts. & Jud. Proc. § 5-807 (2004); Mass. Ann. Laws ch. 231, § 59H (1994); Minn. Stat. Ann. §§ 554.01–554.05 (1994); Mo. Ann. Stat. § 537.528 (2004); Neb. Rev. Stat. §§ 25-21,241 to 25-21,246 (1994); Nev. Rev. Stat. Ann. §§ 41.635–41.670 (2013); N.M. Stat. Ann. §§ 38-2-9.1–38-2-9.2 (2001); N.Y. Civ. Rights Law §§ 70-a, 76-a (2008); Okla. Stat. Ann. tit. 12, § 1443.1 (2014); Or. Rev. Stat. §§ 31.150–31.155 (2001); 27 Pa. Cons. Stat. Ann. §§ 7707, 8301–8305 (2000); R.I. Gen. Laws §§ 9-33-1 to 9-33-4 (1995); Tenn. Code Ann. §§ 4-21-1001–4-21-1004 (1997); Tex. Civ. Prac. & Rem. Code Ann. § 27.001–27.011 (2011); Utah Code Ann. §§ 78B-6-1401–78B-6-1405 (2001); Vt. Stat. Ann. tit. 12, § 1041 (2013); Wash. Rev. Code Ann. §§ 4.24.500–4.24.525 (2010).

58. Colin Quinlan, *Erie and the First Amendment: State Anti-Slapp Laws in Federal Court after Shady Grove*, 114 Colum. L. Rev. 367, 1 (2014).

59. AR Pillow Inc. v. Maxwell Payton, LLC, 2012 WL 6024765, at *1 (W.D. Wash. Dec. 4, 2012); *see also* Colocation Am., Inc. v. Garga-Richardson, 2012 WL 6098545 (Cal. Ct. App. Dec. 10, 2012); Chaker v. Mateo, 147 Cal. Rptr. 3d 496 (2012).

60. *AR Pillow*, 2012 WL 6024765, at *2.

61. *Colocation Am.*, 2012 WL 6098545, at *2.

62. *Id.*

63. *Id.* at *1.

problems and that the quality of the product was a matter of public concern.[64] Similarly, in *Chaker v. Mateo*, a California court found that the anti-SLAPP statute protected the derogatory statements made about the owner of a forensic business. There, the commenter was the mother of the business owner's girlfriend. Her comment on RipoffReport.com described the business owner as "a criminal and deadbeat." Despite the personal relationship, the court held that the postings "plainly [fell] within the rubric of consumer information about Chaker's 'Counterforensic' business and were intended to serve as a warning to consumers about his trustworthiness."[65] Accordingly, the appellate court affirmed the motion to strike under California's anti-SLAPP statute.[66]

On the other hand, some businesses have succeeded in both asserting defamation claims and avoiding the anti-SLAPP statutes.[67] For example, in *Neumann v. Lilies*, the operator of a wedding venue sued a patron for making defamatory comments about the service at a wedding he attended. The Oregon Court of Appeals rejected the defendant's anti-SLAPP motion because the comments that the venue "forced guests to leave earlier than agreed upon" was an assertion of fact and his statement that the operator was "two-faced" and "crooked" suggested dishonesty and could be defamatory.[68] Even an experienced practitioner would have difficulty distinguishing between the "criminal and deadbeat" comment found protected in *Chaker* and the "two-faced" and "crooked" comment, which a court held could be defamatory and thus unprotected, in *Neumann*. These disparate results have made it difficult to determine with any degree of certainty when the anti-SLAPP statutes apply. In addition, state anti-SLAPP laws have subtle differences, and courts applying similar tests may reach different conclusions for virtually identical statements.

At times, however, businesses have succeeded and have recovered large damage awards against authors of defamatory reviews. In *Fireworks Restoration Co. v. Hosto*,[69] a co-founder of a company providing lead generation services to restoration companies wrote three fabricated and defamatory reviews on Google and Yahoo after the business relationship had dissolved. The co-founder used real customers' names and information and pretended to write on behalf of multiple, unhappy customers.[70] He described the company's purportedly "untrustworthy business practices and poor customer service."[71] The company won $1,150,000, including $150,000 in punitive damages, which award the appellate court affirmed on appeal.[72] In another case, a

64. *Id.* at *5.
65. *Id.* at 1142.
66. Chaker v. Mateo, 147 Cal. Rptr. 3d 496 (2012).
67. Neumann v. Liles, 323 P.3d 521 (Or. Ct. App. 2014).
68. *Id.* at 528.
69. 371 S.W.3d 83 (Mo. Ct. App. 2012).
70. *Id.* at 86.
71. *Id.*
72. *Id.* at 85.

California state court held a business liable for false and defamatory statements made on Ripoff Report, Yelp, and MerchantCircle.[73] The court stated, "while courts have recognized that online posters often 'play fast and loose with the facts,' this should not be taken to mean online commentators are immune from defamation liability."[74]

In the recent and closely watched case of *Dietz Development and Dietz v. Perez*,[75] a general contractor filed a defamation suit against a disgruntled customer who authored scathing reviews of its services on Yelp and Angie's List. The customer alleged that Dietz damaged her home and invoiced her for work he failed to complete and that jewelry disappeared from her home during the time Dietz was working; Dietz replied to her posts with his own accusations.[76] The case garnered national attention from both free speech advocates and businesses reeling over what they perceived to be a lack of available remedies against defamatory online reviews.[77] In February 2014, after a five-day trial and eight-hour deliberation, a jury found that both parties had defamed each other online and awarded neither damages.[78] Although this case may have provided some Pyrrhic vindication for Dietz, the contractor ultimately had no compensation for its tarnished reputation and years of litigation. One clear lesson from *Dietz* is that serious repercussions may result from taking an aggressive stance and responding to customers online.

The holdings in *Fireworks Restoration*, *Sanders*, and *Dietz* suggest that a franchisor or franchisee may have a chance to bring a successful suit against an online reviewer; however, the initial legal hurdles, coupled with the risk of damage to a franchise system's brand and reputation, may outweigh the potential benefit.

III. Preventing and Contending with Bad Reviews

Desperate times call for desperate measures. Because litigation costs are high and success rates against reviewers are low, a franchisor or franchisee may look for alternative remedies to filing a lawsuit. A franchisee facing a downturn in business it attributes to defamatory online reviews may resort to taking actions that are not in the best interest of the franchise system and sometimes against the law. Not surprisingly, statistics show that businesses with fewer reviews, bad reviews, or changing patterns of competition are

73. Sanders v. Walsh, 219 Cal. App. 4th 855 (2013).

74. *Id.* at 864 (citing Summit Bank v. Rodgers, 206 Cal. App. 4th 669 (2012)).

75. Dietz Dev., LLC and Dietz v. Perez, Case No. 2012-16249 (Oct. 31, 2012), http://apps.washingtonpost.com/g/documents/local/complaint-filed-in-fairfax-county/164/.

76. *Id.*

77. Justin Jouvenal, *Fairfax jury declares a draw in closely watched case over 'Yelp' Review*, Wash. Post, Feb. 1, 2014, http://www.washingtonpost.com/local/in-closely-watched-yelp-case-jury-finds-dual-victory/2014/01/31/2d174580-8ae5-11e3-a5bd-844629433ba3_story.html.

78. *Id.*

the most likely to engage in online review fraud.[79] Navigating a business's potential legal options can be difficult and confusing. State and federal laws governing online opinions, advertising, endorsements, and customer relationships are constantly changing to account for new forms of electronic communications and social media. This section reviews what franchisors and franchisees should and should not do when faced with an online reputation issue.

A. *Replacing Negative Reviews with Glowing Recommendations*

No franchisor or franchisee should combat negative reviews by encouraging, requiring, or enabling, directly or indirectly, employees, agents, or insiders to post online reviews of its products, services, or location. First, businesses commonly bungle such attempts, and the results are embarrassing and expensive to remedy. Whole Foods, the natural food supermarket chain, endured public backlash and an investigation by the Securities and Exchange Commission, which later ended without enforcement action, after the *Wall Street Journal* revealed that CEO John Mackey spent seven years posting negative comments about a rival under a pseudonym.[80]

If general ethical considerations and embarrassment are insufficient deterrents, the FTC's *Guides Concerning the Use of Endorsements and Testimonials in Advertising*[81] provide guidance for complying with Section 5 of the FTC Act,[82] which holds advertisers liable for "failing to disclose material connections between themselves and their endorsers."[83] The FTC Act requires endorsers to disclose any connection that could "materially affect the weight or credibility of the endorsement."[84] The FTC *Endorsement Guidelines* provide examples of what relationships require this disclosure.[85] Example 8 outlines a scenario where an employee posts messages on an online discussion board promoting her employer's product.[86] The FTC *Endorsement Guidelines* conclude that knowledge of the endorser's employment is likely to affect her credibility, so the employee must disclose her relationship to the readers of the message board.[87] Example 8 became a real world scenario in September 2014 when the FTC discovered and investigated Yahoo's employees' positive reviews of Yahoo's mobile application without properly disclosing their connection to the company.[88] Although Yahoo's social media policy

79. Michael Lucs & Georgios Zervvas, *Fake it Till You Make It: Reputation, Competition, and Yelp Review Fraud* (Harvard Bus. Sch. Faculty & Research Working Paper Nov. 8, 2013).

80. Kaitlin A. Dohse, *Fabricating Feedback: Blurring the Line Between Brand Management and Bogus Reviews*, 2013 U. Ill. J. L. Tech. & Pol'y 363, 374 (2013).

81. 16 C.F.R. § 255.

82. Federal Trade Commission Act, 15 U.S.C. § 45.

83. 16 C.F.R. § 255.1(c).

84. 16 C.F.R. § 255.5.

85. 16 C.F.R. § 255.5.

86. 16 C.F.R. § 255.5.

87. 16 C.F.R. § 255.5.

88. Yahoo App Reviews, FTC Closing Letter, File No. 142-3092 (Sept. 3, 2014), http://www.ftc.gov/system/files/documents/closing_letters/yahoo-app-reviews/140903zwillingerletter.pdf.

required all employees to disclose their employment status, the FTC stated that Yahoo had not adequately informed the employees of the policy.[89] The FTC did not pursue an enforcement action against Yahoo, but the investigation and public admonishment demonstrate the FTC's resolve.[90]

It is undoubtedly a strong temptation for a restaurant, store, or business to reply to negative online reviews on websites like Yelp, TripAdvisor, Google+, Facebook, Merchant Circle, and Angie's List with its own manipulated "reviews." Technology research company Gartner, Inc. released a 2012 survey estimating that companies pay for 10 percent to 15 percent of all reviews and ratings posted on social media sites.[91] A similar study found that 16 percent of restaurant reviews on Yelp are fraudulent.[92]

Posting fraudulent reviews clearly violates Section 5 of the FTC Act if the reviewer has any material connection or relationship with a referenced franchise system and that relationship is not disclosed in the review. These rules extend beyond the clear employer-employee relationship. A connection can be material even if the social media endorser is not an employee or agent for the business.[93] When Nordstrom sent $50 gift cards to social media influencers in exchange for attending a store opening last year, the FTC sent a letter chastising the retail giant for failing to remind the attendees who posted about the event online to disclose that each had received gifts for attending.[94] The FTC did not pursue an enforcement action against Nordstrom at the time, but reserved the right to do so in the future.[95] The FTC conducted similar investigations of Hewlett-Packard and Ann Taylor in connection with their practices of providing bloggers with product gifts.[96] In the case of Ann Taylor, the company failed to require bloggers to disclose gifts that each received for attending an Ann Taylor summer collection preview event.[97] The FTC found that Ann Taylor's posting of a sign at the event reminding bloggers to disclose the gifts in any online comments was insufficient to satisfy Section 5.[98]

89. *Id.*

90. *Id.*

91. Press Release, Gartner, Gartner Says by 2014, 10–15 Percent of Social Media Reviews Will Be Fake, Paid for by Cos., Sept. 17, 2012, www.gartner.com/it/page.jsp?id=2161315.

92. Lucs & Zervvas, *supra* note 79.

93. Federal Trade Comm'n, Guides Concerning the Endorsement and Testimonials in Advertising, 16 C.F.R. § 255, https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-publishes-final-guides-governing-endorsements-testimonials/091005revisedendorsementguides.pdf.

94. Nordstrom Rack, FTC Closing Letter, File No. 122-3167 (Feb. 22, 2013), http://www.ftc.gov/sites/default/files/documents/closing_letters/nordstrom-rack/130222nordstromrackletter.pdf.

95. *Id.*

96. Dohse, *supra* note 80, at 384.

97. AnnTaylor Stores Corp., FTC Closing Letter, File No. 102-3147 (Apr. 20, 2010), http://www.ftc.gov/sites/default/files/documents/closing_letters/anntaylor-stores-corporation/100420anntaylorclosingletter.pdf.

98. *Id.*

The FTC keeps abreast of all forms of online social media, and a violation in any form may be cause for an FTC investigation. In 2014, the FTC investigated fashion company Cole Haan after a contest it conducted through the social media site Pinterest.[99] Cole Haan had offered to award a $1,000 shopping spree to the contestant who designed the most creative Pinterest board featuring Cole Haan shoes.[100] The FTC ruled that the contestants' Pinterest boards qualified as endorsements of Cole Haan products and investigated the company for failing to instruct contestants to label their Pinterest "pins" to clarify that the display of Cole Haan products was part of a contest to win a cash prize.[101] The investigation was the first instance where the FTC found that entry into a contest was a "material connection" under Section 5 of the FTC Act.[102]

The FTC typically reserves its resources to combat more egregious violators, and a small company's inadvertent or minor infraction is not a likely target. But even a minor slap on the wrist can quickly become a public relations nightmare for a franchise system because the FTC publicizes every settlement in a press release.[103] In addition, if similar violations exist across multiple franchises or if the FTC identifies a pattern of violations, an entire franchise system may be subject to heightened scrutiny or investigation.

The FTC is not the only agency policing the Internet for misleading or false reviews. State investigations of "astroturfing"—the practice of "preparing or disseminating a false or deceptive review that a reasonable consumer would believe to be a neutral, third-party review"[104]—increased following the 2009 settlement between the New York Attorney General's Office and the cosmetic surgery company Lifestyle Lift.[105] Astroturfing is a violation of multiple New York laws prohibiting false advertising and illegal and deceptive business practices.[106] Lifestyle Lift, which at the time of the settlement had over forty locations throughout the United States, had combatted negative postings on message boards by having employees create false accounts on online message boards and review sites to post positive reviews and comments about their

99. Cole Haan, FTC Closing Letter, File No. 142-3041 (Mar. 20, 2014), http://www.ftc.gov/system/files/documents/closing_letters/cole-haan-inc./140320colehaanclosingletter.pdf.

100. *Id.*

101. *Id.*

102. *Id.*

103. Kendall L. Short, *Buy My Vote: Online Reviews for Sale*, 15 VAND. J. & TECH. L. 441 (2013).

104. Press Release, N.Y. Att'y Gen. Off., A.G. Schneiderman Announces Agreement with 19 Companies to Stop Writing Fake Online Reviews and Pay More Than $300,000 in Fines, Sept. 23, 2013, http://www.ag.ny.gov/press-release/ag-schneiderman-announces-agreement-19-companies-stop-writing-fake-online-reviews-and.

105. Press Release, N.Y. Att'y Gen. Off., Attorney General Cuomo Secures Settlement with Plastic Surgery Franchise That Flooded Internet with False Positive Reviews, July 14, 2009, http://www.ag.ny.gov/press-release/attorney-general-cuomo-secures-settlement-plastic-surgery-franchise-flooded-internet.

106. Schneiderman Press Release, *supra* note 104; *see* N.Y EXEC. LAW § 63(12); N.Y. GEN. BUS. § 349-350-A.

employer and its services.[107] The Attorney General's Office uncovered emails proving that Lifestyle Lift gave specific instructions to its employees describing how to pose as satisfied customers online.[108] In addition to posting false reviews, these employees also attacked legitimate critical or negative customer reviews.[109] As part of the settlement, Lifestyle Lift agreed to pay $300,000 in penalties and costs to the State of New York and cease posting anonymous, false positive reviews about its business.[110] The Attorney General's Office called Lifestyle Lift's practices cynical, manipulative, and illegal and pledged to continue its mission to protect customers from "emerging fraud and deception, including 'astroturfing,' on the Internet."[111] Last year, the New York Attorney General's Office[112] completed a year-long investigation called Operation Clean Turf,[113] which resulted in a $350,000 settlement with nineteen companies and an agreement that they would stop selling fake reviews to businesses for posting on online review sites like Yelp and Citysearch.[114] In that case, the offending companies were third-party providers of fake reviews that marketing themselves as search engine optimization companies (SEOs) offering online reputation management services.[115] As part of the investigation, representatives from the Attorney General's Office called some of the leading SEOs. The investigators posed as businesses needing help bolstering their online reputations and battling negative customer reviews posted on the Internet.[116] A number of the SEOs immediately offered to write false reviews and post them on sites like Yelp and Citysearch.[117]

Finally, even Yelp entered the fray by suing online reputation management sites that promise to deliver only positive reviews and to filter negative reviews.[118] On February 13, 2015, Yelp filed a lawsuit against three named companies and twenty other "Does" alleging trademark infringement, unfair competition, cybersquatting, and other California state or common law claims.[119] According to the complaint, the companies claim the ability to

107. Schneiderman Press Release, *supra* note 104.
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*
112. Cuomo Press Release, *supra* note 105.
113. *Id.*
114. *Id.* The requests from the businesses for assistance writing fake reviews were meticulously specific. For example, one company hiring fake reviewers wanted a person who had multiple IP addresses and an understanding of how the Yelp filter worked. In another ad, a business was looking for a "Yelp expert" to post positive reviews of its business "that would not be filtered using legitimate existing Yelp accounts." Press Release, Attorney General Cuomo, *supra* note 105; *See also* N.Y. EXEC. LAW § 63(12); N.Y. GEN. BUS. LAW §§ 349, 350.
115. Press Release, Attorney General Cuomo, *supra* note 105.
116. *Id.*
117. *Id.*
118. Yelp Inc. v. Yelpdirector, Revpley and Reveleap, Case No. 3:15-cv-00693 (N.D. Cal. Feb. 13, 2015), https://consumermediallc.files.wordpress.com/2015/02/2015-02-13-filed-revleap-complaint.pdf.
119. *Id.*

generate higher star reviews that "stick to the front page of Yelp" and filter or remove negative reviews. Yelp is alleging trademark infringement based on the companies' use of the name "Yelp" in advertising its services and interference with contractual relations by inducing Yelp users to violate its service terms.[120]

B. *Contracting Away a Customer's Right to Honestly Review*

Many businesses have included inconspicuous nondisparagement clauses on receipts, invoices, or contracts with customers or patrons. In some cases, companies include liquidated damages clauses or fees for customers who share negative reviews of their experiences.[121] In addition to simply being bad business, a franchisee should never attempt to contract away a customer or patron's right to give a bad review. One of the most well-publicized cases is that of John Palmer and Jennifer Kulas, who wrote a negative review of the online novelty store, Kleargear, when it failed to deliver an order Palmer placed with the company.[122] After Kleargear discovered the negative review, it demanded a $3,500 fee for violating the nondisparagement clause posted on its website.[123] Palmer and Kulas disputed the charge, but Kleargear reported the couple to a debt collector, tarnishing their credit.[124] In 2014, Palmer and Kulas obtained a default judgment against Kleargear for violations of the Fair Credit Reporting Act,[125] defamation, intentional interference with prospective contractual relations, and intentional infliction of emotional distress;[126] they received $102,250 in compensatory damages and $204,500 in punitive damages.[127] This practice has garnered harsh criticism, and politicians have responded with legislation aimed to prevent such nondisparagement clauses. In September 2014, California Governor Jerry Brown signed into law a bill making a contract unlawful

> if it contains a provision requiring the consumer to waive his or her right to make any statement regarding the consumer's experience with the business, or to threaten or seek to enforce such a provision, or to otherwise penalize a consumer for making such a statement unless the waiver was knowing, voluntary and intelligent.[128]

Companies violating the law are subject to a $2,500 penalty for the first violation, $5,000 for subsequent violations, and up to $10,000 for willful,

120. *Id.*
121. Palmer v. Kleargear, No. 13-cv-00175 (D. Utah Dec. 18, 2013).
122. *Id.*
123. *Id.*
124. *Id.*
125. Fair Credit Reporting Act, 5 U.S.C. § 1681 (1970).
126. Palmer v. Kleargear, No. 13-cv-00175 (D. Utah Dec. 18, 2013), Order Entering Default Judgment, http://www.scribd.com/doc/224430518/Palmer-v-Kleargear-Default-Judgment.
127. *Id.*, Order Awarding Damages Upon Default Judgment, http://www.citizen.org/documents/Palmer-v-Kleargear-order-awarding-damages.pdf.
128. A.B. 2365, Cal. Leg., 2013–14 Reg. Sess. (Cal. 2014).

reckless, or intentional violations.[129] Following the signing of the California law, two California representatives introduced the Consumer Review Freedom Act of 2014[130] (CRF Act) in the House of Representatives. The CRF Act is similar to the California law, but it also prohibits businesses from claiming copyrights over customer reviews and photographs.[131] Proponents of the CRF Act contend it will curb "review retaliation."[132] The bill's sponsor, Representative Eric Swalwell, said it will "allow people to share honest reviews without fear of litigation." Although all fifty states have not yet outlawed the practice, businesses are likely to take the hint that nondisparagement clauses in consumer contracts are rarely, if ever, a good idea. Courts have shown no favor for such clauses, and the public ridicules them and the businesses that use them.[133]

C. *Steps to Avoid Liability*

No franchise system wants to see its franchisees connected with a lawsuit or a federal or state investigation involving alleged illegal and deceptive business practices. To ensure compliance with federal and state laws prohibiting false or misleading advertising online, franchisors should take certain steps.

First, if not included already, revise and update social media policies to include provisions addressing best practices when providing free services; gifts, including gift cards or other promotional items; or anything of monetary value to social media influencers. Any social media policy should contain a provision stating that a franchisee or outlet will not issue any gift to a social media influencer without first explicitly reminding the influencer that he or she must disclose the gift if writing about the franchisee's products, services, or events. The FTC did not recommend an enforcement action against Nordstrom, Ann Taylor and Cole Haan, in part, because each revised its respective social media policies to include the disclosure language. This policy should encompass all forms of social media, including, at a minimum, Facebook, Twitter, Pinterest, and Instagram. The company should also docu-

129. *Id.*

130. H.R. 5499, 113th Cong. (2014).

131. *Id.*

132. Julian Hattem, *Dem Reps Introduce Bill to Protect Yelp Comments*, HILL, Sept. 16, 2014, http://thehill.com/policy/technology/217933-dem-reps-introduce-bill-to-protect-yelp-comments.

133. Chris Moran, *Online Retailer Will Fine You $250 If You Even Threaten to Complain About Purchase*, CONSUMERIST, Aug. 27, 2014, http://consumerist.com/2014/08/27/online-retailer-will-fine-you-250-if-you-even-threaten-to-complain-about-purchase/. The subject of the article, Accessory Outlet, contained the follow provision in its terms section on its website:

> You agree not to file any complaint, chargeback, claim, dispute, or make any public forum post, review, Better Business Bureau complaint, social media post, or any public statement regarding the order, our website, or any issue regarding your order, for any reason, within this 90 day period, or to threaten to do so within the 90 day period, or it is a breach of the terms of sale, creating liability for damages in the amount of $250, plus any additional fees, damages—both consequential and incidental, calculated on an ongoing basis. *Id.* A customer is now suing the business for charging these damages after the customer disputed a credit card bill for items never shipped by the company. *Id.*

ment the actions it has taken to ensure that its employees and social media influencers are aware of the policies. As shown with the Yahoo investigation, merely having a policy in place is insufficient. [134]

Second, make certain franchisees and managers are aware that any type of false or misleading online posts or reviews about their business or a competitor's business is a violation of the franchise agreement. If revisions to the franchise agreement are necessary to clarify this point, then franchise systems should make such revisions.

Third, thoroughly research any SEO, prior to engagement, to confirm that it has a history, policy, and practice of compliance with the FTC and any applicable state laws when providing online reputation management services.[135] Some SEOs operate by constantly searching the Internet for any and all reviews about a business client and providing review "alerts" that allow a client to respond immediately to any complaints or comments posted online.[136] That SEO business model is likely acceptable, but it is critical to ensure that the SEO is not also providing illegitimate services.

IV. Conclusion

Regardless of size, social media and the online global community have made companies more vulnerable to negative online reviews. Franchises are not immune. They are at a greater risk of harm because the business model depends on the consistency and sameness of the brand wherever a customer goes, which means whatever reputation the brand has, all of the franchisees may share it. The best course of action is to take preventive measures to decrease the risk of potential disputes with customers, proactively addressing customer concerns offline through private email and telephone calls. Franchisees should not use veiled threats, coercion, or hidden contracts to eliminate negative reviews online. Unless a customer review contains false and severely damaging facts about the product or service, threats of legal action against a reviewer are unlikely to help. If there is a credible belief that a competitor, disgruntled former employee, or business partner authored the review, a franchisor or franchisee may consider subpoenaing the online review site for the name of the reviewer. Often, sites like Yelp, Angie's List, and TripAdvisor, which rely on honest third-party reviews, will cooperate with businesses attempting to ferret out fake reviews and users that violate the website policies.[137]

As with all areas of operating a franchise system, it is a difficult balance to control the potential risks to the brand image while allowing franchisees to

134. Yahoo App Reviews, FTC Closing Letter, File No. 142-3092 (Sept. 3, 2014), http://www.ftc.gov/system/files/documents/closing_letters/yahoo-app-reviews/140903zwillingerletter.pdf.

135. Dohse, *supra* note 80 at 373, n.106.

136. *Id.* at373, n.107.

137. *Id.* at 378.

operate and manage their businesses independently. Operations manuals, guidelines, and training seminars can list suggestions for addressing customer complaints—both real and fake. Thorough social media and online review policies, guidelines, and suggestions may prevent an embarrassing incident from going viral and limit the necessary damage control.