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No. 21-1264

FILED
JUN 0 3 2022
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

LARRY KLAYMAN,

Petitioner,

v.

JUDICIAL WATCH, INC., THOMAS J. FITTON, PAUL ORFANEDES, AND CHRISTOPHER FARRELL,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR REHEARING

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PREAMBLE

Pursuant to Rule 44.1 of this Court, Petitioner Larry Klayman ("Mr. Klayman") respectfully petitions for a rehearing of the denial of a writ of certiorari to review the judgment of the U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit").

PETITION FOR REHEARING

This Petition stems from an appeal to the D.C. Circuit from a jury verdict and judgment of the U.S. District Court for the District of Columbia ("District Court") against Larry Klayman ("Mr. Klayman"), the founder and former Chairman and General Counsel of Judicial Watch, Inc. ("JW").

Importantly, this Petition involves issues of monumental importance not only to Mr. Klayman, but to U.S. and international trade and commerce as a whole, which underscores why it is so imperative that the Court step in and take action, since this case impacts not only Mr. Klayman personally, but advertising, trade, commerce and industry as we know it in the 21st century, where everything is digital, and advertisements are often broadcasted nationally, if not worldwide. This is why it is so important that there be a uniform test among all of the circuits for claims brought under the Lanham Act.

However, the D.C. Circuit has created a circuit split in terms of interpreting the "likelihood of

confusion" standard for claims brought under the Lanham Act. Without a uniform interpretation of what constitutes "likelihood of confusion," individuals and corporations will have no way of knowing what language that they can or cannot include in an advertisement. This is of particular importance, given the fact that many advertisements are now sent over the internet, which therefore reaches every state, and spans every single Circuit. For instance, an advertisement created in the District of Columbia, and thus under the D.C. Circuit, would very likely be viewed in California, under the Ninth Circuit. The harmful precedent created by the D.C. Circuit in this case conflicts with that of the Ninth Circuit, so how is an advertiser supposed to know what he or she can or cannot say to avoid liability under the Lanham Act? Thus, it is untenable for Circuits to have different interpretations of the "likelihood of confusion" standard under the Lanham Act, as what is acceptable in one Circuit may be held improper in another. This would clearly have a strong impact on U.S. and international trade and commerce as a whole. This is underscored by new case law which has been published after Mr. Klayman's Petition for Writ of Certiorari was submitted to this Court in *Ariz. Bd. of Regents v. Doe*, 2022 U.S. App. LEXIS 13036 (9th Cir. May 13, 2022).

Second, the recent opinion in *Stella v. Davis Cty.*, 2022 U.S. Dist. LEXIS 45631 (D. Utah Mar. 14, 2022) underscores the fundamental prejudice and error of the District Court allowing into the record highly prejudicial, inflammatory, and irrelevant testimony from

Mr. Klayman's ex-wife which poisoned the jury against Mr. Klayman. This, in conjunction with the erroneous instructions given to the jury, the failure to give the correct jury instructions requested by Klayman, and, most importantly, the failure to docket any written jury instructions delivered to the jury (assuming that any were delivered in the first place), App. 257, directly led to the baseless, outrageous, and completely flawed $2.8 million dollar jury verdict against Mr. Klayman which this Court must step in and correct. Simply put, the conduct of the District Court in allowing in such not only prejudicial but also completely irrelevant testimony, in conjunction with its fatally flawed handling of the jury instructions at trial, constitute such a gross and fundamental miscarriage of justice that it must be afforded no deference by this Court, which has a clear duty to administer to its lower courts and to ensure that such disastrous precedent is not set which permits this type of outrageous miscarriage of justice.

REASONS FOR REHEARING

A petition for rehearing should present intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented. Supreme Court Rule 44.2. Here, new substantial grounds not previously presented mandate rehearing.

I. THE D.C. CIRCUIT ERRED ON THE LANHAM ACT ISSUE, CREATING AT A MINIMUM, A CIRCUIT SPLIT THAT MUST BE ADDRESSED.

The D.C. Circuit fundamentally erred by ignoring conflicting court legal precedent which clearly stated that there needed to be an "appreciable number" of consumers confused to meet the "likelihood of confusion" standard under the Lanham Act. As shown below, courts in the Ninth, Eleventh and Sixth Circuits have adopted this standard, so the D.C. Circuit has created a circuit split. This is underscored by new case law which has been published after Mr. Klayman's Petition for Writ of Certiorari was submitted to this Court in *Ariz. Bd. of Regents v. Doe*, No. 21-16525, 2022 U.S. App. LEXIS 13036 (9th Cir. May 13, 2022).

In *Doe*, with regard to a Lanham Act claim, the Ninth Circuit found that the District Court had properly dismissed the claim and found no likelihood of confusion when Doe had made eighteen posts on Instagram, and only one post included the use of the Arizona Board of Regents' mark and trade dress. *Id.* at 2. That one post contained profanity, so the Ninth Circuit reasoned that a "reasonable consumer would not think that a university would use such language when addressing the public." *Id.* at 3.

Mr. Klayman's facts to show a lack of confusion are even more compelling than *Doe*, yet the D.C. Circuit still found a likelihood of confusion, which underscores the need for rehearing to fix the circuit split that the

D.C. Circuit has created. Here, the single time that any mailings which "Judicial Watch" was included on a mailing was the result of negligence by Mr. Klayman's fundraiser, which Mr. Klayman never authorized and actually reprimanded them for doing. App. 305. And, in this instant case there were far more than eighteen (18) letters sent, as was the case in *Doe*, where there were only eighteen (18) Instagram posts at issue. Additionally, letters sent by Mr. Klayman were regarding "saving" Judicial Watch. Like in *Doe*, no reasonable consumer would have possibly been confused because they would not think that Judicial Watch would send out letters to "save" itself. Thus, under *Doe*, and in the Ninth Circuit, there is no question that there would have been no Lanham Act Violation with regard to Mr. Klayman because there would have been no likelihood of confusion. Yet, due to the circuit split created by the D.C. Circuit, there is a complete lack of uniformity in the enforcement of the Lanham Act, as set forth in detail below.

A. THE D.C. CIRCUIT ERRED BY FAILING TO REVERSE THE JURY VERDICT WITH REGARD TO LIKELIHOOD OF CONFUSION WHICH IS NECESSARY FOR TRADEMARK INFRINGEMENT.

Of crucial importance is the fact that the D.C. Circuit concedes that there is, at a minimum, a split regarding likelihood of confusion and trademark infringement:

> **Klayman argues that the court erred by failing to instruct the jury that likelihood of confusion requires confusion by an "appreciable number" of consumers. But his only support for this proposition comes from two unpublished decisions of our district court, which are of course not precedential. *See In re Exec. Office of President*, 215 F.3d 20, 24 (D.C. Cir. 2000).**
>
> . . . .
>
> **This circuit "has yet to opine on the precise factors courts should consider when assessing likelihood of confusion. . . ."** App. 34–35.

Thus, the D.C. Circuit admitted that (1) it has yet to opine on the precise factors . . . when assessing likelihood of confusion, and (2) there are courts in this Circuit who have held that likelihood of confusion requires an appreciable number of consumers. This has therefore created a circuit split that must be addressed by this Court.

It is well-settled that isolated or occasional instances of actual confusion are discounted as being "insufficient to support an inference that a significant number of prospective purchasers are likely to be confused." *See* Restatement [Third] of Unfair Competition §23 cmt. c at 250 (1995). *See also* Richard L. Kirkpatrick, *Likelihood of Confusion in Trademark Law* §1:8.2 (2nd). ("The likelihood of confusion must affect relevant persons in numbers which are 'appreciable' under the circumstances." Many district courts in

this Circuit, as well as courts in other Circuits, have followed this standard, as recognized by the Panel. "While AAAS must show that an "appreciable" number of reasonable buyers is likely to be confused, this does not necessarily mean a majority." *Hearst Corp.*, 498 F. Supp. at 258; *see also Hansen Bev. Co. v. Nat'l Bev. Corp.*, 493 F.3d 1074, 1080 (9th Cir. 2007); *Pillsbury Co. v. Milky Way Prods.*, 1981 U.S. Dist. LEXIS 17722, at *36-37 (N.D. Ga. Dec. 24, 1981); *Progressive Distribution Servs. v. United Parcel Serv.*, 856 F.3d 416, 434 (6th Cir. 2017) (holding that an isolated instance was insufficient to show likelihood of confusion); *Fla. Int'l Univ. Bd. of Trs. v. Fla. Nat'l Univ. Inc.*, 830 F.3d 1242, 1265 (11th Cir. 2016). Importantly, the U.S. District Court for the District of Columbia has made this finding as well. *See Am. Ass'n for the Advancement of Sci. v. Hearst Corp.*, 498 F. Supp. 244 (D.D.C.1980).

Indeed, the Panel's opinion in this regard is actually contradictory, as it states that "[t]o warrant provision to the jury, an instruction must fairly state the law as it is, not how the party wishes it to be." App. 35. As set forth above, the law dictates that there needs to be an "appreciable number" of consumers confused to trigger liability under the Lanham Act. Thus, simply put, all Mr. Klayman sought was a jury instruction that reflected the "law as it is."

Specifically, here, with regard to Respondents' trademark infringement claim, there was simply nothing in the evidentiary record or testimony to support a finding that there was any likelihood of confusion

created by Klayman, which is a necessary precursor to any award of damages on this claim.

Indeed, the only instance of conduct remotely attributable to Mr. Klayman personally in this regard is the **one** time that Mr. Klayman's direct mail provider, Response Unlimited, made an honest mistake and used JW's name on a reply envelope: Q: "Is that a copy of what the envelope would look like for the return envelope for donors?" A: "I should hope not because it says 'Judicial Watch.'" App. 305. Any confusion that this alleged mistake caused would have undoubtedly been *de minimus*, and far short of the "appreciable number of consumers" standard adopted by sister circuits.

Furthermore, the few letters among the millions that were sent by both Mr. Klayman and Respondents that Respondents entered into evidence that purported to show that donors were "confused," which were not even authenticated, as set forth below, fall short of the "appreciable" standard to demonstrate likelihood of confusion. App. 84–109. To the contrary, most of the exhibits actually demonstrate that the alleged donors were not confused, and clearly understood that Mr. Klayman was no longer affiliated with JW. For instance:

> Mr. Thomas Fitton, I wish to be removed from your office. I now support Larry Klayman. You are a liar + a cheat. App. 84.

> Take my name off your mailing list until Larry Klayman is brought back as president and founder. App. 85.

Thus, in sum, the D.C. Circuit's opinion had deviated not only from the precedent of its sister circuits, but also opinions rendered in its lower court as well. This has created an untenable circuit split that must be addressed by this Court, as people must be held to a uniform standard under the Lanham Act. The "appreciable number" standard simply makes the most sense, as there will always be people who are purportedly "confused" by things which are objectively not confusing. The adoption of this standard would create a reasonable safeguard for advertisers, while still ensuring that the purpose of the Lanham Act is still maintained.

II. THE D.C. CIRCUIT HAS PERMITTED INCONSISTENT APPLICATIONS OF THE FEDERAL RULES OF EVIDENCE.

In 2003, Mr. Klayman entered into a Severance Agreement ("SA") with Judicial Watch ("JW") after he voluntarily left to run for the Senate. App. 310. In his complaint filed in 2006, Klayman alleged that Respondents JW, and JW's officers, Thomas J. Fitton, Paul Orfanedes and Christopher Farrell engaged in a pattern of tortious activity designed to harm Klayman, and that these actions breached the SA. Respondents filed a counterclaim alleging that Klayman owed money for unpaid expenses and falsely advertised and

violated their trademark. This was all that was at issue during this case.

Yet despite this, the Honorable Colleen Kollar-Kotelly ("Judge Kotelly") allowed highly prejudicial, inflammatory, false, and—perhaps most importantly—completely irrelevant testimony to be presented by Respondents, which undoubtedly poisoned the minds of the jury, as well as the judges of the D.C. Circuit, against Mr. Klayman, which led to the erroneous jury verdict and judgment, App. 242, as well as the decisions on appeal. These statements had absolutely nothing to do with the case, and were only introduced to poison the minds of the jury against Mr. Klayman.

These false, inflammatory, prejudicial, and irrelevant statements included (1) an alleged effort to pursue an improper relationship with a JW employee, (2) claiming he effectively sexually harassed her, (3) Mr. Klayman's alleged admission that he was in love with the employee, had purchased gifts for her and had kissed her, and (4) Mr. Klayman's alleged acknowledgment of an incident with his wife that provided the basis for his wife's allegation that he physically assaulted her in front of their children, that is beat his wife. App. 244. This last point was the most harmful, as the entirely false and fabricated allegations and testimony regarding what allegedly occurred in a church parking lot, was Mr. Klayman's estranged wife falsely claimed that he "put his hands around [her] neck, and [] started to shake [her] and bang [her] head against the car window," App. 306–307, in other words, that Mr. Klayman had beat his wife. Notwithstanding Mr.

Klayman's vehement denial of these false and outrageous allegations, and the fact that the subsequent divorce decree which was on the record rescinded these blatantly false allegations, the jury should never have heard such testimony because it was highly inflammatory and grossly prejudicial, even if it was relevant or true, which it clearly was not.

Indeed, this highly prejudicial, inflammatory, and false testimony was purportedly introduced by Respondents to perpetuate the falsity that Mr. Klayman did not voluntarily leave to run for the U.S. Senate, which he clearly did. Rather, Appellees falsely testified that they forced him out due to this alleged misconduct. However, this ignores the plain fact that the SA, which was undeniably signed and agreed to by all the parties, unequivocally provided that Mr. Klayman left JW voluntarily to pursue other endeavors and praised him as well:

> Judicial Watch announced today that Larry Klayman has stepped down as Chairman and General Counsel of Judicial Watch, [sic] to pursue other endeavors. Tom Fitton, who is the President of Judicial Watch, said: "Larry conceived, founded and helped build Judicial Watch into the organization it is today, as we will miss his day to day involvement. Judicial Watch now has a very strong presence and has become the leading non-partisan, public interest watchdog seeking to promote and ensure ethics in government, and Larry leaves us well positioned to continue our important work." App. 329.

Thus, it is abundantly clear that this highly prejudicial testimony, on its face alone, was completely irrelevant, and should never have been put before the jury.

In stark contrast, the Court must consider the U.S. District Court for the District of Utah's correct application of the Federal Rules of Evidence. *Stella v. Davis Cty.*, 2022 U.S. Dist. LEXIS 45631 (D. Utah Mar. 14, 2022).

In *Stella*, the estate of the deceased Plaintiff brought suit against Defendants prison administrators when the Plaintiff died while in their case. The Defendants sought to introduce evidence of the deceased's prior drug use and criminal history which they argued went to the measure of damages (expected quality of the deceased's remaining life and earning capacity) as well as to impeach the estate of the Plaintiff (the deceased's mother), who had previously has given inconsistent answers about her daughter's drug use and criminal history.

Despite this, the Court mostly denied the Defendants' request under Rule 403 of the Federal Rules of Evidence, finding that "[e]vidence that an individual engaged in prostitution is highly prejudicial" and that the Defendants had failed to demonstrate that the probative value—namely that prostitution is a dangerous profession—outweighed such prejudice. *Id.* at 8. The Court also found that "the prejudicial effect of evidence of Miller's mental health diagnoses substantially outweighs its probative value." *Id.* And, while the Court allowed in evidence of the deceased's drug use,

it was careful to caution: "However, this court will not tolerate defense counsel engaging in character assassination via evidence of Miller's drug abuse."

In this instant case, Judge Kotelly admitted incredibly prejudicial false "evidence" that Mr. Klayman had abused his wife, when it was not even remotely at issue in the case. When placed next to the *Stella* case, where the Court actually applied the balancing test under Federal Rule of Evidence 403, the glaring error by Judge Kotelly is even more evident.

CONCLUSION

The Court must respectfully step in and correct these errors to prevent not only manifest injustice to Mr. Klayman with regard to a $2.8 million judgment which will bankrupt him and his family, but also to avoid setting and allowing to stand conflicting harmful and disastrous legal precedent which will govern, if left unaddressed and corrected, U.S. and international trade and commerce as a whole.

Dated: June 9, 2022

Respectfully submitted,

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CERTIFICATE OF COUNSEL

Pursuant to Rule 44, Rules of the Supreme Court, counsel hereby certifies that this petition for rehearing is restricted to the grounds specified in Rule 44, paragraph 2, Rules of the Supreme Court, and is being presented in good faith and not for delay.

LARRY KLAYMAN, ESQ.