

Room for Optimism: The “Puffery” Defense under the Federal Securities Laws (Part 1 of 2)

By Robert N. Kravitz

The great Learned Hand had this to say in a case in which the buyer of a machine complained that the seller had deceived him by exaggerating the machine’s capabilities:

There are some kinds of talk which no sensible man takes seriously, and if he does he suffers from his credulity. If we were all scrupulously honest, it would not be so; but, as it is, neither party usually believes what the seller says about his own opinions, and each knows it. Such statements, like the claims of campaign managers before election, are rather designed to allay the suspicion which would attend their absence than to be understood as having any relation to objective truth. It is quite true that they induce a compliant temper in the buyer, but it is by a much more subtle process than through the acceptance of his claims for his wares.¹

Hand was describing the doctrine of “puffing” or “dealers’ talk” as a defense to common-law fraud. Seventy years later, the federal courts are applying a similar doctrine as a defense to federal securities claims.

Every circuit court that has considered the issue has ruled that “puffery,” “puffing,” or “statements of corporate optimism” are not actionable as a matter of law, and that securities claims based on such statements are subject to dismissal on a motion to dismiss. Most recently, the U.S. Court of Appeals for the Sixth Circuit held that statements of “corporate optimism” are not probative of scienter on the part of corporate officials.²

This judge-made doctrine of “puffery” or “corporate optimism” provides an important complement to the statutory pleading requirements that Congress enacted under the Private Securities Litigation Reform Act of 1995 to rein in what Congress viewed as frequently baseless securities class action suits. It gives federal judges another tool for evaluating, and potentially dismissing, securities claims at the motion-to-dismiss stage, prior to discovery.

Although there is some variation from circuit to circuit, as a general matter, under the “puffery” or “corporate optimism” doctrine, the courts have ruled that an alleged misrepresentation is not actionable where:

- It is so vague that it is not subject to being either proved or disproved.
- It is a nonspecific expression of optimism regarding future performance.
- It is a future projection stated as an opinion and not as a guarantee, or which is indefinite as to time.³

As explained by a number of the courts, the doctrine reflects the view that such statements are immaterial as a matter of law, because no reasonable investor could find them important to the total mix of information available.⁴ Some courts have also said the doctrine makes particular sense in “fraud on the market” cases, where stock prices are presumed to be set by market professionals considering all relevant information.⁵ In those courts’ view, market professionals do not base their analyses on those types of statements.

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To a degree, the doctrine also seems to rest on a normative view similar to Judge Hand's—that is, that these are the type of statements that reasonable investors should not rely upon in making their investment decisions—as well as a view that corporate officials should have room to speak with optimism about their company's prospects.⁶

First Circuit

The First Circuit adopted the “puffery” doctrine, under the rubric of “loosely optimistic statements,” in *Shaw v. Digital Equipment Corp.*⁷ The court's opinion in *Shaw* is one of the most fulsome circuit court explanations of the doctrine.

In *Shaw*, the plaintiffs alleged that the defendants made a number of fraudulently optimistic statements about Digital Equipment Corp. (DEC) in newspaper and trade publications and in company press releases. The challenged statements included that:

- The company's transition to selling its Alpha chip products was “going reasonably well” and that the company “should show progress quarter over quarter, year over year.”
- The company was “basically on track.” • “DEC was a very healthy company.”
- The CEO was “confident that DEC was pursuing the right strategy.”
- The head of the company's European operations was “pretty optimistic” that the company would “be able to stabilize [its] revenue” in the first half of calendar year 1994 and “start to grow revenue” in the second half.⁸

The district court held that each of the statements was immaterial as a matter of law, and the First Circuit agreed. The appeals court noted that, in most circumstances, the issue of materiality is reserved for the trier of fact. But, the court stated:

[N]ot every unfulfilled expression of corporate optimism, even if characterized as misstatement, can give rise to a genuine issue of materiality under the securities laws. In particular, courts have demonstrated a willingness to find immaterial as a matter of law a certain kind of rosy affirmation commonly heard from corporate managers and numbingly familiar to the marketplace—loosely optimistic statements that are so vague, so lacking in specificity, or so clearly constituting the opinions of the speaker, that no reasonable investor could find them important to the total mix of information available.⁹

The court noted that, under the common law of fraud, “courts typically would find such statements to be mere ‘puffing’ or sales talk upon which no reasonable person could rely, and thus to be legally insufficient to support a claim.”¹⁰

The court went on to say that the review of “vaguely optimistic statements” for immateriality as a matter of law “may be especially robust in cases involving a fraud-on-the-market theory of liability.”¹¹ In such cases, the court explained:

[A] claim that a fraud was perpetrated on the market can draw no sustenance from allegations that defendants made overly-optimistic statements, if those statements are ones that any reasonable investor (ergo, the market) would easily recognize as nothing more than a kind of self-directed corporate puffery. The market is not so easily duped, even granted that individual investors sometimes are.¹²

In support, the court cited the Fourth Circuit's opinion in *Raab v. General Physics Corp.*,¹³ and its statement that “[a]nalysts and arbitrageurs rely on facts in determining the value of a security, not mere expressions of optimism from company spokesmen.”

The First Circuit adopted similar reasoning in affirming the dismissal of securities fraud claims in *Suna v. Bailey Corp.*¹⁴ In *Suna*, the plaintiffs challenged certain statements in a company prospectus that projected positive future earnings, but the court noted that the statements “were tempered with language indicating that Bailey did not, and could not, guarantee the future profitability of the company. “‘Soft,’ ‘puffing’ statements such as these generally lack materiality because the market price of a share is not inflated by vague statements predicting growth,” the court ruled, again quoting *Raab*:

We find . . . that no reasonable investor would rely on these statements, and they are certainly not specific enough to perpetrate a fraud on the market. Analysts and arbitrageurs rely on facts in determining the value of a security, not mere expressions of optimism from company spokesmen. A reasonable purchaser would know that these statements consisted of optimistic predictions of future potential and would not have been misled by them.¹⁵

The First Circuit again affirmed the dismissal of securities claims under the “puffery” doctrine in *Greebel v. FTP Software, Inc.*¹⁶ The statements at issue included the following statements by the defendant company's president and CEO:

- “We are pleased with our performance for the second quarter. Sales continue to be strong in both our U.S. and international channels.” He also touted the release of several new products, stating that “these products should help us achieve our revenue objective for the second half of 1995.”
- His prediction that “FTP Software [would] lead the market in providing applications and support that make it possible to share information and access resources across workgroups, LAN's, enterprise networks, and the global Internet.”
- “This was another excellent quarter for FTP. Sales continue to grow both in our U.S. and international channels Our new ventures are also off to a good start with revenues of \$2.7 million. . . . These new products have been well received by our channel partners and customers and will help us in our efforts to achieve fourth quarter revenue objectives.”¹⁷

The court ruled that these “upbeat statements of optimism and puffing about the company's prospects . . . have each been reviewed and we conclude that they are not actionable,” citing *Shaw*.

Second Circuit

The Second Circuit was an early adopter of the “puffery” doctrine, without labeling it as such, in *Zerman v. Ball*.¹⁸ In *Zerman*, the plaintiff had been sold certain municipal bonds and other securities by her broker, E.F. Hutton. The plaintiff alleged, among other things, two fraudulent statements: (a) Hutton's advertising slogan: “When E.F. Hutton Talks, People Listen”; and (b) the alleged characterization of the municipal bonds as a “marvelous” investment. The court ruled that these statements “do not constitute representations of fact that could be actionable under the securities laws.”¹⁹

The Second Circuit again endorsed the “puffery” doctrine several years later, in *San Leandro Emerg. Medical Group Profit Sharing Plan v. Philip Morris Cos.*²⁰ In *San Leandro*, the plaintiffs contended that general announcements by Philip Morris that it was “optimistic” about its earnings and “expected” its Marlboro brand to perform well required the company to disclose the possibility of

adoption of an alternative marketing strategy that would hurt short-term earnings. The Second Circuit affirmed dismissal of this claim, stating: “Such puffery cannot have misled a reasonable investor to believe that the company had irrevocably committed itself to one particular strategy, and cannot constitute actionable statements under the securities laws.”²¹

The plaintiffs in *San Leandro* also alleged that, after defendants made statements that the company “should deliver income growth consistent with historically superior performance” and “we are optimistic about 1993,” the defendants had a duty to disclose adverse sales figures in the first quarter of 1993 and the overall lack of success of the company’s historic marketing strategy. The Second Circuit rejected that claim, too, ruling that these statements “lack the sort of positive projections that might require later correction,” and again referred to them as “puffery.”²²

The Second Circuit has ruled on a number of other “puffery” cases subsequent to *San Leandro*. In *Lasker v. New York State Electric & Gas Corp.*²³ the court affirmed dismissal of securities claims alleging fraud on the basis of statements that the defendant company was convinced that its “business strategies will lead to continued prosperity,” that it would “not compromise its financial integrity,” and was committed “to create earnings opportunities.” The court ruled that “[t]hese statements consist of precisely the type of ‘puffery’ that this and other circuits have consistently held to be inactionable. . . . A reasonable investor would not believe that, by merely making the broad, general statements cited in this complaint, NYSEG had insured against the risks inherent in diversification.”²⁴

In *In re Int’l Business Machines Corp. Sec. Litig.*,²⁵ plaintiffs alleged securities fraud based on a series of statements by defendants that the company’s dividend was secure and that there were no plans to cut it. The district court dismissed the claims on summary judgment and the Second Circuit affirmed. The court ruled that statements regarding future performance may be actionable “if they are worded as guarantees or are supported by specific statements of fact.” But, the court held, none of those conditions applied in that case.²⁶

The plaintiffs also challenged a statement to analysts by the director of investor relations that “we’re not—despite your anxiety—concerned about being able to cover the dividend for quite a foreseeable time.” The court ruled that the statement contained “no long-term guarantee or assurance that the dividend will be paid at a specific level for a foreseeable time.” Moreover, the court ruled, “it is plainly an expression of optimism that is too indefinite to be actionable under the securities laws.”²⁷

Similarly, in response to an analyst’s question whether the company believed it would be able to cover its dividend in the following year, the director of investor relations responded: “I think from your planning point of view the answer to that is yes. I think that despite the economic turmoil we see that we would plan on some modest revenue growth in the year.” Again, the court ruled that “[t]his highly qualified expression of corporate optimism is not sufficiently material, as a matter of law, to support a claim for securities fraud.”²⁸

The court also rejected that claim that the company had any duty to update any of the challenged statements, saying: “The statements at issue here were not material and ‘lack the sort of definite positive projections that might require later correction.’ The challenged statements are vague expressions of opinion which are not sufficiently concrete, specific or material to impose a duty to update.”²⁹

In *Novak v. Kasaks*,³⁰ the Second Circuit rejected application of the “puffery” defense to certain statements that the defendants had made in regard to inventory levels at AnnTaylor stores. The defendants allegedly issued statements that the company’s inventory situation was “in good shape” or “under control,” while they allegedly employed a “box and hold” strategy that systematically under-reported out-of-date inventory. The court ruled:

While statements containing simple economic projections, expressions of optimism, and other puffery are insufficient, defendants may be liable for misrepresentations of existing

facts. Here, the complaint alleges that the defendants did more than just offer rosy predictions; the defendants stated that the inventory situation was “in good shape” or “under control” while they allegedly knew the contrary was true. Assuming, as we must at this stage, the accuracy of the plaintiffs’ allegations about AnnTaylor’s “Box and Hold” practices, these statements were plainly false and misleading.³¹

In *Rombach v. Chang*,³² the Second Circuit affirmed dismissal of claims based, at least in part, on the “puffery” defense. The case involved securities claims brought by investors in a golf center business that had acquired and operated a number of golf courses. The plaintiffs alleged that company officials stated in press releases that integration of the company’s new sites was “well underway” and progressing smoothly, while they allegedly knew of problems with the integration of operations and computer systems.³³ The court affirmed the district court’s dismissal of those claims, stating:

Up to a point, companies must be permitted to operate with a hopeful outlook: People in charge of an enterprise are not required to take a gloomy, fearful or defeatist view of the future; subject to what current data indicates, they can be expected to be confident about their stewardship and the prospects of the business they manage. To succeed on this claim, plaintiffs must do more than say that the statements in the press releases were false and misleading; they must demonstrate specifically why and how that is so.³⁴

The plaintiffs also alleged that the defendants disseminated misleading earnings projections and statements about the company’s integration efforts to analysts, and that the misinformation found its way into several analysts’ reports. Again, the court ruled that, like the press releases, the analyst reports contained only “financial projections and statements of guarded optimism, and that such “puffery” and “misguided optimism” was not actionable as fraud.³⁵

Third Circuit

The Third Circuit first considered the “puffery” doctrine in *Hoxworth v. Blinder, Robinson & Co.*³⁶ In *Hoxworth*, the plaintiffs challenged statements by the defendant brokerage firm that certain stocks came recommended by its “research department”—whereas, in fact, the firm’s “research department” allegedly consisted of a single individual who performed no independent research and only recommended stocks underwritten by the firm. The Third Circuit rejected the defendants’ argument that the statements regarding the “research department” were mere “puffing.” The court ruled:

Strictly speaking, the securities laws recognize no distinct “puffing” exception. To say that a statement is mere “puffing” is, in essence, to say that it is immaterial, either because it is so exaggerated (“You cannot lose.”) or so vague (“This bond is marvelous.”) that a reasonable investor would not rely on it in considering the “total mix of [available] information.”

The court then ruled that the district court’s ruling that the challenged statements were material and more than just “puffing” was not clearly erroneous.³⁷

The Third Circuit then made brief reference to “puffery” in *Shapiro v. UJB Financial Corp.*,³⁸ and applied the doctrine. The plaintiffs in *Shapiro* challenged a number of statements by the defendants, including one that “United Jersey looks to the future with great optimism.” The court ruled: “This statement is clearly inactionable puffery.”³⁹

The Third Circuit applied the “puffery” doctrine again in *In re Burlington Coat Factory Sec. Litig.*⁴⁰ In *Burlington Coat Factory*, the plaintiffs challenged a statement that the defendant company believed it could “continue to grow net earnings at a faster rate than sales.” The court ruled that the statement was too vague to be actionable, adding: “To the extent plaintiffs are asserting that there was either a duty to correct or update the forward-looking portion of the statement, those claims fail on account of the original statement’s vagueness and resultant immateriality.”⁴¹

The Third Circuit gave more definition to the “puffery” defense in *Weiner v. Quaker Oats Co.*⁴² In *Weiner*, the plaintiffs challenged a statement by Quaker’s CEO that the company was “confident of achieving at least 7 percent real earnings growth” in fiscal 1995, which plaintiffs alleged became inaccurate and should have been updated in light of Quaker’s planned acquisition of Snapple Beverage Company. The Third Circuit said that the statement “was not a vague expression of optimism like those that we have in the past held to be immaterial.” Instead, the court said, it was “a specific figure regarding a particular, defined time period—namely, fiscal 1995.”⁴³

The court ruled, however, the company subsequently modified that statement in its annual report, which was issued five weeks prior to the merger announcement. In the annual report, the company said that “we are committed to achieving a real earnings growth of at least 7 percent *over time*.” (emphasis added by the court). The court ruled that this statement, unlike the earlier statement, was too vague to be the basis of a fraud claim.⁴⁴

The Third Circuit applied the “puffery” defense again in *In re Advanta Corp. Securities Litig.*⁴⁵ In *Advanta*, the plaintiffs challenged a number of “positive portrayals” of the defendant credit card company, including, among others:

- “The Company is among the most efficient producers in the credit card industry. Our superior cost structure for delivering and servicing financial products allows us to achieve outstanding returns with highly competitive pricing and flexibility.”
- A letter to shareholders touting “an experienced management team, technological expertise . . . and expanding distribution channels.”
- The company had a “risk-adjusted pricing strategy” in which “credit cards are issued with lower rates to customers whose credit quality is expected to result in a lower rate of credit losses.”⁴⁶

The court ruled that the statements were not actionable, stating: “The representations identified by plaintiffs fall entirely into these categories: accurate reports of past earnings, and non-actionable expressions of optimism for the future. We are skeptical that plaintiffs or any other reasonable investors would make investment decisions based on the positive portrayals.”⁴⁷

The Third Circuit reconfirmed the “puffery” rule again in *EP MedSystems, Inc. v. EchoCath, Inc.*⁴⁸ The plaintiffs in *EP MedSystems* challenged a statement by defendants that any investment by MedSystems together with “other outside investments” would provide EchoCath with sufficient operating funds to allow it to actively develop and market its products for at least 18 to 24 months. The court ruled that this statement was not material and therefore not actionable. The court stated:

As alleged, the representation was of “anticipated” investment in EchoCath—not guaranteed. Unlike the imminent contracts representation, the Co-Chairman’s statements did not refer to specific companies (besides MedSystems itself). Nor was this representation repeated over a six-month period. MedSystems was well aware that it was dealing with a start-up company and should have expected that cash flow would be an issue. No reasonable investor could find that one optimistic statement made by the company’s board member affects the total mix of information available to that investor.⁴⁹

Fourth Circuit

The Fourth Circuit affirmed summary judgment on a securities claim based on the “puffery” defense in *Howard v. Haddad*.⁵⁰ In that case, the plaintiff alleged that the defendant told him that: (1) he was a director of Trust Bank; (2) “the Bank was growing”; (3) “that the stock was a good investment”; (4) “that the stock was a good opportunity”; and (5) that defendant would have difficulty securing stock for the plaintiff to purchase. The court agreed with the district court that the statements

were not material. “At most they amounted to ‘puffery,’ which lacks the materiality essential to a securities fraud allegation,” the court ruled.⁵¹

The Fourth Circuit’s subsequent opinion in *Raab v. General Physics Corp.*⁵² was one of the first circuit court decisions to elaborate on the “puffery” doctrine. It is one of the opinions cited most frequently by other circuits in support of the doctrine.

In *Raab*, the plaintiffs challenged statements that “regulatory changes . . . have created a marketplace for the DOE Services Group with an expected annual growth rate of 10 percent to 30 percent over the next several years” and “the DOE Services Group is poised to carry the growth and success of 1991 well into the future.” The court ruled that the statements were not actionable, stating: “‘Soft,’ ‘puffing’ statements such as these generally lack materiality because the market price of a share is not inflated by vague statements predicting growth.”⁵³ Elaborating on its ruling, the court stated:

The whole discussion of growth is plainly by way of loose prediction, and both the range of rates cited, as well as the time for their achievement, are anything but definite. No reasonable investor would rely on these statements, and they are certainly not specific enough to perpetrate a fraud on the market. Analysts and arbitrageurs rely on facts in determining the value of a security, not mere expressions of optimism from company spokesmen. The market gives the most credence to those predictions supported by specific statements of fact, and those statements are, of course, actionable if false or misleading. However, “projections of future performance not worded as guarantees are generally not actionable under the federal securities laws.” Statements such as “the DOE Services Group is poised to carry the growth and success of 1991 well into the future” hardly constitute a guarantee.⁵⁴

The court ruled that the company’s statement that its results “should be in line with analysts’ current projections” was also not actionable, because it “hardly constitute[d] a guarantee that earnings would be forthcoming in particular amounts” and that “this forecast, like the others, lacks the specificity necessary to make it material.”⁵⁵

The Fourth Circuit applied the “puffery” doctrine again in *Malone v. Microdyne Corp.*⁵⁶ In *Malone*, plaintiffs challenged a statement by Microdyne’s president that he was “comfortable” with the earnings estimates for fiscal 1992 and 1993 prepared by a particular securities analyst. The day before, the analyst had predicted that Microdyne would earn 80 cents per share in fiscal 1992 and \$1.05 the following year. The Fourth Circuit ruled that, under *Raab*, the defendants’ “comfort” statement was not actionable, because it did not constitute a guarantee and was not specific enough to perpetrate a fraud on the market.⁵⁷

The Fourth Circuit again affirmed dismissal of claims under the “puffery” doctrine in *Hillson Partners L.P. v. Adage, Inc.*⁵⁸ In *Hillson*, the plaintiffs challenged statements that: “significant sales gains should be seen as the year progresses”; “1992 will produce excellent results for Adage”; and Adage is “on target toward achieving the most profitable year in its history.” The court ruled that these, too, were “the type of vague predictions of growth” that, as a matter of law, were not material.⁵⁹

The Fourth Circuit also applied the “puffery” doctrine in affirming dismissal on summary judgment of securities claims in *Longman v. Food Lion, Inc.*⁶⁰ Unlike the earlier Fourth Circuit cases, *Longman* did not involve projections. The plaintiffs in *Longman* alleged that the defendants had failed to disclose allegedly widespread unsanitary practices and labor law violations at its grocery stores. In its annual reports, Food Lion stated: (1) “We will continue to pay close attention to service levels and cleanliness in our stores and believe we will achieve high marks from customers in these areas”; and (2) “We believe that Food Lion’s Extra Low Prices and its clean and conveniently located stores are especially well suited to the demands of our customers.” The court ruled that: “On their face, these

statements are the kind of puffery and generalizations that reasonable investors could not have relied upon when deciding whether to buy stock.”⁶¹

In *Dunn v. Borta*,⁶² on claims asserted under the Virginia Securities Act, the Fourth Circuit reversed the district court’s determination that certain of the defendants’ statements constituted inactionable “puffery.” The allegedly false statements alleged in *Dunn* were that:

- Ronbotics (the defendant company) had sold 225 CoasteRider units.
- Three other companies were designing products using Ronbotics’s technology.
- Ronbotics was in negotiations with General Electric and several other major companies.
- Ronbotics planned to introduce in early 2001 a product simulating gravitational forces with two degrees of freedom, and would feature its motion theater with three degrees of freedom.
- Ronbotics was negotiating with a particular manufacturing facility in Oklahoma to handle overflow production.

The Fourth Circuit ruled that these alleged misrepresentations were actionable, stating: “These specific factual allegations regarding Ronbotics’s business dealings and prospects are not simply sale pitches but rather can be proven true or false—and if properly supported, could be found material by a reasonable jury.”⁶³

Fifth Circuit

The Fifth Circuit referred briefly to the “puffery” defense in *Nathenson v. Zonagen Inc.*⁶⁴ The court ruled that certain challenged statements were not material and not relied upon by the plaintiffs, because the company stock price did not rise, but instead fell, following the statements. In a footnote, the court noted that certain other unspecified statements were also inactionable because they were “at most mere optimistic generalizations consisting of ‘the type of ‘puffing’ that . . . [the] circuits have consistently held to be inactionable.”⁶⁵

The court applied the “puffery” doctrine again in *Rosenzweig v. Azurix Corp.*⁶⁶ In *Azurix*, plaintiffs alleged fraud based on several statements in the prospectus for the initial public offering of Azurix stock. These statements: “touted Azurix’s ability to become a successful player in the global water and wastewater industry” by emphasizing the company’s competitive strengths of management and financial expertise; “emphasized the global privatization opportunities [Azurix] purportedly intended to pursue”; and stated that Azurix anticipated being able to finance its ambitious capital improvement plan from the cash flows of the privatization opportunities Azurix would obtain.⁶⁷ The Fifth Circuit agreed with the district court that none of the challenged prospectus statements were actionable. The court ruled: “Azurix was under no duty to cast its business in a pejorative, rather than a positive, light. As the district court concluded, a “company’s expressions of confidence in its management or business are not actionable, especially where, as here, all historical information appears to be factually correct.”⁶⁸

The court also found that certain post-IPO statements were also not actionable. For example, it ruled that statements that “Our fundamentals are strong,” and “The pipeline of private transactions and announced public tenders that we are pursuing remains strong,” were both “obviously immaterial puffery.”⁶⁹ In addition, the court ruled that the statement that Azurix was “making steady progress” was “precisely the sort of generalized positive characterization that is not actionable under the securities laws.”⁷⁰

The Fifth Circuit also affirmed dismissal of claims under the “puffery” doctrine in *Southland Securities Corp. v. INSpire Insurance Solutions Inc.*⁷¹ The court held that “generally positive

statements about demand for INSpire’s products and services” made during a conference call with securities analysts was “puffery,” as was the company’s announcement that a particular contract would “produce many positive results.”⁷²

Conclusion

So far we have surveyed the published appellate court opinions on the “puffery” defense in the First through Fifth Circuits. The second of this two-part article, in the next issue of this newsletter, will discuss the remaining circuits, setting forth the precise statements at issue and each court’s reasoning in determining whether the statements constituted inactionable “puffery” or “corporate optimism.”

Robert N. Kravitz is with Paul, Weiss, Rifkind, Wharton & Garrison LLP in New York.

1. Vulcan Metals Co., Inc. v. Simmons Mfg. Co., 248 F. 853 (2d Cir. 1918).
2. Ley v. Visteon Corp., No. 06-2237, 2008 U.S. App. LEXIS 20994, at *23 (6th Cir. Oct. 6, 2008).
3. A similar “puffery” defense exists for claims under the Lanham Act. *See, e.g.*, Time Warner Cable, Inc. v. DIRECTV, Inc., 497 F.3d 144, 159 (2d Cir. 2007). The Lanham Act cases are outside the scope of this article.
4. *See, e.g.*, *In re Advanta Corp. Securities Litig.*, 180 F.3d 525, 538–39 (3d Cir. 1999); *Shaw v. Digital Equip. Corp.*, 82 F.3d 1194, 1217 (1st Cir. 1996).
5. *See, e.g.*, *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 869 (5th Cir. 2003); *Raab v. General Physics Corp.*, 4 F.3d 286, 290 (4th Cir. 1993).
6. *See, e.g.*, *Rombach v. Chang*, 355 F.3d 164, 174 (2d Cir. 2004); *Eisenstatdt v. Centel Corp.*, 113 F.3d 738, 745–46 (7th Cir. 1997).
7. 82 F.3d 1194 (1st Cir. 1996).
8. *Shaw*, 82 F.3d at 1219.
9. *Id.* at 1217 (citations omitted).
10. *Id.* at 1218 n.32.
11. *Id.* at 1218.
12. *Id.* at 1218.
13. 4 F.3d 286, 289–90 (4th Cir. 1993).
14. 107 F.3d 64 (1st Cir. 1997).
15. *Suna*, 107 F.3d at 72 (internal quotations and citations omitted).
16. 194 F.3d 185 (1st Cir. 1999).
17. *Greebel*, 194 F.3d at 189–90.
18. 735 F.2d 15 (2d Cir. 1984).
19. *Id.* at 20–21.
20. 75 F.3d 801 (2d Cir. 1996).
21. *San Leandro*, 75 F.3d at 811.
22. 75 F.3d at 811.
23. 85 F.3d 55 (2d Cir. 1996).
24. *Lasker*, 85 F.3d at 59.
25. 163 F.3d 102 (2d Cir. 1998).
26. *In re IBM*, 163 F.3d at 107.
27. *Id.* at 108 (internal citations omitted).
28. *Id.* at 109.
29. *Id.* at 110 (internal citations omitted).
30. 216 F.3d 300 (2d Cir. 2000).
31. *Novak*, 216 F.3d at 315.
32. 355 F.3d 164 (2d Cir. 2004).
33. *Rombach*, 355 F.3d at 172.
34. *Id.* at 174 (internal quotation and citations omitted).
35. *Id.* at 175 (citations omitted).
36. 903 F.2d 186 (3d Cir. 1990).
37. *Hoxworth*, 903 F.2d at 200–201.
38. 964 F.2d 272 (3d Cir. 1992).
39. *Shapiro*, 964 F.2d at 283 n.12.
40. 114 F.3d 1410 (3d Cir. 1997).
41. *Burlington Coat Factory*, 114 F.3d at 1427–28.
42. 129 F.3d 310 (3d Cir. 1997).
43. *Wiener*, 129 F.3d at 320.

44. *Id.* at 321.
45. 180 F.3d 525 (3d Cir. 1999).
46. *Advanta*, 180 F.3d at 537.
47. *Id.* at 538–39 (citations omitted).
48. 23 F.3d 865 (3d Cir. 2000).
49. *EP MedSystems*, 235 F.3d at 880.
50. 962 F.2d 328 (4th Cir. 1992).
51. *Howard*, 962 F.2d at 331.
52. 4 F.3d 286 (4th Cir. 1993).
53. *Raab*, 4 F.3d at 289 (citations omitted).
54. *Id.* at 290.
55. *Id.* at 291.
56. 26 F.3d 471 (4th Cir. 1994).
57. *Malone*, 26 F.3d at 479–80 (citation omitted).
58. 42 F.3d 204 (4th Cir. 1994).
59. *Hillson*, 42 F.3d at 212.
60. 197 F.3d 675 (4th Cir. 1999).
61. *Longman*, 197 F.3d at 685.
62. 369 F.3d 421 (4th Cir. 2004).
63. *Dunn*, 369 F.3d at 431.
64. 267 F.3d 400 (5th Cir. 2001).
65. *Nathenson*, 267 F.3d at 417 n.15.
66. 332 F.3d 854 (5th Cir. 2003).
67. *Rosenzweig*, 332 F.3d at 859.
68. *Id.* at 869.
69. *Id.* at 869-70.
70. *Rosenzweig*, 332 F.3d at 870.
71. 365 F.3d 353 (5th Cir. 2004).
72. *Southland Securities*, 365 F.3d at 371, 372, & 380.