

App. 1

**United States Court of Appeals
for the Fifth Circuit**

No. 20-30233

ALLIANCE FOR GOOD GOVERNMENT,

Plaintiff–Appellee,

versus

COALITION FOR BETTER GOVERNMENT,

Defendant–Appellant,

DARLEEN JACOBS,

Objecting Party–Appellant.

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. 2:17-CV-3679

Before HIGGINBOTHAM, SMITH, and DENNIS, *Circuit
Judges.*

JUDGMENT

(Filed May 19, 2021)

This cause was considered on the record on appeal
and the briefs on file.

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IT IS ORDERED and ADJUDGED that the judgment of the District Court is AFFIRMED.

IT IS FURTHER ORDERED that each party bear its own costs on appeal.

App. 3

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Before HIGGINBOTHAM, SMITH, and DENNIS, *Circuit Judges.*

PATRICK E. HIGGINBOTHAM, *Circuit Judge:*

Coalition for Better Government and Darleen Jacobs challenge the reasonableness of the district court’s award of attorney’s fees to Alliance for Good Government for federal trademark infringement under the

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Lanham Act. Jacobs also argues that she was improperly joined post-judgment. We affirm.

I.

Our two prior opinions detail the relevant background.¹ Briefly, Alliance and Coalition are nonprofit organizations that endorse political candidates in New Orleans. In 2017, Alliance sued Coalition, seeking to enjoin use of its trade name (word mark) and logo (composite mark) for federal trademark infringement under the Lanham Act, state trademark infringement, and unfair trade practices. The district court granted Alliance summary judgment on its federal trademark infringement claim, enjoining Coalition from using both its word and composite marks. Alliance voluntarily dismissed its other claims.

Coalition appealed, and we affirmed the district court's summary judgment but modified its injunction to restrain only Coalition's use of its composite mark.² While the first appeal was pending, Alliance moved for attorney's fees pursuant to the Lanham Act's fee-shifting provision,³ and the district court awarded

¹ *All. for Good Gov't v. Coal. for Better Gov't (Alliance I)*, 901 F.3d 498 (5th Cir. 2018); *All. for Good Gov't v. Coal. for Better Gov't (Alliance II)*, 919 F.3d 291 (5th Cir. 2019).

² *Alliance I*, 901 F.3d at 514.

³ The Lanham Act authorizes the award of "reasonable attorney fees to the prevailing party" in "exceptional cases." 15 U.S.C. § 1117(a).

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Alliance \$68,237.25 in fees.⁴ Coalition also appealed the fee award. In our second opinion, we concluded that the district court did not abuse its discretion in classifying this case as an exceptional one, warranting reasonable attorney's fees under the Lanham Act.⁵ As Alliance had not prevailed on its word mark claim, it was not entitled to attorney's fees for work related to that claim, or for the claims it voluntarily dismissed.⁶ We remanded, instructing the district court to adjust the fee award to account for claims on which Alliance did not prevail, as best it could in light of our opinion.⁷ We made no reference to and did not prohibit awarding additional fees related to the additional litigation of the fee award.

On remand, the district court instructed Alliance to file a new motion for attorney's fees, separating fees

⁴ *Alliance II*, 919 F.3d at 294. This amount included "fees already incurred and projected fees from replying to Coalition's opposition to the fees motion." *Id.*

⁵ *Alliance II*, 919 F.3d at 295. The Appellants attempt to relitigate the issue of whether this case is exceptional in their reply brief. Our prior determination that the district court did not abuse its discretion in finding this case exceptional is law of the case and cannot be challenged in this appeal. *Tollett v. City of Kemah*, 285 F.3d 357, 363 (5th Cir. 2002), *cert. denied*, 537 U.S. 883 (2002) ("Under the law of the case doctrine, an issue of law or fact decided on appeal may not be reexamined either by the district court on remand or by the appellate court on a subsequent appeal." (citing *United States v. Becerra*, 155 F.3d 740, 752 (5th Cir. 1998))). Because we will not reconsider the exceptional nature of this case, it is unnecessary to strike this portion of the Appellants' reply brief as Alliance requests in its motion to strike.

⁶ *Alliance II*, 919 F.3d at 298.

⁷ *Id.*

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in accordance with our judgment and including any demand for fees related to the appeals “not inconsistent with [our] judgment,” which had affirmed the exceptional nature of the case. Alliance argued that its work on the word mark claim was “inextricably intertwined with work” on the composite mark claim, so it was unable to fully disentangle fees related to each claim. Instead, it proposed a 10% across-the-board reduction of fees to estimate for time spent on the word mark claim, and a \$1,500 reduction to account for the claims it voluntarily dismissed. Alliance also moved to join Darleen Jacobs, a principal of Coalition, because it had learned during post-judgment discovery that Coalition lacked resources to pay the fee award.

The district court joined Jacobs as a third party to the case, required that Alliance serve her with the court’s order, and gave Jacobs two weeks to respond to Alliance’s motion. Jacobs opposed Alliance’s motion for fees, but the district court ultimately found it appropriate to hold her directly liable. The district court agreed with Alliance’s efforts to modify the fee award in accordance with our second opinion, rejected Coalition’s objections, and awarded Alliance \$148,006.15 in fees.

Both Jacobs and Coalition appealed. Jacobs argues that the district court’s order joining her was improper. And both challenge the reasonableness of the district court’s fee award.

II.

A.

As the Supreme Court explained in *Nelson v. Adams USA, Inc.*, a court adding a party post-judgment must afford that party due process.⁸ Such process, as reflected in Federal Rules of Civil Procedure 12 and 15, requires an added party have an opportunity to respond to the claims against him.⁹ We review the district court’s decision to join a party for abuse of discretion.¹⁰

The facts here mirror those in *Nelson*, with key exceptions. In both cases, the prevailing party was awarded attorney’s fees and subsequently sought to join an individual in a leadership role within the opposing party entity out of fears the party itself did not have sufficient assets to pay the fee award.¹¹ However, in *Nelson*, the district court immediately granted the prevailing party’s motion, making Nelson a party and subjecting him to the fee award.¹² The Supreme Court held that the district court violated due process because it failed to give Nelson “an opportunity to respond and contest his personal liability for the award

⁸ *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 463 (2000).

⁹ *Id.* at 468; see also *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (“The fundamental requisite of due process of law is the opportunity to be heard.” (citation omitted)).

¹⁰ *Acevedo v. Allsup’s Convenience Stores, Inc.*, 600 F.3d 516, 520 (5th Cir. 2010) (per curiam).

¹¹ *Nelson*, 529 U.S. at 462–63.

¹² *Id.* at 463.

after he was made a party and before the entry of judgment against him.”¹³ The district court here gave Jacobs two weeks to respond to Alliance’s motion for attorney’s fees after joining her, and she did so. It was only after considering Jacobs’s arguments in opposition that the district court found her liable for the fee award. This procedure met the demands of due process.¹⁴

B.

Jacobs next argues that she is not liable as an individual under the Lanham Act.

The Lanham Act authorizes the award of “reasonable attorney fees to the prevailing party” in “exceptional cases.”¹⁵ The text of the provision does not expressly limit the persons who can be held liable for attorney’s fees. In interpreting the Patent Act’s identically worded fee-shifting provision, the Supreme Court explained that the “text is patently clear. It imposes one and only one constraint on district courts’ discretion to award attorney’s fees in patent litigation,” which is determining whether the case is exceptional.¹⁶

¹³ *Id.*

¹⁴ Jacobs also argues that *Nelson* requires that the district court join her by means of an amended pleading instead of a motion. However, as the district court correctly noted, it has the authority to join a party “[co]n motion or on its own” at any time. FED. R. CIV. P. 21.

¹⁵ 15 U.S.C. § 1117(a).

¹⁶ *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 553 (2014). We have found case law interpreting the

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The Court gave no indication that the provision limited who could be held liable. Indeed, in *Nelson*, which also concerned attorney’s fees under the Patent Act, the Court underscored that its decision to invalidate the manner of Nelson’s joinder did “not insulate Nelson from liability.”¹⁷

The Federal Circuit in turn has affirmed imposition of fee awards under the Patent Act against individuals who were not party to the underlying litigation when their conduct contributed to the court’s decision to award attorney’s fees.¹⁸ The decision to do so stems from the fee-shifting provision’s purpose of preventing “gross injustice when a party has litigated

Patent Act’s fee-shifting provision instructive in interpreting the Lanham Act’s identical provision. *See, e.g., Alliance II*, 919 F.3d at 295; *Baker v. DeShong*, 821 F.3d 620, 623 (5th Cir. 2016) (citing S. REP. No. 93-1400 (1974)); *CJC Holdings, Inc. v. Wright & Lato, Inc.*, 979 F.2d 60, 65 (5th Cir. 1992) (“Given the parallel language, we infer that Congress meant courts to apply similar standards in both patent and trade dress cases.”).

¹⁷ *Nelson*, 529 U.S. at 472.

¹⁸ *See, e.g., Insituform Tech., Inc. v. CAT Contracting, Inc.*, 385 F.3d 1360, 1373 (Fed. Cir. 2004); *Mach. Corp. of Am. v. Gullfiber AB*, 774 F.2d 467, 475 (Fed. Cir. 1985) (“This court has held that an individual may be assessed fees under [the fee-shifting provision of the Patent Act] if his conduct supports a finding that the case is exceptional.” (citing *Hughes v. Novi Am., Inc.*, 724 F.2d 122, 126 (Fed. Cir. 1984))); *see also Iris Connex, LLC v. Dell, Inc.*, 235 F. Supp. 3d 826, 843 (E.D. Tex. 2017) (holding a non-party liable for attorney’s fees under the Patent Act where the non-party was afforded due process, was responsible for the conduct making the case exceptional, and where it was equitable to do so).

vexatiously”¹⁹ and the general principle that “[a]n officer is individually liable for any tortious conduct that he committed in connection with his corporate duties.”²⁰ Given the similar underlying purpose of the Lanham Act’s fee-shifting provision,²¹ we find it reasonable to likewise impose liability for a Lanham Act fee award on a properly-added party responsible for the conduct making a case exceptional.

We affirmed the district court’s determination that this case is exceptional because Coalition litigated in an unreasonable manner, including presenting meritless defenses at the summary judgment stage, filing an unsupported lathes defense, meritless counterclaim, and a meritless motion to dismiss, and behaving unreasonably during discovery by insisting on proceeding with depositions even after the district court granted summary judgment on Alliance’s federal trademark infringement claim and Alliance dismissed its other claims.²² While Jacobs argues she was not responsible for this conduct, she is a principal of Coalition and personally signed the motion for summary judgment, the counterclaim, the motion to dismiss, and Coalition’s

¹⁹ *Sun-Tek Indus., Inc. v. Kennedy Sky Lites, Inc.*, 929 F.2d 676, 679 (Fed. Cir. 1991) (internal quotation marks and citation omitted).

²⁰ *Insituform*, 385 F.3d at 1373 (citing *Walker v. FDIC*, 970 F.2d 114, 122 (5th Cir. 1992)).

²¹ See *Baker*, 821 F.3d at 623 n. 1 (explaining that the legislative history indicates that the purpose of the fee-shifting provision in the Lanham Act is similar to the purpose underlying the fee-shifting provision in the Patent Act).

²² *Alliance II*, 919 F.3d at 296.

memorandum insisting on proceeding with depositions after the district court’s summary judgment ruling.²³ We find no abuse of discretion in the district court’s decision to join Jacobs and hold her directly liable for the fee award.²⁴

III.

Both Appellants argue that the fee award is unreasonable. We review the reasonableness of a fee award under the Lanham Act for abuse of discretion.²⁵

The Appellants raise three challenges to the fee award. They first argue the district court had no authority to award any fees related to the two appeals because only our Court has that authority. The Federal Circuit has interpreted the Patent Act’s fee-shifting provision as allowing district courts to “award[] fees for the entire case, including any subsequent appeals”

²³ See, e.g., *Nelson*, 529 U.S. at 472 (stating that Nelson, president and sole shareholder of a party, was not insulated from liability for an attorney’s fee award); *Insituform Tech.*, 385 F.3d at 1372–73 (holding main executive officer who “was directly and actively involved in all aspects of the litigation” and “individually responsible for all of the conduct that led the district court to increase damages and award attorney’s fees” individually liable for Patent Act fee award).

²⁴ Alliance moved to strike the section of the Appellants’ reply brief arguing that Jacobs was not solely responsible for Coalition’s litigation conduct because that argument was waived. Since we reject Jacobs’ argument, there is no need to strike it from the reply brief. Having rejected the other portions of Alliance’s motion to strike above, we deny its motion in full.

²⁵ *Alliance II*, 919 F.3d at 295.

because neither the text “nor its legislative history distinguishes between awarding attorney fees in the district court and in the appellate court.”²⁶ We again find it appropriate to extend the interpretation of the Patent Act fee-shifting provision to our interpretation of the Lanham Act and find that district courts do have the authority to award appellate fees under the Lanham Act.

The district court’s decision to award fees for further litigation of the attorney’s fee award did not contravene the mandate rule. On remand, a lower court “must implement both the letter and spirit of [our] mandate, and may not disregard [our] explicit directives.”²⁷ The mandate must be “construed in the light of [our] opinion.”²⁸ In *Alliance II*, we “remand[ed] for the district court to assess the amount of the award of fees in light of this opinion.”²⁹ Notably, our opinion itself made two conclusions: first, we affirmed the exceptional nature of the case allowing Alliance attorney’s fees, and second, we instructed the district court to adjust the award to exclude fees related to Alliance’s work on the word mark claim and claims it voluntarily

²⁶ *Therasense, Inc. v. Becton, Dickinson and Co.*, 745 F.3d 513, 517 (Fed. Cir. 2014) (quoting *Rohm & Haas Co. v. Crystal Chem. Co.*, 736 F.2d 688, 692 (Fed. Cir. 1984)); see also *PPG Indus. Inc. v. Celanese Polymer Specialities Co.*, 840 F.2d 1565, 1569 (Fed. Cir. 1998) (“[T]he power to award attorney fees for appellate work is not the exclusive domain of an appellate court.”).

²⁷ *Tollett*, 285 F.3d at 364 (emphasis omitted) (cleaned up).

²⁸ *Id.* (emphasis omitted) (cleaned up).

²⁹ *Alliance II*, 919 F.3d at 298.

dismissed.³⁰ But we did not address whether Alliance was entitled to further attorney’s fees for continued litigation of the fee award either expressly or implicitly. As such, when the district court allowed Alliance fees for continued fee-award litigation, it did not contradict either the letter or the spirit of *Alliance II*.³¹

Second, the Appellants argue Alliance failed to properly document its fees because its time sheets do not differentiate between work done on the composite mark claim as opposed to other claims. This argument ignores the efforts of the district court to adjust the fee award for claims on which Alliance did not prevail. The court found that the word and composite mark claims were “intertwined” and difficult to separate because the parties had not distinguished between the word and composite mark claims prior to the first appeal. It

³⁰ *Id.*

³¹ The Appellants argue that the district court is an improper forum for considering appellate fees. They do not argue, and so we do not address here, whether appellate fees may be recovered under the Lanham Act only when an appeal itself is exceptional as several other circuits have held. *See, e.g., Tamko Roofing Prods., Inc. v. Ideal Roofing Co., Ltd.*, 294 F.3d 227, 230 (1st Cir. 2002) (applying a three-factor analysis to determine whether an appeal is exceptional); *Urban Outfitters, Inc. v. BCBG Max Azria Grp., Inc.*, 430 F. App’x 131, 134 (3d Cir. 2011) (unpublished) (applying the First Circuit’s three-factor analysis); *U-Haul Int’l, Inc. v. Jartran, Inc.*, 793 F.2d 1034, 1044 (9th Cir. 1986) (declining to award appellate fees because the appeal was not exceptional); *see also Therasense*, 745 F.3d at 518 (declining to award appellate fees under the Patent Act because appeal was not exceptional); *Rohm & Haas*, 736 F.2d at 692 (allowing award of appellate fees under the Patent Act where “the appeal itself is exceptional”). We leave this question open for another day.

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applied a 10% across-the-board reduction to estimate for work related to the word mark claim and further reduced the award by \$1,500 for the claims voluntarily dismissed.³² The Appellants make no argument for why these reductions are an abuse of discretion. Even if they are correct that Alliance’s billing entries are flawed, the proper remedy is “a reduction of the award by a percentage intended to substitute for the exercise of billing judgment,” which the district court did.³³

Finally, the Appellants argue the district court did not consider their objections to Alliance’s fees motion. We disagree. The district court considered each of these objections and provided reasons for rejecting them. The Appellants make no argument that the district court’s rulings on any of these objections were improper, and we find no abuse of discretion.

IV.

The Appellants append a First Amendment argument similar to one raised in the prior two appeals, arguing that the imposition of an attorney fee award would violate their free speech. This argument rests on

³² Indeed we acknowledged in our previous opinion the possibility that Alliance’s work on the composite mark claim may be intertwined with its other claims, noting that the district court had a “duty to make *some* attempt to adjust the fee award in an effort to reflect an apportionment” even if it was not possible to make an exact apportionment. *Alliance II*, 919 F.3d at 298 (quoting *Gracie v. Grade*, 217 F.3d 1060, 1070 (9th Cir. 2000)).

³³ *Saizan v. Delta Concrete Prods. Co, Inc.*, 448 F.3d 795, 799 (5th Cir. 2006) (citation omitted).

the premise that trademark restrictions should not apply to Coalition because it is engaged in political speech, a challenge to the injunction itself. Coalition first raised this argument during its original appeal of the district court’s grant of summary judgment. The *Alliance I* panel declined to examine the First Amendment issue then because it had not been preserved or ruled on below, relying on the doctrine that “an appellate court, in reviewing a summary judgment order, can only consider those matters presented to the district court.”³⁴

The dissent argues that this decision was clearly erroneous and so our panel is not bound by law of the case. We disagree. The clearly-erroneous exception for law-of-the-case doctrine applies only in “extraordinary circumstances.”³⁵ “Mere doubts or disagreement about the wisdom of a prior decision of this or a lower court will not suffice for this exception. To be ‘clearly erroneous,’ a decision must strike us as more than just maybe or probably wrong; it must be dead wrong.”³⁶ While the *Alliance I* panel had the discretion to address a waived argument,³⁷ its decision not to do so was not “dead wrong.” Moreover, even if Coalition’s speech is rightly considered noncommercial speech, this Court has not

³⁴ *Alliance I*, 901 F.3d at 506 (citing *Frank C. Bailey Enters., Inc. v. Cargill, Inc.*, 582 F.2d 333, 334 (5th Cir. 1978)).

³⁵ *City of Pub. Serv. Bd. v. Gen. Elec. Co.*, 935 F.2d 78, 82 (5th Cir. 1991).

³⁶ *Id.* (cleaned up).

³⁷ See *United States v. Martinez*, 263 F.3d 436, 438 (5th Cir. 2001).

previously held that § 32(1) of the Lanham Act, the section at issue here, applies only to commercial speech.³⁸ Because *Alliance I* was not “dead wrong” to decline to address Coalition’s First Amendment argument, we are bound by law of the case. The argument is therefore not properly before us, and we do not address it.

V.

We affirm.

JAMES L. DENNIS, *Circuit Judge*, dissenting:

The majority strains at gnats but swallows a camel.

This is the third appeal in this case. I regret that I was not assigned to participate in the first appeal. *See All. for Good Gov’t v. Coal. for Better Gov’t (Alliance I)*, 901 F.3d 498, 506 (5th Cir. 2018). If I had taken part, I would have worked to persuade the court that applying

³⁸ This Court has held that § 43(a) contains a commercial-use requirement, *see Seven-Up v. Coca-Cola Co.*, 86 F.3d 1379, 1383 & n.6 (5th Cir. 1996), but it has not extended that requirement to § 32(1). Additionally, under similar circumstances, the Second Circuit has held, that § 32(1) applies to “[a] political organization that adopts a platform and endorses candidates under a trade name.” *United We Stand Am., Inc. v. United We Stand Am. N.Y., Inc.*, 128 F.3d 86, 90 (2d Cir. 1997). Thus, this is not a case where our sister circuits have made uniform holdings that Coalition’s speech falls outside the reach of § 32(1). *See United States v. Garza*, 706 F.3d 655, 662–63 (5th Cir. 2013) (finding “clear or obvious” error where case law from sister circuits was “uniform[]”).

the Lanham Act to the noncommercial political speech of Coalition for Better Government is contrary to the Act and violates the First Amendment. And had the *Alliance I* panel correctly held that Coalition’s pure political speech cannot be enjoined under the Lanham Act, this litigation would have terminated, averting two additional and flawed decisions that followed *Alliance I*. See *All. for Good Gov’t v. Coal. for Better Gov’t (Alliance II)*, 919 F.3d 291 (5th Cir. 2019); *All. for Good Gov’t v. Coal. for Better Gov’t*, No. CV 17-3679, 2020 WL 1503533, at *1 (E.D. La. Mar. 30, 2020).

It is not too late to correct *Alliance I*’s serious statutory and constitutional error, however; under our precedents “the law of the case” is not an inexorable command. We need not adhere to a former decision if it was clearly erroneous and doing so would work a manifest injustice. *E.g.*, *Schwartz v. NMS Indus., Inc.*, 575 F.2d 553, 554–55 (5th Cir. 1978); *United States v. Vahlco Corp.*, 895 F.2d 1070, 1072–73 (5th Cir. 1990). In my view, that exception to the rule applies here. *Alliance I* and *Alliance II* were predicated on a patent error, *i.e.*, that the Lanham Act can be constitutionally applied to the noncommercial political speech of a political organization, such as the political endorsements made by Coalition in this case.¹ And misapplying the

¹ See *Seven-Up v. Coca-Cola Co.*, 86 F.3d 1379, 1383 & n.6 (5th Cir. 1996) (holding that § 43(a) of the Lanham Act applies only to activities that are “‘commercial’ in nature”); *Procter & Gamble Co. v. Amway Corp.*, 242 F.3d 539, 547 & n.13 (5th Cir. 2001) (same), *abrogated on other grounds by Lexmark Intern., Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014); *Farah v. Esquire Magazine*, 736 F.3d 528, 541 (D.C. Cir. 2013) (holding

Lanham Act to noncommercial political speech creates an anomalous precedent that will beget grave injustice—the imposition of liability for, and consequent chilling of, the exercise of constitutionally-protected free speech. What is more, the previous decisions in *Alliance I & II* set dangerous Precedents inviting federal courts to improperly involve themselves in state and local political disputes.

Alliance for Good Government (Alliance) and Coalition for Better Government (Coalition) are New Orleans-based nonprofit corporations whose principal activity is the vetting and endorsement of political candidates vying for local and state offices. Their missions and work can only be described as political. Neither

that the Lanham Act applies only to commercial speech); *Utah Lighthouse Ministry*, 527 F.3d 1045, 1052–54 (10th Cir. 2008) (same); *Bosley Med. Inst., Inc. v. Kremer*, 403 F.3d 672, 676–77 (9th Cir. 2005) (same); *Taubman Co. v. Webfeats*, 319 F.3d 770, 774 (6th Cir. 2003) (same); *Porous Media Corp. v. Pall Corp.*, 173 F.3d 1109, 1120 (8th Cir. 1999) (same); cf. *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 552, 566 (1987) (Brennan, J., dissenting) (explaining that a “key” requirement of the Lanham Act is the rule that a trademark violation occurs only when an offending trademark is applied to *commercial* goods and services”); *Radiance Found., Inc. v. N.A.A.C.P.*, 786 F.3d 316, 322 (4th Cir. 2015) (“Although this case does not require us to hold that the [First Amendment’s] commercial speech doctrine is in all respects synonymous with the” Lanham Act’s requirement that an infringer’s use of a mark be “‘in connection with’” goods or services, “we think that doctrine provides much the best guidance in applying the Act. The ‘in connection with’ element [in § 32(1) of the Act] reads very much like a description of different types of commercial actions: ‘in connection with the *sale, offering for sale, distribution, or advertising* of any goods or services.” (quoting 15 U.S.C. § 1114(1)(a)).

organization offers or advertises commercial goods or services. And the speech in which they engage—purely political speech—is at the core of the First Amendment’s protections. *See Arizona Free Enter. Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011) (“[T]he First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office.” (internal quotation marks omitted)).

Conversely, the Lanham Act, 15 U.S.C. § 1051, *et seq.* (“the Act”)—the statute that Alliance alleges Coalition violated—exclusively regulates commercial activity and commercial speech.² Because Coalition does not engage in commercial activity or commercial speech, its conduct is beyond the reach of the Lanham Act, and holding it liable under the statute for its political speech violates the First Amendment’s protections for free speech. *See Seven-Up v. Coca-Cola Co.*, 86 F.3d 1379, 1383 n.6 (5th Cir. 1996); *Procter & Gamble*

² In addition to bringing a Lanham Act claim, Alliance’s complaint alleged a claim under the Louisiana Unfair Trade Practices Act, LA. REV. STAT. § 51:1401 *et seq.* However, Alliance voluntarily dismissed that state-law cause of action in its motion for summary judgment, leaving only its claim under the Lanham Act. *See All. for Good Gov’t v. Coal. for Better Gov’t*, No. 17-3679, 2017 WL 6442156, at *1 (Oct. 23, 2017 E.D. La.). Thus, although there is a body of common law extending trademark protection to various entities, ‘including nonprofits, *see* 6 FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 2436 (Sept. 2020), the only cause of action at issue here is a claim under the Lanham Act, a federal statute, which, as discussed below, carries a specific requirement that the alleged infringer use the mark “in connection with the sale, offering for sale, distribution, or advertising of any goods or service,” *i.e.*, that the mark be used in commerce. 15 U.S.C. § 1114(a).

Co. v. Amway Corp., 242 F.3d 539, 547 & n.13 (5th Cir. 2001) (same), *abrogated on other grounds by Lexmark Intern., Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014); *Farah v. Esquire Magazine*, 736 F.3d 528, 541 (D.C. din 2013); *Utah Lighthouse Ministry*, 527 F.3d 1045, 1052–54 (10th Cir. 2008); *Bosley Med. Inst., Inc. v. Kremer*, 403 F.3d 672, 676–77 (9th Cir. 2005); *Taubman Co. v. Webfeats*, 319 F.3d 770, 774 (6th Cir. 2003); *Porous Media Corp. v. Pall Corp.*, 173 F.3d 1109, 1120 (8th Cir. 1999); *see also Radiance Found., Inc. v. N.A.A.C.P.*, 786 F.3d 316, 321 (4th Cir. 2015) (observing that Congress “did not intend for trademark laws to impinge the First Amendment rights of critics and commentators”).

Nevertheless, in the first appeal in this case, *see Alliance I*, 901 F.3d at 506, this court committed serious error by holding Coalition’s speech subject to injunction under the Lanham Act, and thus infringing on Coalition’s First Amendment freedom of political expression.

Although a prior panel’s rulings in a case typically bind a subsequent panel under the law-of-the-case doctrine, our decision in *Alliance I*, as noted above, was manifestly erroneous, and adhering to it now works a clear injustice. Thus, this panel’s hands are not tied by that decision. *See Vahlco Carp.*, 895 F.2d at 1072–73 (applying this exception to the law-of-the-case doctrine where (1) a ruling in a prior appeal in the same litigation was “clearly in error,” and (2) it “would be manifestly unjust” to follow that prior decision; accordingly, the previous decision “does not establish the law of the

case and is not binding on the Court in the present appeal”). This panel should thus correct’ this court’s error in *Alliance I* by vacating each judgment based on that error and remanding for a judgment of dismissal with prejudice with respect to Alliance’s Lanham Act claim against Coalition.³

Remedying the foundational flaw in *Alliance I* would of course obviate the need to reach the subsequent mistakes by the district court that generated the present appeal. But because the majority chooses not to correct the foundational error of *Alliance I*, I must also address the errors committed by the district court in its decision following the remand of the case to it after *Alliance II*. In *Alliance II*, a panel affirmed in part the district court’s award of attorneys’ fees to Alliance. Our mandate in *Alliance II* instructed the district court only to adjust downward its \$68,237.25 award of

³ Under this court’s Rules, we are empowered to recall our mandates in *Alliance I* and *Alliance II* and reform them to direct vacatur of the judgments appealed from in order “to prevent injustice.” 5TH CIR. R. 41.2; *see also Natal Sur. Corp. v. Charles Carter & Co.*, 621 F.2d 739, 741 (5th Cir. 1980) (explaining that this court is empowered to “recall” or “reform” a previous mandate “to prevent injustice”). Because abiding by those prior decisions would, as discussed, work a manifest injustice, *a fortiori* the standard for recalling and reforming our mandates in *Alliance I* and *II* is satisfied and, indeed, these measures are necessary to avoid the highly unjust results of those rulings. *See In re Incident Aboard the D.B. Ocean King on Aug. 30, 1980*, 877 F.2d 322, 323 (5th Cir. 1989) (holding that “the equities of this case dictate the exercise of our power under Rule 41.2 to recall and reform the mandate,” when “not once, but twice this Court has itself brought about” a “potential injustice” that could only be averted by recalling the court’s mandate).

attorneys' fee to Alliance on remand. Instead, the district court awarded additional fees for time Alliance spent litigating the two appeals and its motion for attorneys' fees, resulting in a total award to Alliance of \$148,006.15. The court then *sua sponte* joined Coalition's attorney, Darleen Jacobs, as a party to the case and, purporting to act pursuant to the Lanham Act's fee-shifting provision, 15 U.S.C. § 1117(a), held her personally liable for the full \$148,006.15 fee award. In so doing, the district court plainly violated the mandate rule, the fundamental requirement that on remand a district court can do one thing and one thing only—scrupulously implement this court's mandate. *See, e.g., United States v. Matthews*, 312 F.3d 652, 657 (5th Cir. 2002); *Tollett v. City of Kemah*, 285 F.3d 357, 364 (5th Cir. 2002).

What is more, § 1117(a) of the Act nowhere states or implies that a litigant's counsel can be held liable for an award of attorneys' fees, and it thus does not authorize the district court's imposition of personal liability on Coalition's counsel. *See Healey v. Chelsea Res., Ltd.*, 947 F.2d 611, 624 (2d Cir. 1991) ("When a fee-shifting statute that authorizes the courts to award attorneys' fees to prevailing parties does not mention an award against the losing party's attorney, the appropriate inference is that an award against attorneys is not authorized"); *see also Baker v. DeShong*, 821 F.3d 620, 623–24 (5th Cir. 2016) (Characterizing the fee-shifting provisions in the Lanham Act and Patent Act as "statutory equivalents" and determining that "Congress intended" the provisions "to have the same

meaning” given their “parallel purpose, structure, and language”); *cf. Phonometrics, Inc. v. ITT Sheraton Corp.*, 64 F. App’x 219, 222 (Fed. Cir. 2003) (vacating imposition of liability for attorneys’ fees on losing party’s counsel under the Patent Act’s identically-worded fee-shifting provision because counsel cannot be “liable for fees awarded under § 285 [of the Act]; it can only be liable for excess fees awarded under [28 U.S.C.] § 1927”); *cf. also Tech. Props. Ltd. LLC v. Canon Inc.*, No. C 14-3640 CW, 2017 WL 2537286, at *5 (N.D. Cal. Jan. 26, 2017) (holding that a litigant’s counsel could not be held liable for an attorneys’ fees award under § 285 of the Patent Act based on the “the text of the statute”), *aff’d*, 718 F. App’x 987 (Fed. Cir. 2018) (mem.).

In sum, this court’s decision in *Alliance I* to hold Coalition liable under the Lanham Act for noncommercial political speech was clearly erroneous and following it now will result in manifest injustice. Thus, this panel is not bound by that errant determination and should correct it by vacating judgments based thereon and directing the district court to dismiss Alliance’s Lanham Act claim with prejudice. *See Schwartz*, 575 F.2d at 554–55 (explaining “that ‘the law case doctrine’ is not an inexorable command” and need not be adhered to when a prior “decision was clearly erroneous and would work a Manifest injustice”). Moreover, even if this court continues to mistakenly adhere to *Alliance I*, the district court committed multiple errors on remand from *Alliance II* that would necessitate reversal. Because the majority fails to rectify this court’s error

in *Alliance I* and because it ratifies the district court's errors on remand, I respectfully dissent.

I.

The overriding problem in this case is that the Lanham Act plainly does not reach the noncommercial political speech in which Coalition engages and holding otherwise curtails important First Amendment free speech guarantees.⁴ Enacted in 1946, the Lanham

⁴ In *Alliance I*, the panel determined that Coalition did not preserve below its arguments (1) that the Lanham Act does not apply to noncommercial or political speech and (2) that its political speech was protected by the First Amendment, and held these issues were therefore “waived,” refusing to consider Coalition’s contentions. 901 F.3d at 506. This was error for at least three reasons. First, it is axiomatic that a party can only be liable for violating a statute if the statute actually applies to the party and its acts (or omissions). And determining whether a particular statute applies to a particular party necessarily requires courts to, interpret that statute. *See, e.g., Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803) (“Those who apply the rule to particular cases, must of necessity expound and interpret that rule.”). Indeed, it is the very task of courts “to construe what Congress has enacted.” *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 56 (2006) (quoting *Duncan v. Walker*, 533 U.S. 167, 172 (2001)). Logically, then, for the *Alliance I* panel to have concluded that it could hold Coalition liable under the Lanham Act, the panel necessarily must have determined that the statute’s scope covers Coalition’s conduct; implicit in that determination is *Alliance I*’s (demonstrably wrong) conclusion that the Act extends to noncommercial political speech. Thus, regardless of the *Alliance I* panel’s claim that Coalition waived its defense as to the interpretation of the Lanham Act, there was simply no way for the panel to hold Coalition liable without it concluding that the Lanham Act may, in its view, validly constrain noncommercial political speech. But as discussed below, the Act’s history, text, and the plethora of cases

interpreting the Act make clear that it does not apply to noncommercial or political speech.

Second, and as explained in more detail *infra*, *Alliance I*'s application of the Lanham Act to Coalition's noncommercial political speech infringes on First Amendment free speech rights. Again, the *Alliance I* panel necessarily had to interpret the Lanham Act in order to impose liability under it on Coalition. But applying the Lanham Act in this way directly conflicts with this court's "obligat[ion] to construe the statute to avoid constitutional problems if it is fairly possible to do so." *Boumediene v. Bush*, 553 U.S. 723, 787 (2008) (cleaned up). A reading of the Act that limits its reach to commercial speech and, moreover, precludes it from touching purely political speech is not only "fairly possible" but is the *only* plausible interpretation of the statute. Accordingly, the *Alliance I* panel failed to uphold its duty to read the Act in a manner that avoids raising constitutional doubts.

Third, even assuming Coalition did not preserve in the district court its defenses to an injunction under the Lanham Act, it nevertheless pressed those arguments on appeal in *Alliance I*, and the *Alliance I* panel therefore erred in failing to apply the plain-error standard of review to Alliance's unpreserved arguments. Decades ago, "our Court . . . adopted 'the practice of reviewing unpreserved error in a civil case using the plain-error standard' of review." *Crawford v. Falcon Drilling Co., Inc.*, 131 F.3d 1120, 1123 (5th Cir. 1997); *see also* *Sec. & Exch. Comm'n v. Life Partners Holding, Inc.*, 854 F.3d 765, 783 (5th Cir. 2017) ("We review unpreserved challenges in civil cases for plain error."); *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428–29 (5th Cir. 1996) (en banc) (plain error applies to a party's failure to timely file written objections to a magistrate judge's report and recommendation), *superseded by statute on other grounds*, 28 U.S.C. § 636(b)(1). Under this standard, which is identical to plain-error review in the criminal context, the court "must determine (1) if there was error, (2) if that error was plain, (3) if the error affects substantial rights, and (4) whether allowing that error to stand seriously affects the fairness, integrity or public reputation of judicial proceedings." *Crawford*, 141 F.3d at 1123–24 (adopting the four-prong plain-error test as articulated in *United States v. Olano*, 507 U.S. 725, 732, (1993)).

Considering the first prong of the test, it was error to extend the Lanham Act to noncommercial political speech because doing so, as detailed *infra*, violates the statute, which applies only to commercial speech, and tramples on free speech rights. Second, this legal error was plain. We have previously held that several of the statute’s provisions—including a provision pertaining to unregistered trademarks that is analogous to the provision protecting registered trademarks at issue here—apply only to commercial speech. See *Seven-Up v. Coca-Cola Co.*, 86 F.3d at 1383 & n.6; *Procter & Gamble Co.*, 242 F.3d at 547 & n.13. And even if no Fifth Circuit decision squarely holds that the particular provision of the Lanham Act invoked here is limited to commercial speech, the “absence of circuit precedent does not prevent the clearly erroneous application of statutory law from being plain error.” *United States v. Brown*, 316 F.3d 1151, 1158 (10th Cir. 2003) (cleaned up) (quoting *United States v. Evans*, 155 F.3d 245, 252 (3d Cir. 1998)). The obviousness of the error in the district court’s interpretation of the Lanham Act is evident from the Act’s text, its legislative history, and the need to give the Act a construction that does not conflict with the First Amendment. It is also underscored by the near uniform holdings of our sister circuits that the Act does not reach noncommercial speech. Cf. *United States v. Garza*, 706 F.3d 655; 662–63 (5th Cir. 2013) (error was clear or obvious because, although “this court had not [yet] definitively answered” the question presented, the caselaw on the issue among all five of our sister circuits was “uniform[]”). Third, the error affected Coalition’s substantial rights. To affect substantial rights, the error generally must be “prejudicial; it must affect the outcome of the proceedings.” *Crawford*, 131 F.3d at 1125 (quoting *United States v. Calverly*, 37 F.3d 160, 164 (5th Cir. 1994) (en banc), *abrogated in part on other grounds by Johnson v. United States*, 520 U.S. 461 (1997)). Obviously, the mistake in applying the Lanham Act to Coalition’s noncommercial political endorsements affected the outcome of the case—indeed, was dispositive of the case—because Coalition would not have been liable for violating the Act had the statute been construed properly. Thus, the error that confronted the *Alliance I* panel was plain and affected Coalition’s substantial rights. The *Alliance I* panel therefore had the discretion to notice and correct the error, and it should have done so because holding Coalition liable for violating the Lanham

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Act “was designed to protect both consumers’ confidence in the quality and source of goods and services and protect businesses’ goodwill in their products by creating a federal right of action for trademark infringement.” *Peaches Ent. Corp. v. Ent. Repertoire Assocs., Inc.*, 62 F.3d 690, 692 (5th Cir. 1995) (citing S. REP. NO. 1333, 79th Cong., 2d Sess. at 1). The Act’s text, its legislative history, and the imperative to give the statute a constitutionally permissible construction all lead to the inescapable conclusion that the Act does not reach noncommercial political speech.

Start with the text. The Act defines “commerce” as “all commerce” that Congress “may lawfully regulate[.]” 15 U.S.C. § 1127. Its purpose, *inter alia*, is to “secure to the owner of the mark the goodwill of his business and to protect the ability of consumers to distinguish among competing producers.” *Two Pesos, Inc. v. Taco Cabana Inc.*, 505 U.S. 763, 774 (1992) (internal quotation marks omitted).

Section 43(a) of the statute, which addresses false and misleading descriptions of unregistered marks, states in part that:

Any person who, on or in connection with any good or services, . . . uses in commerce any word, term, name, symbol, or false designation

Act by its political speech muzzles the political organization’s free speech rights, chills the speech of other political entities, and inappropriately calls upon federal courts to referee state and local political disputes, all of which “seriously affect[] the fairness” and “public reputation of judicial proceedings.” *Crawford*, 131 F.3d at 1123 (quoting *Olano*, 507 U.S. at 732).

of origin, . . . which . . . is likely to cause confusion—as to the origin . . . of [another person’s] goods, services, or commercial activities, . . . shall be liable in a civil action by any person who believes that he or she is likely to be damaged by such act.

15 U.S.C. § 1125(a). The provision is meant to protect “against a myriad of deceptive *commercial* practices.” *Seven-Up Co.*, 86 F.3d at 1383 (emphasis added) (quoting *Res. Dev. v. Statue of Liberty-Ellis Island Found.*, 926 F.2d 134, 139 (2d. Cir. 1991)). Unsurprisingly, we have “previously determined that § 43(a) . . . only applies to commercial speech.” *TMI, Inc. v. Maxwell*, 368 F.3d 433, 436 n.2 (5th Cir. 2004) (citing *Procter & Gamble Co.*, 242 F.3d at 547). The provision’s legislative history supported our conclusion. *See Seven-Up Co.*, 86 F.3d at 1383 n.6. (citing 134 Cong. Rec 31,851 (Oct. 19, 1988) (statement of Rep. Kastenmeier) (commenting that the reach of Section 43(a) “specifically extends only to false and misleading speech that is encompassed within the ‘commercial speech’ doctrine developed by the United States Supreme Court”)); *see also Procter & Gamble Co.*, 242 F.3d at 547 n.13 (same).

At issue in this case is § 32(1) of the Act, which covers infringement of registered marks. 15 U.S.C. § 1114(1). Section 32(1) creates a cause of action When trademark infringement occurs “in connection with the sale, offering for sale, distribution, or advertising of any goods or services” and is “likely to cause confusion, or to cause mistake, or to deceive.” *Id.*

Based on the similar language between §§ 43(a) and 32(1), courts have concluded that claims under the two provisions have the same elements, with the exception that § 32(1) applies solely to registered marks. *See Lamparello v. Falwell*, 420 F.3d 309, 312–13 (4th Cir. 2005); *cf.* Margreth Barrett, *Finding Trademark Use: The Historical Foundation for Limiting Infringement Liability to Uses “In the Manner of A Mark”*, 43 WAKE FOREST L. REV. 893, 942–43 (2008) (“While the statutory language of sections 32(1)(a) and 43(a) differs, the provisions are generally understood to impose the same standard for infringement.”). “To prevail under either cause of action, the trademark holder must prove:

- (1) that it possesses a mark; (2) that the [opposing party] used the mark; (3) that the [opposing party’s] use of the mark occurred ‘in commerce’; (4) that the [opposing party] used the mark ‘in connection with the sale, offering for sale, distribution, or advertising’ of goods or services; and (5) that the [opposing party] used the mark in a manner likely to confuse consumers.”

Lamparello, 420 F.3d at 313 (alterations in original). Significantly, both provisions require that actionable infringement be “in connection with” goods or services in a manner likely to cause confusion to consumers. *Compare* 15 U.S.C. § 1125(a) (use of mark “in connection with any goods or services”), *with id.* § 1114(1) (use of mark “in connection with the sale, offering for sale, distribution, or advertising of any goods or

services”). “This is commonly described as the commercial use requirement.” *Utah Lighthouse Ministry*, 527 F.3d at 1052.

In light of this requirement, the clear majority of circuits to have considered whether the Act applies to *any* noncommercial speech have determined that it does not. See *Bosley Med. Inst., Inc.*, 403 F.3d at 676–77 (construing § 32(1)); *Taubman Co.*, 319 F.3d at 774 (same); *Farah*, 736 F.3d at 541; *Utah Lighthouse Ministry*, 527 F.3d at 1052–54; *Porous Media Corp.*, 173 F.3d at 1120; cf. *S.F. Arts & Athletics, Inc.*, 483 U.S. at 566 (Brennan, J., dissenting); *Radiance Found., Inc.*, 786 F.3d at 322.⁵

In the instant case, Coalition’s use of its emblem certainly was not “in connection” with commercial activity. Coalition exists solely to engage in the endorsement of candidates for public office. As the district court recognized, “[p]eople are not buying products here.” Because these entities’ activities are not commercial in

⁵ In *United We Stand, Inc. v. United We Stand, America New York, Inc.*, the Second Circuit held that that noncommercial political activities may be “services” within the meaning of the Lanham Act but also stated that a “crucial” factor in permitting such a conclusion is that the infringer “us[e] the Mark not as a commentary on its owner, but instead as a source identifier.” 128 F.3d 86, 89–92 (2d Cir. 1997). Not only is the Second Circuit the sole outlier court in an otherwise uniform line of federal appellate authority holding that the Lanham Act does not apply to non-commercial speech, but the Second Circuit is also incorrect that purely political speech is a “service” under the Lanham Act. “[S]uch a service is not being rendered in commerce[] it is being rendered as part of the political process.” *Tax Cap Comm. v. Save Our Everglades, Inc.*, 933 F. Supp. 1077, 1081 (S.D. Fla. 1996).

nature, the Lanham Act simply does not apply to this case.

Applying the Lanham Act in the manner the *Alliance I* panel did was also clearly inconsistent with Congress's intent in enacting the statute. Congress specifically recognized the constitutional problems of creating liability for free speech and sought to avoid doing so. *See Radiance Found., Inc.*, 786 F.3d at 321; *see also MasterCard Int'l Inc. v. Nader 2000 Primary Comm., Inc.*, No. 00 CIV. 6068, 2004 WL 434404, at *7–8 (S.D.N.Y. Mar. 8, 2004) (“The legislative history of the Lanham Act clearly indicates that Congress did not intend for the Act to chill political speech.”). Congress's concerns were well founded. As stated, the *Alliance I* panel's interpretation of the Lanham Act raises serious constitutional concerns. Coalition limits itself to endorsements of political candidates, so its use of an avian emblem similar to Alliance's occurred only in the context of engaging in political speech. Imposing liability under the Act on Coalition for its political speech, then, results in the precise problem Congress aimed to avoid: creating liability under federal trademark law for actors exercising their free speech rights.

It is well established that commercial speech—that is, speech that does “no more than propose a commercial transaction,” *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983)—is accorded only a “measure of First Amendment protection.” Indeed, “the government may freely regulate” misleading commercial speech, the very speech that the Lanham Act was meant to target. *Florida Bar v. Went For It, Inc.*, 515

U.S. 618, 623–24 (1995). By contrast, free speech protections are at their zenith in the context of political speech precisely because such speech is at the heart of the values embodied in the First Amendment. See *McIntyre v. Ohio Elecs. Comm’n*, 514 U.S. 334, 346 (1995) (“Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people.” (cleaned up)). Extending liability under the Lanham Act to noncommercial political speech risks eroding the First Amendment’s safeguards for political expression.⁶ Finally, under the canon that “statutes should be interpreted to avoid constitutional doubts,” *Clark v. Martinez*, 543 U.S. 371, 379 (2005), the Lanham Act ought not be construed to apply to political speech in order to avoid a construction of the Act that could conflict with the First Amendment.

Because Coalition only used its emblem in the context of political speech, the Lanham Act simply and

⁶ To the extent that there may be concern over permitting a political organization to use marks that are confusingly similar to those of another political entity, Justice Brandeis’s concurring opinion in *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring), which Justice Holmes joined, suggests an answer: “If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.”

obviously cannot be applied to its speech. Thus, the *Alliance I* panel’s decision to impose on Coalition liability under the Act was clearly erroneous.⁷ Moreover, adhering to that grievously wrong decision will result in a manifest injustice by stifling the political speech that is key to the functioning of our democracy. The law-of-the-case doctrine therefore does not stand as an impediment to correcting our past mistakes, and the majority

⁷ For nearly sixty years, this court has repeatedly and consistently explained that the law of the case does not apply when a prior “decision is clearly erroneous and works manifest injustice.” *Lincoln Nat. Life Ins. Co. v. Roosth*, 306 F.2d 110, 113, (5th Cir. 1962); accord *Lumberman’s Mut. Cas. Co. v. Wright*, 322 F.2d 759 (5th Cir. 1963); *White v. Murtha*, 377 F.2d 428, 432 (5th Cir. 1967); *Morrow v. Dillard*, 580 F.2d 1284, 1290 (5th Cir. 1978); *Goodpasture, Inc. v. M/V Pollux*, 688 F.2d 1003, 1005–06 (5th Cir. 1982). Clear error is a familiar legal standard for reviewing prior decisions that applies across various contexts. For example, appellate courts apply clear error in reviewing district court’s factual findings, *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985), and in reviewing discretionary decisions by district courts, *United States v. Walker*, 772 F.2d 1172, 1176 n.9 (5th Cir. 1985). A decision is clearly erroneous when the reviewing court is left with “a definite and firm conviction” that the previous court was in error. *Id.* Under this standard, based on the foregoing analysis, it is plain that the decision in *Alliance I* was clearly erroneous. On a handful of occasions, this court has stated that for a previous decision to be “clearly erroneous” such that the exception to the law-of-the-case doctrine for clearly erroneous and manifestly unjust rulings may apply, the prior decision must have been “dead wrong.” *E.g.*, *City Pub. Serv. Bd. v. Gen. Elec. Co.*, 935 F.2d 78, 82 (5th Cir. 1991). But the “dead wrong” language has been employed infrequently and inconsistently and does not alter or supplant the proper and longstanding test for assessing whether a previous ruling was clearly erroneous—that the appellate court must have a definite and firm conviction that the prior decision was wrong.

errs in failing to do so. *See Vahlco Corp.*, 895 F.2d at 1072–73.

II.

Beyond the fundamental error in *Alliance I* that has infected the entire litigation, the district court’s missteps on remand from *Alliance II* raise their own set of problems. Foremost among them, the able district court acted outside the narrow ambit of our mandate. In *Alliance II*, we directed the district court to undertake only one action on remand: reducing and reallocating its attorneys’ fee award to Alliance. 919 F.3d 291. Rather than heeding our mandate, the district court (1) increased its fee award by awarding to Alliance fees incurred for time spent on the appeals in *Alliance I & II* and in prosecuting its motion for attorneys’ fees, (2) *sua sponte* joined Jacobs as a party, and (3) held Jacobs personally liable for the total augmented award. A brief summary of this case’s lengthy procedural history makes manifest the district court’s error.

At the outset of the litigation, Alliance claimed that both Coalition’s “word mark”—its trade name, Coalition for Better Government—and its “composite mark”—its emblem—infringed on Alliance’s marks. The district court agreed, enjoining Coalition from using both its trade name and emblem. Coalition appealed, and this court concluded that only Coalition’s emblem, and not its trade name, violated the Lanham Act. The *Alliance I* panel thus modified the district

court's injunction to restrain only Coalition's use of the emblem. *See* 901 F.3d at 514.

During the pendency of the first appeal, the district court determined that the case was "exceptional" within the meaning of the Lanham Act's attorneys' fees provision, 15 U.S.C. § 1117(a), and thus awarded Alliance, as the prevailing party, \$68,237.50 in attorneys' fees. Coalition appealed, and this court, in the second appeal in this matter, affirmed the conclusion that the case warranted an award of attorneys' fees. *Alliance II*, 919 F.3d at 297.

The *Alliance II* panel noted, however, this court's earlier determination in *Alliance I* that Alliance had prevailed only on its emblem claim. Hence, in *Alliance II*, "we remand[ed] for the district court to reassess the amount of fees" to omit work that furthered Alliance's trade-name claim from its fee calculation. *Id.* at 293. Specifically, our mandate called only for the district court "to account for billed time for claims on which Alliance did not prevail, and to adjust the fee award accordingly." *Id.* at 298. We gave no indication that the district court should take any action other than a downward adjustment of the attorneys' fees award.

In failing to hew to the constraints we imposed on remand, the district court violated the well-established mandate rule. That rule "provides that a lower court on remand must implement both the *letter and spirit* of the [appellate court's] mandate." *Tollett*, 285 F.3d at 364 (internal quotation marks omitted) (alterations in original). Notably, the mandate rule extends both to

those matters “decided expressly or by necessary implication” by the appeals court. *DeJoria v. Maghreb Petroleum Expl., S.A.*, 938 F.3d 381, 394 (5th Cir. 2019). A district court is “without power to do anything which is contrary to either the letter or spirit of the mandate construed in the light of the opinion of [the] court deciding the case.” *Id.* (alterations in original) (internal quotation marks omitted).

The Supreme Court’s decision in *Briggs v. Pa. R.R. Co.*, 334 U.S. 304, 305 (1948), is instructive on how a district court can run afoul of the mandate rule. In that case, a jury returned a verdict of \$42,500 in favor of the plaintiff, but the district court granted a post-verdict motion to dismiss the case for lack of jurisdiction. *Id.* The appellate court, however, reversed and directed that the district court, in accordance with the jury’s verdict, enter judgment for the plaintiff. *Id.* On remand, despite the fact that the appellate court’s mandate “made no provision for interest,” the district court entered judgment and “added to the verdict interest from the date the [jury returned its verdict] to the date of the judgment.” *Id.* The Supreme Court determined that it was “clear that the interest was in excess of the terms of the mandate and hence was wrongly included” by the district court. *Id.* at 306. *Briggs* thus stands for the proposition that a district court violates the mandate rules where it takes actions on remand that the appeals court “made no provision for,” thereby exceeding the “terms of the [appellate] mandate.” *Id.*

Tollett v. City of Kemah presented very similar facts to the present appeal, and our decision there underscores the district court's error. 285 F.3d at 364. In *Tollett*, a district court awarded \$5,000 in sanctions against the defendant city and two of its employees. The amount of the award was purportedly to compensate the plaintiff for attorneys' fees and court costs incurred in connection with the sanctioned entities' discovery abuses. On appeal, plaintiff conceded that the quantum of the sanctions was not supported by proof of reasonable fees and costs. Thus, this court vacated the award and "remand[ed] for a redetermination and assessment of reasonable attorney's fees and costs." *Id.* at 362 (emphasis omitted).

But on remand the district court imposed sanctions and attorneys' fees against not only the city but also the city's counsel, while dropping the fees it had previously assessed against the city's employees. *Id.* at 363. The city and its attorney appealed, contending that the district court violated the mandate rule. We agreed, explaining that it was "clear from our opinion" in the first appeal "that the district court was not to redetermine . . . whether, and against whom, sanctions should be imposed. The opinion expressly directed the district court *only* to determine the *proper amount to impose as . . . sanctions*." *Id.* at 365. Accordingly, we, once again, vacated the sanctions and fee award. *Id.* at 366; see *Doe v. Chao*, 511 F.3d 461, 466–67 (4th Cir. 2007) (holding that district court violated the mandate rule when the appeals court's mandate called only for reconsideration of award of attorneys' fees for work

performed during district-court proceedings but, on remand, district court awarded fees for work performed during appellate phase of the litigation); *Wang v. Douglas Aircraft Co.*, 221 F.3d 1350, *1 (9th Cir. 2000) (unpublished) (district court violated mandate rule where mandate directed court to determine whether a foreign law firm was entitled to attorneys' fees based on the work performed by the firm but district court instead awarded fees in accordance with terms of a letter agreement between the foreign firm and a local firm that reallocated fees; appeals court's mandate "precluded any . . . inquiry" other than whether foreign firm was entitled to fees based on its legal services, not a letter agreement).

Here, too, the import of our directive to the district court on remand was "clear": it was only to reevaluate its attorneys' fee calculation in order to award Alliance fees solely for time spent on the emblem claim, thereby reducing its earlier award. The "necessary implication" of our mandate was that the district court was barred from doing anything other than reducing the fee award. *DeJoria*, 935 F.3d at 394. Venturing beyond our delimited directive, the district court *sua sponte* joined Jacobs as a party to the case; held her personally liable; and awarded additional attorneys' fees against Coalition and Jacobs for Alliance's prosecution of both appeals and its motion for attorneys' fees, causing the fee award to mushroom to over \$148,000. But as in *Tollett*, our directive to the district court "was not to redetermine . . . against whom[] sanctions should be

imposed,” nor was it to augment the sanctions. *See id.* at 365.

Coalition is therefore correct that the district court’s order was directly contrary to our mandate. The majority, however, fails to mention this argument, characterizing Jacobs and Coalition as merely contending that the district court was an “improper forum” for considering appellate attorneys’ fees. *See* Maj. Op. at 10 n.54. True, Coalition made that assertion in its briefing on appeal, but it also expressly objected to the district court’s award of appellate attorneys’ fees on a second basis; Coalition explained that the district court’s decision is inconsistent with *Alliance II* because in that appeal we ordered the district court only to recalculate attorneys’ fees to account for the claim on which *Alliance* prevailed, and, as Coalition states in its brief, “[n]othing in” our “opinion address[ed]” appellate attorneys’ fees.

Because Coalition adequately raised the issue of the district court’s compliance with the mandate rule, and because the district court did not faithfully apply our mandate in *Alliance II*, I cannot agree with the majority’s endorsement of the decision to join attorney Jacobs as a party to the case or to award *Alliance* additional attorneys’ fees for time incurred in litigating the two appeals and its fees motion.

III.

Regrettably, in holding Jacobs personally liable for the award of attorneys’ fees, this court becomes the

first to my knowledge to sanction such liability against a party's counsel under the Lanham Act's fee-shifting provision, 15 U.S.C. § 1117(a). Indeed, the Federal Circuit, in construing that the Patent Act's identically-worded fee-shifting provision, has expressly held that the provision cannot be used to impose liability for attorneys' fees on a party's counsel. *Phonometrics, Inc.*, 64 F. App'x at 222 ("Section 285 is a fee shifting statute that in exceptional cases may require the losing party to reimburse the prevailing party its attorney fees. Sheraton[, the prevailing party,] has provided us with no legal basis for entering a fee award against the losing party's attorney under § 285. . . . Counsel for Phonometrics is not liable for fees awarded under § 285."); see also *Baker*, 821 F.3d at 623–24 (borrowing attorneys' fees jurisprudence under the Patent Act to interpret the fee-shifting provision in the Lanham Act).

That no court has previously permitted imposing attorneys' fees against a party's counsel under the Lanham Act and that the Federal Circuit has held that imposing such fees on an attorney is not authorized by the Patent Act is unsurprising in light of the text of the statutes' attorneys' fees provisions, which both read: "The court in exceptional cases may award reasonable attorney fees to the prevailing party." 15 U.S.C. § 1117(a); 35 U.S.C. § 285. Notably absent from the provisions is any explicit authorization to impose attorneys' fees against a party's counsel. "When a fee-shifting statute that authorizes the courts to award attorneys' fees to prevailing parties does not mention an award against the losing party's attorney, the

appropriate inference is that an award against attorneys is not authorized.” *Healey*, 947 F.2d at 624. Section 1117(a) thus “stands in contrast to other sections and [Federal] Rules [of Civil Procedure] that expressly provide for the imposition of sanctions against attorneys,” *id.*, such as 28 U.S.C. § 1927, which empowers courts to order “[a]ny attorney” who “multiplies the proceedings in any case unreasonably and vexatiously” to pay the costs and attorneys’ fees incurred because of their conduct, and Rule 11(b), which authorizes district courts to award sanctions against “attorney[s]” for misconduct in an array of circumstances. The availability of these traditional—and effective—tools to discipline wayward behavior by counsel means that courts will not be hampered in their ability to police proceedings without applying § 1117(a) against a litigant’s counsel; similarly, these well-established provisions ensure that parties can recover costs incurred as a result of opposing counsel’s unprofessional conduct.

Further underscoring that Jacobs cannot be held liable for the award of attorneys’ fees under § 1117(a) for her representation of Coalition is that, even in cases where courts have imposed attorneys’ fees personally on individuals who were not party to the underlying litigation, they have done so not against a party’s counsel; rather, attorneys’ fees have been assessed against individuals who served as a company’s president, owner, or sole shareholder when that individual’s conduct caused the case to be “exceptional” under a proper interpretation of the Lanham or Patent Acts. *See, e.g., Mach. Corp. of Am. v. Gullfiber AB*, 774

F.2d 467, 475 (Fed. Cir. 1985) (holding that an individual who was “not a proper party to” the claims for violation of the Patent Act “may be assessed fees under § 285 [of the Patent Act] if his conduct supports a finding that the case is exceptional” (citing *Hughes v. Novi American, Inc.*, 724 F.2d 122 (Fed. Cir. 1984)); *Iris Conner, LLC v. Dell, Inc.*, 235 F. Supp. 3d 826, 852–53 (E.D. Tex. 2017) (imposing attorneys’ fees against a company that filed a meritless patent-infringement suit and holding the owner of the company jointly liable for the fees where the owner was the “driving force behind th[e] litigation” and was “responsible” for making the case exceptional). Indeed, the majority states that its decision to hold Jacobs personally liable is rooted in the notion that “[a]n officer is individually liable for any tortious conduct that he committed in connection with his corporate duties.” Maj. Op. at 7 (internal quotation marks omitted). But the principle of imposing liability for attorneys’ fees not only on the business that is the party to the case but also on the individual who stands behind that business and directs its conduct has no application to an attorney representing her client; attorneys initiate and prosecute cases at the behest of their clients, but it is the client who ultimately must decide whether to bring a case. Thus, when the fee-shifting provision is applied to individuals who were not party to the underlying litigation, it should be reserved for those who, in their capacity as a high-level officer or owner of an organization, make

a case exceptional. *See Mach. Corp. of Am.*, 774 F.2d at 475.⁸

⁸ The majority cites Jacobs's leadership role within Coalition as a basis for holding her personally liable for the fee award. Maj. Op. at 8. But this misapprehends the basis of the district court's decision to hold Jacobs liable for the fee award; the district court expressly cited Jacobs's conduct as Coalition's *counsel*—not her position within Coalition's corporate structure—as rendering the case “exceptional” under the Lanham Act and thus justifying imposing liability for the award on her personally. Indeed, in its order holding Jacobs personally liable, the district court discussed only Jacobs's actions as an attorney for Coalition: “Jacobs is personally responsible for” filing a meritless “motion for summary judgment, . . . counterclaim, and . . . motion to dismiss because she personally signed them, thus certifying that they were not presented for any improper purpose and were not frivolous.” The court further found that Jacobs's conduct rendered the case exceptional because she was “personally responsible” for abuses in discovery that necessitated issuance of a protective order to prevent a wasteful deposition; “she was the one who insisted on proceeding with the depositions even after the Court granted summary judgment and Alliance informed the Court that it would not pursue its remaining claim.” Wholly absent from the court's order is any mention of actions undertaken by Jacobs in her position as an officer or principal of Coalition. The majority's citations to *Nelson v. Adams USA, Inc.*, 529 U.S. 460 (2000) and *Insituform Technologies, Inc. v. CAT Contracting, Inc.*, 385 F.3d 1360 (Fed. Cir. 2004) are therefore inapposite; those cases concern imposition of personal liability for fees on non-lawyers who had senior roles in organizations that had already been held liable for the fees in question. It was precisely the individuals' wrongful conduct—alleged conduct, in *Nelson*—that was undertaken in their positions within their respective organizations that permitted—or would permit, in *Nelson*—holding them personally liable for the fees imposed on their organizations. Conversely, the district court sought to hold Jacobs liable based not on her role and work within Coalition but instead for her conduct as its counsel.

In sum, Coalition and Jacobs may not be held liable for anything in this case because no Lanham Act claim arises from Coalition's noncommercial political speech, and, independently of that, no Lanham Act defendant's counsel may be cast for attorneys' fees under the Act's fee-shifting provision.⁹ See *Healey*, 947 F.2d at 624, *cf. Phonometrics, Inc.*, 64 F. App'x at 222.

Bereft of authority under the Lanham Act to impose fees directly on Jacobs, the district court's decision resembles an attempt to pierce Coalition's corporate veil. But during the proceedings in the district court, Alliance never attempted to pierce Coalition's corporate veil; in fact, its motion for attorneys' fees makes no mention of veil piercing nor asserts that Jacobs is the alter ego of Coalition. *Cf. Huard v. Shreveport Pirates, Inc.*, 147 F.3d 406, 409–10 (5th Cir. 1998)

⁹ Jacobs was joined as a party only after this court held that Coalition had waived its noncommercial speech and First Amendment defenses, and thus never had the opportunity to lodge these defenses on her own behalf in this court. Now, when she attempts to advance those arguments to protect herself from personal liability, the majority holds the law of the case precludes her doing so. Maj. Op. at 11. This is highly inequitable, particularly in light of the clear merit of her constitutional and statutory defenses, which she has never personally waived. The majority attempts to justify its decision on the grounds that the merits of the infringement claim itself are no longer at issue, and the question now is only one of the appropriate amount of attorneys' fees. Maj. Op. at 11. But the majority offers no analysis as to why Coalition's litigation choices somehow bind Jacobs personally, and, as noted *infra*, there was no finding by the district court that Jacobs controlled Coalition such that its litigation conduct could be attributed to her. The majority thus errs in stripping Jacobs of the opportunity to marshal her full array of defenses.

(observing that, under Louisiana law, “a plaintiff seeking to pierce the corporate veil” must either demonstrate that the corporate form was used “to perpetuate fraud” or must “bear[] a heavy burden of proof in demonstrating that the corporate form has been disregarded by the shareholders to the extent that the corporation and shareholders are indistinguishable “).¹⁰ In the absence of any argument that the district court should pierce Coalition’s corporate veil, it is unsurprising that the court did not make any of the predicate findings necessary to disregard the legally distinct juridical identities of Coalition and Jacobs; there was no finding that Coalition was the alter ego of Jacobs, that Coalition disregarded corporate formalities, or that Coalition was used by Jacobs to perpetuate a fraud. *See id.* And in its briefing in this appeal, Alliance expressly disclaims that it seeks to veil pierce, contending instead that it could do so in a *separate* lawsuit. Under these circumstances, veil piercing is obviously inappropriate and cannot support the district court’s decision to thrust upon Jacobs the liability for fees charged to Coalition.

Accordingly, the district court was without authority under the Lanham Act to hold Jacobs directly and personally liable for attorneys’ fees, did not invoke any other source of authority to hold Jacobs liable in her

¹⁰ “Whether to apply Louisiana or federal law is not an issue. State and federal alter ego tests are essentially the same. Our non-diversity alter ego cases rarely state whether a state or federal standard controls, and apply state and federal cases interchangeably.” *Century Hotels v. United States*, 952 F.2d 107, 110 n.4 (5th Cir. 1992).

capacity as an attorney, and could not and did not make the findings necessary to pierce Coalition's corporate veil.

* * *

In conclusion, this court's decision in *Alliance I* does violence to the text of the Lanham Act by expanding the statute into territory it was never intended to reach—noncommercial and political speech—and, worse yet, authorizes applying the Act in a manner that invades constitutionally-protected political speech and will embroil federal courts in local political disputes. *Alliance I* and the tainted rulings it spawned must therefore be corrected to prevent Coalition from suffering an injustice in this case and, more broadly, to reform this court's Lanham Act caselaw to avert chilling the speech of other organizations and individuals that likewise engage only in political speech. Accordingly, this panel should recall the mandates in *Alliance I* and *II* vacate all judgments imposing liability under the Lanham Act on Coalition for its political speech, and instruct the district court to dismiss Alliance's Lanham Act claim with prejudice. For these reasons and those set forth above, I respectfully dissent.

App. 47

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ALLIANCE FOR GOOD
GOVERNMENT

VERSUS

COALITION FOR BETTER
GOVERNMENT

CIVIL ACTION

No. 17-3679

SECTION: "J"(2)

JUDGMENT

(Filed Mar. 30, 2020)

Considering the Court's Order and Reasons dated
March 30, 2020, filed herein,

IT IS ORDERED, ADJUDGED AND DECREED
that there be judgment in favor of plaintiff, Alliance for
Good Government, and against defendants, Coalition
for Better Government and Darlene Jacobs, jointly and
in solido, awarding plaintiff, Alliance for Good Govern-
ment, attorney's fees in the amount of \$148,006.15,
plus legal interest from the date of this judgment until
paid.

New Orleans, Louisiana, this 30th day of March,
2020.

/s/ Carl J. Barbier

CARL J. BARBIER
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ALLIANCE FOR GOOD
GOVERNMENT

VERSUS

COALITION FOR BETTER
GOVERNMENT

CIVIL ACTION

No. 17-3679

SECTION: "J"(2)

ORDER AND REASONS

(Filed Mar. 30, 2020)

Before the Court is a *Motion for Attorney Fees* (**Rec. Doc. 124**) filed by Plaintiff Alliance for Good Government ("Alliance"). Having considered the motion and memoranda, the record, and the applicable law, the Court finds that Alliance's motion should be **GRANTED** as explained more fully herein.

FACTS AND PROCEDURAL HISTORY

The facts underlying this dispute are set forth more fully in the Fifth Circuit's earlier opinion in this case. *See All. for Good Gov't v. Coal. for Better Gov't (Alliance I)*, 901 F.3d 498, 501-04 (5th Cir. 2018). The following is a summary of the procedural history as relevant to the instant motion.

The Court granted partial summary judgment in favor of Alliance on its federal trademark infringement

claim,¹ and permanently enjoined Defendant Coalition for Better Government (“Coalition”) from using both its trade name and its logo.² On appeal, the Fifth Circuit affirmed the grant of summary judgment but modified the injunction to restrain only Coalition’s use of its logo. *Alliance I*, 901 F.3d at 502.

While that appeal was pending, Alliance moved for attorney’s fees under the Lanham Act.³ The Court found that the case was exceptional and awarded Alliance \$68,237.25 in attorney’s fees, the full amount it requested.⁴ On appeal, the Fifth Circuit affirmed this Court’s holding that Alliance is entitled to attorney’s fees but vacated the fee award and remanded the case to this Court to reassess the amount in light of its earlier decision to modify the injunction. *All. for Good Gov’t v. Coal. for Better Gov’t (Alliance II)*, 919 F.3d 291, 297-98 (5th Cir. 2019).

During post-judgment discovery, Alliance learned that Coalition does not have a bank account, financial assets, insurance policies, accounts, or property.⁵ As a result, Alliance moved to alter the Fee Judgment to hold Darleen Jacobs, lead counsel for Coalition, directly liable for fees because, Alliance contended, Ms. Jacobs was responsible for making this case

¹ (Rec. Doc. 43).

² (Rec. Doc. 55).

³ (Rec. Doc. 61).

⁴ (Rec. Doc. 82).

⁵ (Rec. Doc. 102-3, at 4-9).

exceptional by her own conduct.⁶ Following remand from Coalition’s second appeal, the Court joined Ms. Jacobs as a party so that she would have an opportunity to respond to Alliance’s motion on her own behalf,⁷ which she did.⁸ Alliance’s motion for attorney’s fees is now before the Court on the briefs and without oral argument.

LEGAL STANDARD

Under the Lanham act, in “exceptional cases,” the prevailing party may be awarded “reasonable attorney fees.” 15 U.S.C. § 1117(a). An exceptional case is one that “‘stands out from others with respect to the substantive strength of a party’s litigating position (considering both the governing law and the facts of the case) or the unreasonable manner in which the case was litigated.’” *Alliance II*, 919 F.3d at 295 (citation omitted). “When a party advances both Lanham Act and non-Lanham Act claims, a district court should make efforts to award fees only for successful Lanham Act claims.” *Id.* at 297. “[T]he impossibility of making an exact apportionment does not relieve the district court of its duty to make some attempt to adjust the fee award in an effort to reflect an apportionment.” *Id.* at 298 (quoting *Gracie v. Gracie*, 217 F.3d 1060, 1070 (9th Cir. 2000)).

⁶ (Rec. Doc. 102).

⁷ (Rec. Doc. 133).

⁸ (Rec. Doc. 135).

In determining the appropriate fee award, the “lodestar” calculation is the “most useful starting point.” *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). The lodestar calculation consists of the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. *La. Power & Light Co. v. Kellstrom*, 50 F.3d 319, 324 (5th Cir. 1995). The court may then adjust the lodestar either upward or downward, depending on the circumstances of the case. *Id.*

DISCUSSION

The Fifth Circuit affirmed this Court’s finding that this case was exceptional and therefore Alliance is entitled to attorney’s fees but vacated the fee award because the amount was improperly calculated. *Alliance II*, 919 F.3d at 297-98. Alliance now seeks (1) to hold Darlene Jacobs personally liable for (2) \$146,318.65 in attorney’s fees, which includes its fees incurred on appeal.

I.

Alliance seeks to impose personal liability for attorney’s fees on Darlene Jacobs, president, director, and lead counsel for Coalition. Thus, the Court granted Alliance’s request to join Jacobs as a party to these proceedings so that she would have an opportunity to respond to Alliance’s motion and contest her personal

liability.⁹ See *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 471-72 (2000).

Alliance contends that imposing liability on Jacobs is necessary because she “runs Coalition as an empty shell with no bank account or assets of any kind” and has employed a “litigation strategy designed to bankrupt Alliance even if it prevailed.”¹⁰ In support of its position, Alliance relies on *Iris Connex, LLC v. Dell, Inc.*, 235 F. Supp. 3d 826, 843 (E.D. Tex. 2017), in which the district court found that liability under the Patent Act¹¹ could be assessed against non-parties where “(1) the actor is responsible for conduct that makes the case exceptional, (2) the actor is afforded due process, and (3) it is equitable to do so.”

In *Nelson v. Adams USA, Inc.*, after the district court dismissed the plaintiff’s patent infringement complaint, granted defendant’s motion for attorney’s fees, and set the amount of the fee award, the defendant moved to amend its pleadings to add the plaintiff’s president and sole shareholder as a party from whom fees could be collected. 529 U.S. at 463-64. The defendant simultaneously sought to amend the attorney’s fee judgment to impose liability on the

⁹ (Rec. Doc. 133).

¹⁰ (Rec. Doc. 124-1, at 15-16).

¹¹ The Fifth Circuit has recognized that cases interpreting the fee-shifting provision of the Patent Act are instructive in cases applying the fee-shifting provision of the Lanham Act. See *Baker v. DeShong*, 821 F.3d 620, 623 & n.1 (5th Cir. 2016).

shareholder, which the district court granted. *Id.* at 464. The Court of Appeals affirmed the amended judgment. *Id.*

The Supreme Court reversed, holding that the shareholder's right to due process had been violated because he "was never afforded a proper opportunity to respond to the claim against him." *Id.* at 468. The Court noted that the shareholder was never served with the amended pleading naming him as a party, nor was he afforded the time allowed to respond to an amended pleading by Rule 15. *Id.* at 466. The Court concluded that, even though there was "sufficient identity between" the shareholder and the plaintiff corporation, the shareholder's conduct was responsible for making the case exceptional, and the shareholder had actual notice that the defendant was seeking attorney's fees from the plaintiff corporation, the district court was required to afford the shareholder an "actual opportunity to defend" against the claims against him. *Id.* at 470-71. Significantly, the Court noted, "Our decision surely does not insulate [the shareholder] from liability. As counsel twice represented at oral argument, [the shareholder] seeks only the right to contest on the merits his personal liability for fees originally sought and awarded solely against [plaintiff corporation]. That right, we hold, is just what due process affords him." *Id.* at 472.

The *Iris Connex* court distinguished *Nelson* because it found the due process concerns raised in *Nelson* sufficiently addressed. 235 F. Supp. 3d at 843 n.5. Specifically, the *Iris Connex* court had *sua sponte*

joined the non-party, allowed additional time for briefing, and held a live hearing in which the former non-party had an opportunity to testify before awarding attorney's fees and imposing personal liability. *Id.* at 839-40. Notably, all of this had been done after the court granted summary judgment on the substantive claims. *Id.* at 832-33.

Here, the Court did not *sua sponte* join Jacobs but did so at the request of Alliance after Coalition, through Jacobs, had an opportunity to oppose the request. Thus, Jacobs's arguments based on *Nelson* are unavailing because, unlike the shareholder there, the Court has afforded her an "actual opportunity to defend" against the claim against her, an opportunity she has utilized by opposing the instant motion. *Nelson*, 529 U.S. at 470. Jacobs's argument that an amended pleading is required to add her as a party fails to recognize the Court's authority to add a party under Rule 21. *See* Fed. R. Civ. P. 21 ("On motion or on its own, the court may at any time, on just terms, add or drop a party.").

Jacobs also contends that the use of a "motion," as opposed to a "pleading," to join her as a party violates due process because it deprives her of several benefits under the Federal Rules of Civil Procedure that would allow her to prepare an appropriate defense, including the ability to raise defenses, discover evidence and witnesses, or have her liability determined by a jury. However, Jacobs does not indicate what defenses she hopes to raise or what evidence she hopes to discover, nor does she provide any authority that she is entitled to a

jury in this context. *See AIA Am., Inc. v. Avid Radio-pharmaceuticals*, 866 F.3d 1369, 1373 (Fed. Cir. 2017) (holding that claim for attorney’s fees under the Patent Act did not invoke right to jury trial); *see also Baker*, 821 F.3d at 623 & n.1. Moreover, “[t]he fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner,’” *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976) (citation omitted), and Jacobs has been afforded such here.

Jacobs’s arguments that the Lanham Act does not apply to her individually and that there has been no determination that she individually violated the Lanham Act are unavailing because a claim for attorney’s fees in this context is “‘collateral to and separate from the decision on the merits,’” *AIA Am., Inc.*, 866 F.3d at 1373 (quoting *Bundinich v. Benton Dickinson & Co.*, 486 U.S. 196, 200 (1988)), and the purpose of the fee-shifting provision is “to deter exceptional litigation,” *Iris Connex*, 235 F. Supp. 3d at 854. Thus, the relevant question is not whether Jacobs personally infringed on Alliance’s trademarks but whether her conduct made this litigation exceptional. This same rationale defeats Jacobs’s argument that the First Amendment prevents the assessment of attorney’s fees against her, because what is at issue is her *conduct* that made this litigation exceptional, not her speech in using Coalition’s logo.

Notably, Jacobs does not argue that she is not personally responsible for making this litigation exceptional. This is unsurprising, because her conduct was the sole reason this litigation has been exceptional.

The Court previously found that Coalition litigated this case in an unreasonable manner by (1) filing a motion for summary judgment raising only an unsupported laches defense; (2) filing a counterclaim without any actionable conduct; (3) filing a motion to dismiss two weeks before filing a motion for summary judgment, which rendered the former moot; and (4) behaving unreasonably during discovery by, e.g., refusing to postpone depositions following the Court's grant of summary judgment to Alliance, thereby necessitating a protective order.¹² Jacobs is personally responsible for the motion for summary judgment, the counterclaim, and the motion to dismiss because she personally signed them, thus certifying that they were not presented for any improper purpose and were not frivolous.¹³ *See* Fed. R. Civ. P. 11(b). Jacobs was also personally responsible for the protective order because she was the one who insisted on proceeding with the depositions even after the Court granted summary judgment and Alliance informed the Court that it would not pursue its remaining claims.¹⁴ Additionally, on remand from the second appeal, Jacobs attempted to file a brief on behalf of Coalition contesting Alliance's entitlement to fees, which this Court had already decided and the Fifth Circuit had affirmed.¹⁵ Accordingly, the Court finds that Jacobs is responsible

¹² (Rec. Doc. 86, at 6-7).

¹³ (Rec. Doc. 19, at 2; Rec. Doc. 20, at 1; Rec. Doc. 26, at 1; *see also* Rec. Doc. 43 (denying motion to dismiss as moot)).

¹⁴ (Rec. Doc. 44-1, at 2 n.3; Rec. Doc. 47, at 2).

¹⁵ (Rec. Doc. 131).

for making this litigation exceptional. *See Iris Connex*, 235 F. Supp. 3d at 843.

Second, the Court finds that the requirements of due process are met because Jacobs received notice and an opportunity to be heard: she was personally served with the Court's order adding her as a party and the motion for attorney's fees, as well as all responses to the motion,¹⁶ and she was afforded an opportunity to defend against the claim, which she has.¹⁷ *See Nelson*, 529 U.S. at 472; *Iris Connex*, 235 F. Supp. 3d at 843.

Finally, the Court concludes that it is equitable to impose attorney's fees on Jacobs personally because, as the founder and president of Coalition, she is responsible for Coalition's inability to satisfy the fee award by operating it without dedicated funds or a bank account and paying for its expenses personally. *See Iris Connex*, 235 F. Supp. 3d at 843.

Jacobs did not need to litigate this case in an unreasonable manner. Her decisions to do so have led the Court to conclude that imposing attorney's fees on her personally is necessary to deter exceptional litigation, both from this litigant and as a warning to others. Accordingly, the Court holds that Jacobs is personally liable for Alliance's attorney's fees incurred in this litigation.

¹⁶ (Rec. Doc. 134-1).

¹⁷ (Rec. Doc. 135).

II.

Having determined that both Coalition and Jacobs are liable for Alliance's attorney's fees, the issue remaining before the Court is the amount of the fee award. To resolve this issue, the Court must decide three sub-issues: (1) whether Alliance is entitled to recover its attorney's fees incurred on appeal; (2) whether the amount requested by Alliance is reasonable; and (3) whether Coalition is entitled to an offset as a result of the Fifth Circuit's modification of the injunction.

A. Whether Alliance Is Entitled to Recover Fees Incurred on Appeal

Coalition contends that this Court is not the proper forum for Alliance's request for appellate attorney's fees. In arguing that it is entitled to recover its attorney's fees incurred on appeal, Alliance relies on *Kiva Kitchen & Bath, Inc. v. Capital Distributing, Inc.*, 681 F. Supp. 2d 807, 809-12 (S.D. Tex. 2010), where the district court found that the prevailing plaintiff in a Lanham Act case was entitled to recover its appellate attorney's fees, relying on precedent from the First, Seventh, and Ninth Circuits. See *JCW Inv., Inc. v. Novelty, Inc.*, 509 F.3d 339, 341 (7th Cir. 2007); *Tamko Roofing Prods., Inc. v. Ideal Roofing Co.*, 294 F.3d 227, 230 (1st Cir. 2002);¹⁸ *Comm. for Idaho's High Desert, Inc. v.*

¹⁸ The First Circuit in *Tamko* developed a three-part test for determining when appellate attorney's fees should be awarded under the Lanham Act. 294 F.3d at 230. Because Coalition has

Yost, 92 F.3d 814, 825 (9th Cir. 1996); *see also Dippin' Dots, Inc. v. Mosey*, 602 F. Supp. 2d 777, 785 (N.D. Tex. 2009) (awarding appellate attorney's fees on remand in Patent Act case).

Coalition provides no authority that prohibits a district court from awarding attorney's fees incurred on appeal; the cases relied on by Coalition are inapposite. In *Sims v. Great-West Life Assurance Co.*, the Fifth Circuit denied the motions for attorney's fees because they were untimely. 941 F.2d 368, 370 (5th Cir. 1991). *Sims* says nothing about the propriety of a district court awarding appellate attorney's fees. Additionally, *Exxon Corp. v. Burglin* only concerned attorney's fees under Federal Rule of Appellate Procedure 38, not the Lanham Act; the underlying action was brought under state law. 42 F.3d 948, 952 (5th Cir. 1995). Further, *Burglin* did not hold that a district court could not award appellate attorney's fees; it only held that such fees were not warranted under the facts of that case. *See id.* Accordingly, the Court concludes that Alliance may recover its appellate attorney's fees.

B. Whether Alliance's Requested Fee Award Is Reasonable

In light of the Fifth Circuit's decision in *Alliance II*, Alliance now seeks to recover its attorney's fees for (1) obtaining summary judgment on its claim for infringement of its composite mark; (2) successfully

not argued for application of that test, the Court will not consider it.

defending that summary judgment on appeal; (3) litigating its entitlement to exceptional case fees; (4) successfully defending its entitlement to exceptional case fees on appeal; and (5) imposing liability on Ms. Jacobs directly. Alliance seeks a total of \$146,318.65 in fees. Alliance contends that it has incurred \$131,151.00 in fees as of the filing of its motion, excluding its motion to amend the fee judgment (the “Jacobs Fee Motion”), and proposes to reduce this amount by \$1,500.00 for its claims that were voluntarily dismissed and then by an additional 10% to account for time relating solely to the claim for infringement of the word mark, in accordance with the Fifth Circuit’s instructions in *Alliance II*, resulting in a fee award of \$116,685.90. Alliance also seeks fees for bringing the instant motion, which were \$7,818.75 as of the filing of the motion, and contends it is entitled to additional fees for its replies. Finally, Alliance contends that if the Court imposes personal liability on Jacobs then it is entitled to fees for the Jacobs Fee Motion, which amount to \$21,814.00.

The Court previously determined that the rates charged by Alliance’s attorneys were reasonable,¹⁹ and Coalition does not challenge them here. Therefore, the Court finds that the rates of \$225 per hour for Mr. Sahuc and \$285 per hour for Mr. Latham are reasonable.²⁰

¹⁹ (Rec. Doc. 86, at 9).

²⁰ These rates represent an 18% discount of Mr. Sahuc’s usual rate and a 26% discount of Mr. Latham’s usual rate. (Rec. Doc. 124-2, at 5).

Alliance has submitted evidence showing that it spent 688.6 hours on this matter.²¹ Because Mr. Sahuc performed over 85% of the work on this case, with the remainder performed either by Mr. Latham or a paralegal, the Court will use his rate to determine the lodestar, keeping in mind that deductions must be made for the claims Alliance voluntarily dismissed and its word mark claim on which it did not prevail. Under this method, the lodestar is \$154,935.00, which is more than Alliance's requested amount.

Coalition raises several objections to the number of hours submitted by Alliance. First, Coalition objects to the fact that the time entries fail to distinguish between work done on the composite mark claim and the word mark claim, and also between the Lanham Act claim and the other claims that were voluntarily dismissed. However, Coalition fails to acknowledge Alliance's proposed reductions, which the Court agrees are reasonable.

Prior to the Fifth Circuit's opinion in *Alliance I*, the parties made little distinction between the word mark and composite mark claims. The allegations in Alliance's complaint did not differentiate between the marks with respect to the infringement claim.²² Coalition's summary judgment motion was premised on a laches defense common to both claims.²³ Coalition's appellate brief in the merits appeal did not make any

²¹ (Rec. Doc. 124-2, at 2; Rec. Doc. 124-3).

²² (Rec. Doc. 1, at 5-6).

²³ (Rec. Doc. 26-1).

distinction between the word and composite marks except for a single footnote at the end of the brief.²⁴ Alliance spent only two paragraphs discussing the word mark separately in both its summary judgment motion²⁵ and its appellate brief.²⁶ In light of the intertwined nature of the claims, the Court finds Alliance's proposed 10% reduction to be reasonable. Additionally, the Court agrees that a reduction of \$1,500.00 for the claims that Alliance voluntarily dismissed to be reasonable, as Coalition has not identified any other billing entries that should be reduced on this ground.

Second, Coalition objects that portions of several billing entries are redacted. Alliance contends that these redactions are subject to privilege and offers to provide the Court with an unredacted version for in-camera review. The Court notes that such a review would only increase the fees owed to Alliance by Coalition and finds such review unnecessary because Coalition has failed to support this argument with any legal authority.

Third, Coalition objects to several entries involving Mr. Fandal, chair of Alliance's board of directors,²⁷ because "Coalition is unaware of any reason for Mr.

²⁴ (Rec. Doc. 124-4, at 22 n.45).

²⁵ (Rec. Doc. 28-1, at 14-15).

²⁶ (Rec. Doc. 124-5, at 37-38).

²⁷ (*See* Rec. Doc. 102-8, at 1).

Fandal's involvement in this matter."²⁸ The Court finds this argument frivolous.

Fourth, Coalition objects to Alliance seeking fees for the time it spent litigating the fee issue, particularly Alliance's entitlement to fees for reply briefs. However, Alliance has provided authority showing its entitlement to such fees, *see Camacho v. Bridgeport Financial, Inc.*, 523 F.3d 973, 981 (9th Cir. 2008) ("In statutory fee cases, federal courts, including our own, have uniformly held that time spent in establishing the entitlement to and amount of the fee is compensable." (citation omitted)), and Coalition presents no authority to the contrary.

Likewise, Coalition contends without authority that 21.25 hours for oral argument preparation in the merits appeal and 90.65 hours total for the fee appeal, including 29 hours for oral argument preparation, are unreasonable. The Court disagrees. *See Black v. SettlePou, P.C.*, No. 3:10-CV-1418-K, 2014 WL 3534991, at *9-10 (N.D. Tex. July 17, 2014) (holding 80 hours of appellate briefing and 32 hours of oral argument preparation to be reasonable); *Shepard v. Dallas County*, 3:05-CV-1442-D, 2010 WL 2573346, at *3 (N.D. Tex. June 24, 2010) (holding 80 hours of appellate briefing and 24 hours of oral argument preparation to be reasonable); *Maldonado v. Houstoun*, 256 F.3d 181, 187 (3d Cir. 2001) (holding 26 hours of oral argument preparation to be reasonable).

²⁸ (Rec. Doc. 125, at 14).

Finally, Coalition challenges the following billing entries: (1) 2.5 hours considering whether to participate in the Fifth Circuit mediation program; (2) 6.75 hours for a motion to consolidate appeals and continue oral argument, which the Fifth Circuit denied; and (3) 0.75 hours spent considering whether to file a surreply. Alliance asserts that these tasks amount to a total of \$2,260.00 in fees. To the extent these entries are improper, the Court finds that they are adequately accounted for in the 10% reduction proposed by Alliance. *See SettlePou*, 2014 WL 3534991, at *2.

In light of the foregoing, the Court finds Alliance's requested fee amount of \$146,318.65 to be reasonable. However, instead of allowing the parties to submit additional briefing on Alliance's outstanding fees, which would result in it incurring even more fees, the Court will estimate the amount incurred by Alliance in filing its two reply briefs,²⁹ which is the only work unaccounted for in the fee award.

Alliance spent 3.75 hours on its reply brief for its motion for summary judgment,³⁰ 3.25 hours on its reply brief for its motion for final judgment,³¹ approximately 2.0 hours on its reply brief for its original motion for attorney's fees,³² 11.5 hours on its reply brief for its motion for appellate attorney's fees³³ and

²⁹ (Rec. Docs. 129, 138).

³⁰ (Rec. Doc. 124-3, at 13).

³¹ *Id.* at 16-17.

³² *Id.* at 19.

³³ *Id.* at 32.

approximately 12 hours on its reply brief for the Jacobs Fee Motion.³⁴ Considering these amounts and the substance of the reply briefs, the Court concludes that 5 hours for Alliance’s reply to Coalition’s opposition and 2.5 hours for Alliance’s reply to Jacobs’s opposition is reasonable. *See SEC v. Faulkner*, No. 3:16-CV-1735-D, 2018 WL 5924042, at *3 (N.D. Tex. Nov. 13, 2018) (finding 14.1 hours for a single reply brief addressing a new, complex issue to be reasonable). Using Mr. Sahuc’s rate of \$225 per hour, the Court finds that Alliance should be awarded \$1,687.50 for this work.

Accordingly, Alliance’s total award for attorney’s fees is \$148,006.15. The Court concludes this amount is reasonable and does not require further adjustment.

C. Whether Coalition Is Entitled to an Offset

Coalition also contends that it is entitled to an offset of Alliance’s fee award for its own attorney’s fees based on it “prevailing” on both appeals and for opposing the instant motion. To be entitled to attorney’s fees under the Lanham Act, Coalition must demonstrate that its “case ‘stands out from others with respect to the substantive strength of a party’s litigating position (considering both the governing law and the facts of the case) or the unreasonable manner in which the case was litigated.’” *Alliance II*, 919 F.3d at 295

³⁴ *Id.* at 33.

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(citation omitted). Coalition has made no such showing. Accordingly, it is not entitled to an offset.³⁵

CONCLUSION

Accordingly,

IT IS HEREBY ORDERED that Alliance's *Motion for Attorney's Fees (Rec. Doc. 124)* is **GRANTED**, and Alliance is awarded \$148,006.15 in attorney's fees.

New Orleans, Louisiana, this 30th day of March, 2020.

/s/ Carl J. Barbier

CARL J. BARBIER
UNITED STATES
DISTRICT JUDGE

³⁵ The Court also notes that Coalition previously requested these fees in a separate motion (Rec. Doc. 120), which the Court denied (Rec. Doc. 122).

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ALLIANCE FOR GOOD
GOVERNMENT

CIVIL ACTION

VERSUS

No. 17-3679

COALITION FOR BETTER
GOVERNMENT

SECTION: "J"(2)

ORDER

(Filed Aug. 30, 2019)

Before the Court is a *Motion for Attorney Fees* (**Rec. Doc. 124**) filed by Plaintiff Alliance for Good Government ("Alliance"). Alliance seeks to join Darlene Jacobs, president, director, and lead counsel for Defendant Coalition for Better Government ("Coalition"), in order to hold her personally liable for any attorney's fees owed by Coalition to Alliance. Alliance contends that joinder of Ms. Jacobs is necessary because she "runs Coalition as an empty shell with no bank account or assets of any kind" and has employed a "litigation strategy designed to bankrupt Alliance even if it prevailed."¹ In support of its position, Alliance relies on *Iris Connex, LLC v. Dell, Inc.*, 235 F. Supp. 3d 826, 843 (E.D. Tex. 2017), in which the district court found that liability under the Patent Act² could be assessed

¹ (Rec. Doc. 124-1, at 15-16).

² The Fifth Circuit has recognized that cases interpreting the fee-shifting provision of the Patent Act are instructive in cases applying the fee-shifting provision of the Lanham Act. *See Baker v. DeShong*, 821 F.3d 620, 623 & n.1 (5th Cir. 2016).

against non-parties where “(1) the actor is responsible for conduct that makes the case exceptional, (2) the actor is afforded due process, and (3) it is equitable to do so.”

In *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 463–64 (2000), after the district court dismissed the plaintiffs patent infringement complaint, granted defendant’s motion for attorney’s fees, and set the amount of the fee award, the defendant moved to amend its pleadings to add the plaintiff’s president and sole shareholder as a party from whom fees could be collected. The defendant simultaneously sought to amend the attorney’s fee judgment to impose liability on the shareholder, which the district court granted. *Id.* at 464. The Court of Appeals affirmed the amended judgment. *Id.*

The Supreme Court reversed, holding that the shareholder’s right to due process had been violated because he “was never afforded a proper opportunity to respond to the claim against him.” *Id.* at 468. The Court noted that the shareholder was never served with the amended pleading naming him as a party, nor was he afforded the time allowed to respond to an amended pleading by Rule 15. *Id.* at 466. The Court concluded that, even though there was “sufficient identity between” the shareholder and the defendant, the shareholder’s conduct was responsible for making the case exceptional, and the shareholder had actual notice that the defendant was seeking attorney’s fees from the plaintiff corporation, the district court was required to afford the shareholder an “actual opportunity

to defend” against the claims against him. *Id.* at 470–71.

The *Iris Connex* court distinguished *Nelson* because it found the due process concerns raised in *Nelson* sufficiently addressed. 235 F. Supp. 3d at 843 n.5. Specifically, the *Iris Connex* court had *sua sponte* joined the non-party, allowed additional time for briefing, and held a live hearing in which the former non-party had an opportunity to testify before awarding attorney’s fees and imposing personal liability. *Id.* at 839–40. Notably, all of this had been done after the court granted summary judgment on the substantive claims. *Id.* at 832–33.

In light of the foregoing, the Court concludes that Ms. Jacobs must be given an opportunity to respond to Alliance’s motion. *See Nelson*, 529 U.S. at 471–72.

CONCLUSION

Accordingly,

IT IS HEREBY ORDERED that Darlene Jacobs is **JOINED** as a party to these proceedings. Alliance shall serve a copy of this order, the instant motion, and all responses to the motion on Ms. Jacobs, Ms. Jacobs shall have 14 days from service to respond to Alliance’s motion.

IT IS FURTHER ORDERED that no further briefing shall be submitted without leave of the Court.

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New Orleans, Louisiana, this 30th day of August,
2019.

/s/ Carl L. Barbier

CARL J. BARBIER
UNITED STATES
DISTRICT JUDGE

App. 71

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-30759

D.C. Docket No. 2:17-CV-3679

ALLIANCE FOR GOOD GOVERNMENT,

Plaintiff - Appellee

v.

COALITION FOR BETTER GOVERNMENT,

Defendant - Appellant

Appeals from the United States District Court for the
Eastern District of Louisiana

Before HIGGINBOTHAM, SMITH, and HIGGINSON,
Circuit Judges.

JUDGMENT

(Filed Mar. 21, 2019)

This cause was considered on the record on appeal
and was argued by counsel.

It is ordered and adjudged that the judgment of
the District Court is affirmed in part, vacated in part
and remanded in part to the District Court for fur-
ther proceedings in accordance with the opinion of
this Court.

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IT IS FURTHER ORDERED that each party bear
its own costs on appeal.

App. 73

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 18-30759

ALLIANCE FOR GOOD GOVERNMENT,
Plaintiff - Appellee

v.

COALITION FOR BETTER GOVERNMENT,
Defendant - Appellant

Appeals from the United States District Court
for the Eastern District of Louisiana

(Filed Mar. 21, 2019)

Before HIGGINBOTHAM, SMITH, and HIGGINSON,
Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

The district court granted Alliance for Good Government summary judgment on its trademark infringement claim against Coalition for Better Government, enjoined Coalition from the use of both its logo and its trade name, and then awarded Alliance attorney's fees incurred in bringing the lawsuit. It did not abuse its discretion in finding that Alliance is entitled to fees, and so we affirm that portion of its order. Because we

have since modified the district court's injunction to permit Coalition to use its trade name, however, we remand for the district court to reassess the amount of fees.

I

Our earlier opinion describes this case's background.¹ In short, Alliance and Coalition are both non-profit organizations that endorse political candidates in New Orleans. Alliance began using a logo featuring a bird with wings outstretched in the late 1960s; Coalition began using a similar logo in the 1980s or 1990s, then changed its logo in 2008 to be virtually identical to Alliance's.² Below are the Alliance and post-2008 Coalition logos:



Alliance sued Coalition for trademark infringement in Louisiana court in 2008, then voluntarily dismissed its suit, believing Coalition had ceased using the logo to endorse candidates.³ When Coalition resumed

¹ See *All. for Good Gov't v. Coal. for Better Gov't (Alliance I)*, 901 F.3d 498 (5th Cir. 2018).

² *Id.* at 503. In 2013, Alliance registered both the trade name "Alliance for Good Government" and its logo with the U.S. Patent and Trademark Office. *Id.*

³ See *id.* at 504.

the use of its logo in 2016, Alliance sued Coalition in the Eastern District of Louisiana, claiming federal and state trademark infringement and unfair trade practices.⁴ It argued that both Coalition’s “word mark”—its trade name, “Coalition for Better Government”—and its “composite mark”—its logo—infringed Alliance’s marks. The district court granted Alliance’s motion for partial summary judgment, enjoining Coalition from using both its name and logo.⁵ Alliance voluntarily dismissed its other claims.

Coalition appealed the summary judgment. While the appeal was pending, Alliance moved for attorney’s fees under the Lanham Act. The district court awarded Alliance everything it requested—\$68,237.25 in fees, encompassing fees already incurred and projected fees from replying to Coalition’s opposition to the fees motion. Coalition separately appealed the fee award.⁶

⁴ *See id.*

⁵ The parties had cross-moved for summary judgment: Coalition argued that Alliance’s suit was barred by laches, while Alliance argued that it was entitled to partial summary judgment on its federal trademark infringement claim. While Coalition had initially asserted twelve affirmative defenses in its Answer, its motion for summary judgment and opposition to Alliance’s motion focused on laches. Coalition also averred that there was no likelihood of confusion between the marks as a matter of law and that Alliance had fraudulently obtained its federal trademark registration. Along with granting Alliance’s motion for partial summary judgment, the district court granted Alliance’s separate motion to dismiss Coalition’s counterclaims, including the fraudulent-registration claim.

⁶ The notice of appeal of the fee order was filed approximately two weeks before oral argument in the summary judgment

During briefing in this fees appeal, we affirmed Alliance’s entitlement to summary judgment on its claim that Coalition’s logo infringed its composite mark.⁷ We concluded that based on the summary judgment record, however, Coalition’s trade name did not by itself generate a likelihood of confusion with Alliance’s “differently-worded” trade name.⁸ We therefore modified the district court’s injunction to permit Coalition to continue using its name.

II

The Lanham Act authorizes the award of “reasonable attorney fees to the prevailing party” in “exceptional cases.”⁹ In *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, the Supreme Court established that an “exceptional” case meriting fees under the Patent Act does not require a prevailing party to demonstrate bad faith.¹⁰ Rather, a party seeking fees under the Patent Act must demonstrate that the case “stands out from others with respect to the substantive strength of a

appeal, and we denied Alliance’s emergency motion to consolidate the appeals, explaining that either party could seek a stay of the fees appeal if it believed that unnecessary resources would be expended in the fees appeal during the pendency of the summary judgment appeal.

⁷ *Alliance I*, 901 F.3d at 513.

⁸ *Id.* at 513–14. We observed that our decision was based purely on the summary judgment record and was without prejudice to Alliance’s opposition to Coalition’s pending application to register its name with the USPTO. *Id.* at 513 n.15.

⁹ 15 U.S.C. § 1117(a).

¹⁰ 572 U.S. 545, 555 (2014).

party's litigating position (considering both the governing law and the facts of the case) or the unreasonable manner in which the case was litigated.”¹¹ Recognizing that the Lanham Act's fee-shifting provision is identical to the Patent Act's, we have extended *Octane Fitness*'s disjunctive standard for “exceptional” cases to claims for fees brought under the Lanham Act.¹²

Before *Octane Fitness*, we “review[ed] the district court's determination as to whether a case is ‘exceptional’ under § 1117(a) for clear error, but . . . review[ed] the . . . ultimate decision [on] attorney's fees for an abuse of discretion.”¹³ The same day *Octane Fitness* was decided, the Supreme Court recognized that because *Octane Fitness* commits the determination about whether a case is “exceptional” to the district court's discretion, “an appellate court should review *all* aspects of a district court's [fees determination under the Patent Act] for abuse of discretion.”¹⁴ Since the Lanham Act's fee-shifting provision is identical to the Patent Act's—as we recognized in *Baker*—we conclude that this same standard of review applies to district court fee determinations under the Lanham Act. We will therefore review all aspects of the district court's

¹¹ *Id.* at 554.

¹² *Baker v. DeShong*, 821 F.3d 620, 622–25 (5th Cir. 2016); see also *Octane Fitness*, 572 U.S. at 554 (observing that the two provisions are identical).

¹³ *E.g.*, *Nat'l Bus. Forms & Printing, Inc. v. Ford Motor Co.*, 671 F.3d 526, 537 (5th Cir. 2012).

¹⁴ *Highmark, Inc. v. Allcare Health Mgmt. Sys., Inc.*, 572 U.S. 559, 561 (2014) (emphasis added).

fee determination, including its conclusion that this was an “exceptional” case, for abuse of discretion.¹⁵

III

As we have explained, a fee award may be warranted either where the prevailing party stood out in terms of the strength of its litigating position or where the non-prevailing party litigated the case in an “unreasonable manner.” The district court found that both grounds justified an award of fees to Alliance. We conclude that with respect to Alliance’s claim that Coalition’s logo infringed Alliance’s composite mark, the district court did not abuse its discretion in concluding that this was an “exceptional” case warranting fees.¹⁶

A

The district court first found that the case stood out due to the strength of Alliance’s litigating position:

¹⁵ Two circuits have already extended *Highmark*’s articulation of the proper standard of review to the review of fee awards under the Lanham Act. See *Romag Fasteners, Inc. v. Fossil, Inc.*, 866 F.3d 1330, 1334 (Fed. Cir. 2017); *SunEarth, Inc. v. Sun Earth Solar Power Co., Ltd.*, 839 F.3d 1179, 1181 (9th Cir. 2016) (en banc).

¹⁶ Coalition does not directly contest that Alliance is a prevailing party, nor can it. We have recognized that in the Lanham Act context, a prevailing party is “a party in whose favor judgment is rendered” or “one who has been awarded some relief by the court.” *Kiva Kitchen & Bath Inc. v. Capital Distrib., Inc.*, 319 F. App’x 316, 322 (5th Cir. 2009). Alliance has received a judgment in its favor and relief in the form of an injunction prohibiting Coalition from using its logo, and therefore is a prevailing party potentially entitled to fees. We will later address the relevance of the fact that Alliance did not prevail on *all* aspects of the relief it sought.

Alliance adopted its logo at least 15 years before Coalition began using its similar logo; Alliance's composite mark was strong; the marks were very similar; and both parties provided the same "product," used the same advertising channels, and targeted the same "customers." In sum, "[t]he likelihood of confusion [was] so great that it would appear that customer confusion was Coalition's motivation for adopting the Coalition Mark." Further, Coalition presented meritless defenses at the summary judgment stage: a lathes argument that was not supported by "any credible evidence," as well as the bare assertion that the composite marks were different because one depicted an eagle while the other depicted a hawk.

We find no abuse of discretion in the district court's conclusion that Alliance had an exceptionally strong infringement claim. Indeed, many of the district court's observations also underpinned our decision to affirm the grant of summary judgment to Alliance.¹⁷ While Coalition attempts to repackage several of the defenses it raised to summary judgment as reasons why this case is not "exceptional" under the Lanham Act, we have already concluded that those arguments

¹⁷ For example, we were not just struck by the fact that Alliance and Coalition "*have the same logo*"—we also flatly rejected Coalition's attempt to "distinguish the two logos[] not by appearance, design, color, or font[,] but by the birds' *species*." See *Alliance I*, 901 F.3d at 511. Ultimately, we "agree[d] with the district court: the birds are identical. Whether that bird is a *haliaeetus leucocephalus* (bald eagle), a *buteo jamaicensis* (red-tailed hawk), or some other bird, we need not determine." *Id.* at 512.

were either waived in the district court or plainly meritless or both.¹⁸

B

The district court also determined that this case was exceptional because Coalition litigated it in an unreasonable manner. Coalition behaved unreasonably at several points during the litigation, filing an unsupported laches defense;¹⁹ a “counterclaim without any actionable conduct”; and a meritless motion to dismiss that was rendered moot by a summary judgment motion filed two weeks later.²⁰ The district court also found that Coalition’s behavior during discovery was unreasonable, especially its refusal to postpone

¹⁸ See *id.* at 505–06 (finding that Coalition waived its arguments about political speech and non-engagement in commerce by failing to press them before the district court); *id.* at 507 n.9 (finding that Coalition’s counterclaim that Alliance fraudulently obtained its trademark registration was both waived and “easily resolved”); *id.* at 512–13 (agreeing with the district court that “while there was no evidence of ‘actual intent to infringe’ . . . [the only plausible explanation for the marks’ similarity was] Coalition’s intent to benefit from Alliance’s pre-existing reputation”).

¹⁹ Specifically, Coalition was unable to point to any evidence beyond a bare-bones affidavit to show that Coalition used its logo to endorse candidates *between 2010 and 2016*—a critical aspect of its laches defense.

²⁰ While Coalition points out that Alliance also filed a motion to dismiss alongside its motion for summary judgment, it fails to acknowledge the difference in context. Alliance filed a motion to dismiss Coalition’s *counterclaims* for failure to state a claim after moving for partial summary judgment on its own federal trademark infringement claim.

depositions after the district court ruled on the parties' cross-motions for summary judgment.

Coalition urges that it was the unwilling defendant in a lawsuit initiated by Alliance. To the extent that Coalition argues that only prevailing *defendants* should be awarded fees under the Lanham Act, we cannot agree.²¹ The district court did not abuse its discretion in concluding that taken as a whole, Coalition's litigation conduct rendered this case exceptional.

C

We pause to address Coalition's argument that as a nonprofit entity engaged in political speech, its First Amendment rights are threatened by the imposition of attorney's fees. This is a variant of Coalition's earlier argument, made during the summary judgment appeal, that the First Amendment protected it from liability for trademark infringement. We declined to address this argument on the summary judgment appeal because "Coalition never developed the argument beyond [a cursory statement] and, by the time of the summary judgment proceedings, the issue had

²¹ This suggestion is both waived by Coalition's failure to argue it in its opening brief and contradicted by a wealth of cases granting fees to prevailing Lanham Act cases. See "Recovery of Attorney's Fees—Award to a Prevailing Plaintiff," 5 *McCarthy on Trademarks & Unfair Competition* § 30:100 (5th ed.) (collecting cases awarding fees to prevailing plaintiffs, including many decided even before *Octane Fitness* clarified that a prevailing plaintiff did not need to show willful infringement to recover fees under the Patent Act).

vanished.”²² Ultimately, we observed, “[t]he interplay between the Lanham Act and the First Amendment’s political and commercial speech doctrines raises a thicket of issues we decline to enter when the issues were not preserved or ruled on below.”²³ Here too, Coalition fleetingly raises the slightly different argument that a fees award might interfere with its First Amendment rights, but it did not so contend before the district court in its opposition to attorney’s fees, nor did it present a fully developed argument in its briefing on this appeal. We will not reach the issue.

IV

We have concluded that the district court did not abuse its discretion in finding Alliance to be entitled to attorney’s fees. We agree with Coalition, however, that the district court must reassess their amount given our decision to modify the district court’s injunction to allow Coalition to continue the use of its trade name.

When a party advances both Lanham Act and non-Lanham Act claims, a district court should make efforts to award fees only for successful Lanham Act claims.²⁴ This reflects “the background rule in America . . . [that] the prevailing party usually cannot recover fees absent statutory authority.”²⁵ The same apportionment principle should apply “when in one lawsuit some

²² *Alliance I*, 901 F.3d at 506.

²³ *Id.* at 506 n.8.

²⁴ *Procter & Gamble Co. v. Amway Corp.*, 280 F.3d 519, 527 (5th Cir. 2002).

²⁵ *Id.*

Lanham Act claims qualify for an attorney’s fee award and other Lanham Act claims do not.”²⁶

Here, Alliance prevailed on its claim that Coalition’s logo infringed Alliance’s composite mark—and, as we have explained, the district court did not abuse its discretion in holding that Alliance was entitled to fees on this claim. Alliance did not prevail, however, in its effort to enjoin Coalition from using the “Coalition for Better Government” designation.²⁷ Further, Alliance voluntarily dismissed its other counts after prevailing on the main trademark infringement claim; the district court’s fee award did not distinguish between time spent on the infringement claim and time Alliance’s attorneys spent—however limited—on these other counts. Alliance is only entitled to fees for work its attorneys performed on its claim that Coalition’s logo infringed its composite mark.

While Alliance’s composite-mark claim may be intertwined with its other claims to some extent,²⁸ “the

²⁶ See “Recovery of Attorney’s Fees—Apportionment Among Claims,” 5 *McCarthy on Trademarks & Unfair Competition* § 30:103; see also *Cairns v. Franklin Mint Co.*, 292 F.3d 1139, 1157–58 (9th Cir. 2002) (affirming a twenty-six-percent reduction in fees where the losing party brought some Lanham Act claims that merited fees alongside other claims that, although unsuccessful, were not groundless).

²⁷ While Alliance frequently referred to the marks collectively and addressed federal trademark infringement of both marks in a single count of its complaint, we analyzed the composite and word marks separately for the purposes of summary judgment.

²⁸ Cf. *Procter & Gamble*, 280 F.3d at 527 (explaining that where a party has brought both Lanham Act and non-Lanham

impossibility of making an *exact* apportionment does not relieve the district court of its duty to make *some* attempt to adjust the fee award in an effort to reflect an apportionment.”²⁹ We remand to the able district court to account for billed time for claims on which Alliance did not prevail, and to adjust the fee award accordingly.

V

We affirm the district court’s determination that Alliance is entitled to attorney’s fees, vacate the amount of fees awarded, and remand for the district court to assess the amount of the award of fees in light of this opinion.³⁰

Affirmed in part and remanded in part.

Act claims, “[a] court should permit recovery for work on non-Lanham Act claims only if ‘the Lanham Act and non-Lanham Act claims are so intertwined that it is *impossible to differentiate* between work done on claims’” (quoting *Gracie v. Gracie*, 217 F.3d 1060, 1069 (9th Cir. 2000)).

²⁹ *Gracie*, 217 F.3d at 1070.

³⁰ We do not address Coalition’s argument that the district court erred in denying its motion to strike, as Coalition failed to identify this as one of the issues presented for review and did not present legal authority to support its contention. *See, e.g., Procter & Gamble Co. v. Amway Corp.* 376 F.3d 496, 499 n.1 (5th Cir. 2004) (“Failure adequately to brief an issue on appeal constitutes waiver of that argument.”).

App. 85

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-30859

D.C. Docket No. 2:17-CV-3679

ALLIANCE FOR GOOD GOVERNMENT,

Plaintiff - Appellee

v.

COALITION FOR BETTER GOVERNMENT,

Defendant - Appellant

Appeal from the United States District Court for the
Eastern District of Louisiana

Before DAVIS, HAYNES, and DUNCAN, Circuit Judges.

JUDGMENT

(Filed Aug. 22, 2018)

This cause was considered on the record on appeal
and was argued by counsel.

It is ordered and adjudged that the judgment of
the District Court is affirmed as modified.

IT IS FURTHER ORDERED that defendant-ap-
pellant pay to plaintiff-appellee the costs on appeal to
be taxed by the Clerk of this Court.

App. 86

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 17-30859

ALLIANCE FOR GOOD GOVERNMENT,
Plaintiff - Appellee

v.

COALITION FOR BETTER GOVERNMENT,
Defendant - Appellant

Appeal from the United States District Court
for the Eastern District of Louisiana

(Filed Aug. 22, 2018)

Before DAVIS, HAYNES, and DUNCAN, Circuit Judges.
STUART KYLE DUNCAN, Circuit Judge:

This federal trademark infringement action involves a dispute between two civic organizations over their logos:



The older organization, Alliance for Good Government, developed its logo in the late 1960s and has used it for

fifty years in advertisements and sample ballots to promote political candidates in New Orleans and throughout Louisiana. The younger organization, Coalition for Better Government, developed its logo more recently (in the early 1980s or 1990s) and has also used it in sample ballots to promote political candidates in New Orleans. While the groups have locked talons before, the present appeal arises out of Alliance’s 2017 lawsuit seeking to enjoin Coalition’s use of its logo for federal trademark infringement under the Lanham Act. The district court granted Alliance summary judgment, finding that Coalition’s logo infringed Alliance’s marks as a matter of law, and enjoined Coalition from using both its name and logo in political advertisements. Coalition appeals that ruling.

On appeal, Coalition raises broad threshold questions concerning the applicability of the Lanham Act to what it characterizes as its political, noncommercial speech. We decline to address those questions, because Coalition failed to properly raise them below and the district court never reached them. Coalition also attacks the summary judgment, claiming that fact issues remain as to whether Alliance’s marks are valid and whether Coalition’s logo would likely create confusion with Alliance’s. On the latter point, Coalition’s most curious argument—urged below and renewed on appeal—is that the logos are different because its logo features a *hawk* while Alliance’s features an *eagle*. We conclude the district court did not err in deciding the birds are identical.

Reviewing the summary judgment ruling *de novo*, we conclude that the evidence establishes without dispute that Alliance’s logo is a valid composite mark and that the use of Coalition’s logo infringes Alliance’s composite mark as a matter of law. We modify the district court’s injunction in one respect, however. By its terms, the injunction restrains Coalition from using its *name* as well as its logo. We find that aspect of the injunction overbroad and therefore modify it to restrain Coalition’s use of its logo only.

Accordingly, we AFFIRM the district court’s summary judgment ruling, but MODIFY the injunction to restrain only the use of Coalition’s logo.

I.

A.

Alliance for Good Government (“Alliance”) is a non-profit civic organization formed in 1967 to promote “honest and open government.” Alliance’s founding chapter is in Orleans Parish, but it operates both in New Orleans and throughout Louisiana. The organization hosts political forums, endorses candidates, and participates in campaigns through advertising. It also distributes and publishes sample ballots featuring endorsed candidates.

Alliance ballots dating back to 1969 feature the same logo it continues to use today—a design with the organization’s name in blue type on a rectangular white background arranged around a stylized bird.

Alliance considers its bird to be an eagle. In 2013, Alliance registered its service marks¹ with the United States Patent and Trademark Office (“PTO”): the word mark “Alliance for Good Government,” and the composite mark consisting of the entire logo.²

Coalition for Better Government (“Coalition”) is a non-profit civic organization formed in New Orleans in 1982 to endorse political candidates. Coalition operates mainly in New Orleans and promotes preferred candidates by advertising sample ballots in New Orleans newspapers. Coalition and Alliance sometimes endorse the same, or opposing, candidates: candidates

¹ A “service mark” means “any word, name, symbol, or device, or any combination thereof used by a person . . . to identify and distinguish the services of one person . . . from the services of others and to indicate the source of the services, even if that source is unknown.” 15 U.S.C. § 1127. A “word mark” refers to a mark comprised only of words, while a “design mark” refers to a mark comprised of symbols. *See, e.g., Nola Spice Designs, LLC v. Haydel Enters., Inc.*, 783 F.3d 527, 537, 540 (5th Cir. 2015). A “composite mark” refers to a mark “containing both words and symbols in a distinct manner.” *Igloo Prods. Corp. v. Brantex, Inc.*, 202 F.3d 814, 815 (5th Cir. 2000); *see also* 4 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 23:47 (5th ed. 2018) (“McCarthy”) (discussing comparison of “composite marks involving both designs and words”).

² Specifically, Alliance registered its word mark as No. 4,330,957 on May 7, 2013. This mark is for the name “Alliance for Good Government” in “standard characters without claim to any particular font, style, size, or color.” Alliance registered its composite mark as No. 4,349,156 on June 11, 2013. This mark is described as follows: “[A] bold line drawing of an eagle with outstretched wings with head facing left. Above the image is the word ‘Alliance’ and below the eagle are the words ‘good government’ and on the next line is ‘since 1967.’”

endorsed by each have run in the same election at least twice.

Coalition also has a logo, which it uses in sample ballots dating back to at least 1992 (possibly the early 1980s). Coalition's logo features its name in white type on a rectangular blue background arranged around a stylized bird. Coalition's bird appears identical to Alliance's, but Coalition believes the birds are different types: Coalition considers its bird to be a hawk, not an eagle.³

Because pictures are worth a thousand words, here are the logos again:



B.

Alliance first sued Coalition for trademark infringement in 2008 in Louisiana state court. After skirmishing over venue, Alliance moved to dismiss its suit when it believed Coalition had stopped activity and ceased use of the Coalition logo. But in 2016 Coalition

³ The record reflects that Coalition has used at least two slightly different bird designs in its logos. The bird on Coalition's 1992 ballot looks modestly different from the bird on its post-2008 ballots. But because Alliance challenges the use of Coalition's logo only from 2008 forward, we need not address whether Coalition's 1992 logo infringed Alliance's mark.

resumed using its logo to endorse political candidates. Indeed, in the primary elections for Louisiana district judges on March 25, 2017, Alliance and Coalition endorsed opposing candidates. That same month Coalition filed two applications with the PTO to register its name and logo, which Alliance opposed.⁴

In April 2017, Alliance sued Coalition in federal court claiming federal trademark infringement under 15 U.S.C. § 1114, as well as various other federal and state trademark and unfair trade practice claims. Coalition counterclaimed for, *inter alia*, fraudulent trademark procurement under 15 U.S.C. § 1120. In August 2017 Coalition moved for summary judgment arguing Alliance's suit was barred by laches, and that same month Alliance moved for partial summary judgment solely on federal trademark infringement. The district court held a hearing on the cross-motions. Ruling from the bench, the court denied Coalition's motion for summary judgment on laches and granted Alliance's motion for partial summary judgment on federal trademark infringement. Alliance voluntarily dismissed its remaining claims. Subsequently, the district

⁴ Coalition's word mark application, dated March 17, 2017, seeks to register the name "Coalition for Better Government" in "standard characters, without claim to any particular font style, size, or color." Coalition's composite mark application, also dated March 17, 2017, seeks to register its logo, described as "white letters spelling the words 'Coalition For Better Government' with a drawing of a hawk." Attached to the application are Coalition's present logo (the subject of this suit) and the 1992 version. The parties inform us that the PTO has stayed Alliance's opposition proceeding pending the outcome of this suit.

court issued an order permanently enjoining Coalition from using both its name and logo. Coalition timely appealed the district court's trademark infringement ruling and injunction.⁵

II.

We review a grant of summary judgment *de novo*, applying the same standard as the district court. *Smith v. Reg'l Transit Auth.*, 827 F.3d 412, 417 (5th Cir. 2016). Summary judgment is proper where the pleadings and record materials show no genuine dispute as to any material fact, entitling the movant to judgment as a matter of law. FED. R. CIV. P. 56(a). If the moving party initially shows the non-movant's case lacks support, "the non-movant must come forward with 'specific facts' showing a genuine factual issue for trial." *TIG Ins. Co. v. Sedgwick James*, 276 F.3d 754, 759 (5th Cir. 2002). We must view the evidence in the light most favorable to the non-moving party, drawing all justifiable inferences in the non-movant's favor. *Env'tl. Conservation Org. v. City of Dallas*, 529 F.3d 519, 524 (5th Cir. 2008).

III.

To prevail on a claim of federal trademark infringement under the Lanham Act, 15 U.S.C. § 1051 *et seq.*, a plaintiff must show (1) ownership of a legally

⁵ Coalition raises no argument on appeal concerning the district court's laches ruling, and consequently the issue is not before us.

protectable mark and (2) a likelihood of confusion created by an infringing mark. *Nola Spice Designs, LLC v. Haydel Enters., Inc.*, 783 F.3d 527, 536 (5th Cir. 2015); *Am. Rice, Inc. v. Producers Rice Mill, Inc.*, 518 F.3d 321, 329 (5th Cir. 2008).⁶ On appeal, Coalition first argues that the Lanham Act cannot apply to its marks because Coalition engages only in “political speech” and does not engage in “commerce or the sale of goods.” Coalition failed to raise these arguments below, however, and we decline to address them. Second, Coalition attacks the district court’s summary judgment grant, arguing that the court erred in ruling that Alliance had a valid mark and that Alliance proved Coalition’s marks created a likelihood of confusion. We affirm the district court’s ruling and injunction as to Coalition’s logo but modify the injunction as to Coalition’s name.

A.

As a threshold matter, Coalition argues that the Lanham Act cannot apply to its marks because Coalition engages only in “political speech” and is a non-profit entity not “engaged in commerce or the sale of goods.” Coalition failed to properly raise these

⁶ The Lanham Act provides in relevant part that a person “shall be liable in a civil action” by the registrant of a mark if the person, without the registrant’s consent, “use[s] in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive[.]” 15 U.S.C. § 1114(1)(a).

arguments in the district court. To preserve either issue for appeal, Coalition had to “‘press and not merely intimate the argument during the proceedings before the district court . . . to such a degree that the district court ha[d] an opportunity to rule on it.’” *Keelan v. Majesco Software, Inc.*, 407 F.3d 332, 340 (5th Cir. 2005) (quoting *N.Y. Life Ins. Co. v. Brown*, 84 F.3d 137, 141 n.4 (5th Cir. 1996)) (brackets added). Coalition did not do so and we therefore decline to reach the arguments. *See, e.g., Reyes v. Manor Indep. Sch. Dist.*, 850 F.3d 251 (5th Cir. 2017) (“We do not consider issues brought for the first time on appeal.”).

During summary judgment proceedings, Coalition (1) raised the defense of laches, (2) urged the invalidity of Alliance’s marks due to fraud and lack of distinctiveness, and (3) argued that fact issues precluded summary judgment on likelihood of confusion. Nowhere in those proceedings did Coalition brief or articulate—much less “press”—the argument that its political or non-profit nature insulates it from Alliance’s trademark infringement claims. Because Coalition said nothing about those issues, the district court’s ruling understandably did not address them. “If a party fails to assert a legal reason why summary judgment should not be granted, that ground is waived and cannot be considered or raised on appeal.” *Keelan*, 407 F.3d at 339-40 (quoting *Keenan v. Tejada*, 290 F.3d 252, 262 (5th Cir. 2002)).

To be sure, Coalition’s answer to Alliance’s complaint raised—among thirteen affirmative defenses—the

defense that “its actions constitute purely non-commercial and political free speech.”⁷ But Coalition never developed the argument beyond that cursory statement and, by the time of the summary judgment proceedings, the issue had vanished. The argument is thus waived. *See, e.g., Keenan*, 290 F.3d at 262 (explaining that “[e]ven an issue raised in the complaint but ignored at summary judgment may be deemed waived”) (quoting *Grenier v. Cyanamid Plastics, Inc.*, 70 F.3d 667, 678 (1st Cir. 1995)); *see also Frank C. Bailey Enters., Inc. v. Cargill, Inc.*, 582 F.2d 333, 334 (5th Cir. 1978) (holding that “an appellate court, in reviewing a summary judgment order, can only consider those matters presented to the district court”).⁸

⁷ Coalition’s motion to dismiss also stated it engages in “political free speech,” without ever making, briefing, or otherwise developing a distinct First Amendment claim.

⁸ The interplay between the Lanham Act and the First Amendment’s political and commercial speech doctrines raises a thicket of issues we decline to enter when the issues were not preserved or ruled on below. *See, e.g., Radianc Found., Inc. v. NAACP*, 786 F.3d 316 (4th Cir. 2015) (observing “[a]t least five of our sister circuits”—the D.C., 10th, 9th, 6th, and 8th—“have interpreted [‘in connection with the sale . . . or advertising of any goods or services’ in 15 U.S.C. § 1114(1)(a) of the Lanham Act] as protecting from liability all noncommercial uses of marks”); *id.* at 323-24 (adopting commercial speech doctrine as “guidance” in applying Lanham Act’s “in connection” requirement); *but see United We Stand Am., Inc. v. United We Stand Am. N.Y., Inc.*, 128 F.3d 86, 90 (2nd Cir. 1997) (observing “[t]he Lanham Act has . . . been applied to defendants furnishing a wide variety of non-commercial public and civic benefits” and concluding that “[a] political organization that . . . endorses candidates under a trade name” satisfies the “in connection” requirement). This Court does not appear to have spoken directly on this debate but has held that

B.

We proceed to Alliance’s federal trademark infringement claim. The district court granted Alliance summary judgment, finding the evidence undisputed that Alliance’s marks are legally protectable and that Coalition’s use of its marks creates a likelihood of confusion with Alliance’s. Unless otherwise indicated, the following discussion in parts B.1 and B.2 focuses on Alliance and Coalition’s *logos*. We separately address the district court’s injunction as to Coalition’s *name* in part C, *infra*.

1.

On appeal, Coalition disputes the district court’s conclusion that Alliance’s composite mark is legally protectable. “To be protectable, a mark must be distinctive, either inherently or by achieving secondary meaning in the mind of the public.” *Am. Rice*, 518 F.3d at 329 (citations omitted). We reject Coalition’s arguments.

First, Coalition claims summary judgment was improper on this point because fact issues exist as to

a different section of the Lanham Act, 15 U.S.C. § 1125(a), encompasses only “commercial advertising or promotion.” *Seven-Up Co. v. Coca-Cola Co.*, 86 F.3d 1379, 1382-83 (5th Cir. 1996); *see also TMI Inc. v. Maxwell*, 368 F.3d 433, 436 n.2 (5th Cir. 2004) (stating that “[t]his Court has previously determined that § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a)(1), which addresses false and misleading descriptions, only applies to commercial speech”) (citing *Procter & Gamble Co. v. Amway Corp.*, 242 F.3d 539, 547 (5th Cir. 2001), *abrogated on other grounds by Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 134-37 (2014)).

whether Alliance obtained its mark “by a false or fraudulent declaration” under 15 U.S.C. § 1120. Even assuming this argument is pertinent here,⁹ it fails. Coalition’s only evidence is Alliance’s 2012 PTO declaration stating that, to the best of Alliance’s knowledge, “no other person has the right to use such mark in commerce either in the identical form thereof or in such near resemblance thereto as to be likely . . . to cause confusion[.]” See 15 U.S.C. § 1051(b)(3)(D) (requiring this verification with trademark application). Coalition suggests this declaration was fraudulent because, in 2012, Alliance was “fully aware” Coalition was using its own mark. But Coalition misreads the declaration, which states only that Alliance believed in 2012 that no one else had the “right” to use its mark or any confusingly-similar mark. The record is undisputed that Alliance believed it had the exclusive right to use its marks in 2012—otherwise, why would Alliance have

⁹ Coalition points to no authority suggesting that whether a mark was fraudulently obtained under 15 U.S.C. § 1120 is relevant to whether a mark is “distinctive,” the touchstone for validity in a section 1114 infringement claim. See *Nola Spice*, 783 F.3d at 537 (citing *Wal-Mart Stores, Inc. v. Samara Bros.*, 529 U.S. 205, 210-11 (2000)). Even if it were, however, we note that Coalition raised fraudulent procurement under § 1120 in a separate counterclaim that was dismissed by the district court. Coalition’s appellate briefing neither mentions this ruling nor explains why it was incorrect, thus abandoning the issue. *Yohey v. Collins*, 985 F.2d 222, 224-25 (5th Cir. 1993); FED. R. APP. P. 28(a)(4). Consequently, we doubt that Coalition’s fraud claim is pertinent to the distinctiveness of Alliance’s mark, and we also doubt the issue is properly before us. Nonetheless, we reach the issue because Coalition raised it in opposing summary judgment and because it is easily resolved.

sued in 2008 to stop Coalition from using its marks? The 2012 declaration does not remotely create a fact issue as to whether Alliance obtained its mark by fraud. *See, e.g., Meineke Disc. Muffler v. Jaynes*, 999 F.2d 120, 126 (5th Cir. 1993) (explaining that a fraudulent registration claim requires proof “by clear and convincing evidence that the applicant made false statements with the intent to deceive the licensing authorities”).

Second, Coalition argues that Alliance offered no evidence that its mark was distinctive, and therefore legally protectable, and that fact issues persist on that issue. We disagree. Among other evidence, Alliance offered undisputed evidence that it registered both of its marks with the PTO in 2013—its word mark on May 7, 2013, and its composite mark on June 11, 2013. The registration of Alliance’s composite mark with the PTO “is prima facie evidence that the mark[] [is] inherently distinctive.” *Nola Spice*, 783 F.3d at 537 (citing *Amazing Spaces, Inc. v. Metro Mini Storage*, 608 F.3d 225, 237 (5th Cir. 2010); 15 U.S.C. § 1057(b)).¹⁰ To be sure,

¹⁰ Unlike its composite mark, Alliance’s word mark was registered under section 2(f) of the Lanham Act, which allows registration based on evidence that the mark has “become distinctive” based on “proof of substantially exclusive and continuous use thereof as a mark by the applicant in commerce for five years before the date on which the claim of distinctiveness is made.” 15 U.S.C. § 1052(f); *see also, e.g., Lovely Skin, Inc. v. Ishtar Skin Care Prods., Inc.*, 745 F.3d 877, 882 (8th Cir. 2014). “[T]he presumption of validity that attaches to a § 2(f) registration includes a presumption that the registered mark has acquired distinctiveness, or secondary meaning, at the time of its registration.” *Id.* at 882-83 (citations omitted). While this presumption differs from

Coalition could have offered evidence “to overcome the presumption of inherent distinctiveness that accompanies [Alliance’s] registration[.]” *Nola Spice*, 783 F.3d at 542 (citing *Amazing Spaces*, 608 F.3d at 234). But Coalition offered no evidence concerning the inherent distinctiveness of Alliance’s composite mark; rather, it offered evidence concerning Alliance’s word mark only (specifically, evidence of similarly-named organizations outside Louisiana). Such evidence has nothing to do with the central inquiry governing the inherent distinctiveness of Alliance’s composite mark—namely, whether the mark’s “design, shape or combination of elements is so unique, unusual or unexpected in this market that one can assume without proof that it will automatically be perceived by customers as an indicator of [the] origin” of Alliance’s services, and whether Alliance’s logo “was capable of creating a commercial impression distinct from the accompanying words.” *Nola Spice*, 783 F.3d at 541 (quoting *Amazing Spaces*, 608 F.3d at 232, 243-44) (internal quotation marks omitted); see also *Seabrook Foods, Inc. v. Bar-Well Foods, Ltd.*, 568 F.2d 1342, 1344 (C.C.P.A. 1977) (setting forth analysis governing inherent distinctiveness

the presumption of inherent distinctiveness enjoyed by Alliance’s composite mark, see, e.g., *Nola Spice*, 783 F.3d at 537 n.1, here we consider only Alliance’s composite mark. See, e.g., *Igloo Prods. Corp.*, 202 F.3d at 817 (explaining that the prima facie presumption arising from a composite mark’s registration “pertains to the whole mark . . . rather than to any individual portion of the mark”) (citing *In re Nat’l Data Corp.*, 753 F.2d 1056, 1059 (Fed. Cir. 1985); *In re Bose Corp.*, 772 F.2d 866, 873 (Fed. Cir. 1985)) (emphasis in original).

of design marks).¹¹ Consequently, Coalition failed to rebut the presumption that Alliance’s composite mark was inherently distinctive and therefore legally protectable. The district court properly granted summary judgment on this point.

2.

Coalition also contests the summary judgment ruling that Coalition’s use of its logo created a likelihood of confusion with Alliance’s composite mark.

To prove infringement, a plaintiff “must show that the defendant’s use of the mark ‘creates a likelihood of confusion in the minds of potential customers as to the “source, affiliation, or sponsorship”’” of the product or service at issue. *Bd. of Supervisors for La. State Univ. Agric. & Mech. College v. Smack Apparel Co.*, 550 F.3d 465, 478 (5th Cir. 2008) (quoting *Westchester Media v.*

¹¹ Alliance also argues on appeal that the unrebutted evidence showed its marks have achieved secondary meaning—such as evidence that Alliance has continuously used its marks for nearly fifty years in connection with hundreds of Louisiana elections in a variety of advertising media. *See also, e.g., Alliance for Good Gov’t, Inc. v. St. Bernard Alliance for Good Gov’t, Inc.*, No. 96-CA-0635, at *6 (La. App. 4th Cir. 12/18/96); 686 So.2d 83, 86 (holding that, for purposes of Louisiana trademark law, the name “Alliance for Good Government” has acquired secondary meaning “[g]iven the length of time that [Alliance] has been in existence” and given that “there is obviously a great amount of name recognition and/or goodwill associated with the name ‘Alliance for Good Government’”). We need not reach the issue of secondary meaning, however, given the unrebutted presumption of distinctiveness attaching to Alliance’s mark by virtue of its PTO registration.

PRL USA Holdings, Inc., 214 F.3d 658, 663 (5th Cir. 2000)). The required showing is a “probability” of confusion, not merely a “possibility.” *Xtreme Lashes v. Xtended Beauty*, 576 F.3d 221, 226 (5th Cir. 2009) (citing *Smack Apparel*, 550 F.3d at 478). This Circuit considers the following eight nonexhaustive “digits” to assess likelihood of confusion:

- (1) strength of the mark; (2) mark similarity;
- (3) product or service similarity; (4) outlet and purchaser identity; (5) advertising media identity; (6) defendant’s intent; (7) actual confusion; and (8) care exercised by potential purchasers.

See generally, e.g., Am. Rice, 518 F.3d at 329 (citing *Oreck Corp. v. U.S. Floor Sys., Inc.*, 803 F.2d 166, 170 (5th Cir. 1986)); *Xtreme Lashes*, 576 F.3d at 227 (citing *Smack Apparel*, 550 F.3d at 478). “The absence or presence of any one factor ordinarily is not dispositive; indeed, a finding of likelihood of confusion need not be supported even by a majority of the . . . factors.” *Am. Rice*, 518 F.3d at 329 & n.19 (quoting *Conan Properties, Inc. v. Conans Pizza, Inc.*, 752 F.2d 145, 150 (5th Cir. 1985)). While likelihood of confusion typically presents a contested fact issue, “summary judgment may be upheld if the . . . record compels the conclusion that the movant is entitled to judgment as a matter of law.” *Smack Apparel*, 550 F.3d at 474 (citing *Beef/Eater Rests., Inc. v. James Burrough, Ltd.*, 398 F.2d 637, 639 (5th Cir. 1968)). In its ruling, the district court found that the first six digits pointed strongly towards a likelihood of confusion; that there was no evidence as to

the seventh digit (actual confusion); and that the eighth digit (care exercised by potential purchasers) did not seem applicable. We agree with the district court's ruling as to the parties' logos.

Strength of Mark. The district court found that “Alliance has a very strong mark[.]” We agree. In assessing the strength of Alliance's composite mark, we look to two factors. First, we consider where the mark falls on a spectrum of distinctiveness ranging from “generic, descriptive, [or] suggestive” to “arbitrary and fanciful”—with the strength of the mark increasing as “one moves away from generic and descriptive marks toward arbitrary marks.” *Am. Rice*, 518 F.3d at 330 (quoting *Falcon Rice Mill, Inc. v. Cmty. Rice Mill, Inc.*, 725 F.2d 336, 346 (5th Cir. 1984)); see also, e.g., *Xtreme Lashes*, 576 F.3d at 227 (discussing spectrum) (citing *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 768 (1992)).¹² Second, we consider “the standing of the

¹² A *generic* term “refers to the class of which a good is a member” and receives no trademark protection. *Xtreme Lashes*, 576 F.3d at 227 (citing *Two Pesos*, 505 U.S. at 768). A *descriptive* term “provides an attribute or quality of a good,” and may be protected only if it has acquired secondary meaning. *Id.* A *suggestive* term “suggests, but does not describe an attribute of the good; it requires the consumer to exercise his imagination to apply the trademark to the good.” *Id.* (citing *Zatarains, Inc. v. Oak Grove Smoke-house, Inc.*, 698 F.2d 786, 791 (5th Cir. 1983)). *Arbitrary* or *fanciful* terms “bear no relationship to the products or services to which they are applied.” *Amazing Spaces*, 608 F.3d at 241 (quoting *Zatarains*, 698 F.2d at 790-91). Suggestive, arbitrary, and fanciful terms, “because their intrinsic nature serves to identify a particular source of a product, are deemed inherently distinctive and are entitled to protection.” *Xtreme Lashes*, 576 F.3d at 227 (quoting *Two Pesos*, 505 U.S. at 763).

mark in the marketplace.” *Am. Rice*, 518 F.3d at 330 (citing *Sun Banks of Fla., Inc. v. Sun Fed. Sav. & Loan Ass’n*, 651 F.2d 311, 315 (5th Cir. 1981)).

Both factors support the strength of Alliance’s composite mark. On the distinctiveness spectrum, the dominant feature of the logo—the stylized bird—is suggestive. *See, e.g., Xtreme Lashes*, 576 F.3d at 227 (explaining that “[i]t is proper to give more weight to the distinctive portions of a mark and less weight to unremarkable or generic portions”) (citing *In re Dixie Rests., Inc.*, 105 F.3d 1405, 1407 (Fed. Cir. 1997)). The image of the bird—which Alliance considers to be an eagle—is not “intrinsic” to the services of a good-government organization promoting preferred candidates, which would be characteristic of a merely generic or descriptive feature. *See, e.g., Am. Rice*, 518 F.3d at 330 (explaining that “the image of a girl icon being used to sell rice is not intrinsic to rice as a product”). Instead, the audience for Alliance’s endorsements must “exercise some imagination” to associate the logo’s bird symbolism with Alliance’s services. *See, e.g., Xtreme Lashes*, 576 F.3d at 227 (explaining that “a suggestive term . . . requires the consumer to exercise his imagination to apply the trademark to the good”). Moreover, as explained, Alliance’s composite mark enjoys an unrebutted presumption of distinctiveness¹³

¹³ We again note that Alliance’s word mark enjoys an unrebutted presumption that it had secondary meaning when registered. *See* 15 U.S.C. § 1052(f); *see also, e.g., Lovely Skin*, 745 F.3d at 882-83. Thus, to the extent that Alliance’s name is separately relevant to the strength of Alliance’s composite mark, the name’s presumed secondary meaning under section 1052(f) also supports

due to its PTO registration, *see Nola Spice*, 783 F.3d at 537, further enhancing the strength of the mark. *See, e.g., Amazing Spaces*, 608 F.3d at 237 (explaining that PTO registration constitutes prima facie evidence “that the registrant has the exclusive right to use the registered mark in commerce with respect to the specified goods or services”); 15 U.S.C. §§ 1057(b) & 1115(a); *see also, e.g., Am. Rice*, 518 F.3d at 330 (relying on presumption of validity from PTO registration as a factor in mark strength).¹⁴ Finally, as to the standing of Alliance’s mark in the marketplace, it is undisputed that

the strength of the mark. *See, e.g., Viacom Int’l v. IJR Capital Investments, LLC*, 891 F.3d 178, 193 (5th Cir. 2018) (finding mark at issue strong “because it has acquired distinctiveness through secondary meaning”).

¹⁴ While Alliance does not argue the point, it appears from the record that Alliance’s marks are eligible for incontestability status. *See* 15 U.S.C. § 1065 (providing an owner’s right to use a mark “shall be incontestable,” if the mark “has been in continuous use for five consecutive years subsequent to the date of . . . registration”). Incontestability furnishes “conclusive evidence” of the registrant’s exclusive right to use the mark, *id.* § 1115(b), but does not relieve a plaintiff from his burden of proving infringement. *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111, 117 (2004). Incontestability does, however, preclude an infringement action from being “defended on the grounds that the mark is merely descriptive.” *Park ‘N Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 205 (1985). It also shows strength of the mark. *See, e.g., Am. Rice*, 518 F.3d at 330 (noting in the strength-of-mark analysis that mark at issue was “incontestable”). The record reflects that Alliance’s two marks were registered in May and June of 2013. We express no opinion on whether Alliance’s marks satisfy the additional requirements of section 1065. *See, e.g.,* 15 U.S.C. § 1065(3) (requiring, *inter alia*, filing an affidavit with the Director within one year of expiration of the five-year period).

Alliance has used its mark for some fifty years to promote candidates in yearly elections in a variety of Louisiana advertising media. *See, e.g., Sun-Fun Prods. v. Suntan Research & Devel. Inc.*, 656 F.2d 186, 190-91 (5th Cir. Unit B Sept. 1981) (considering duration of use and promotion of the mark in assessing standing of the mark in the marketplace). Coalition offers no argument on appeal to counter these indicia of strength. We agree with the district court that the evidence points to the strength of Alliance's mark.

Mark Similarity. The district court found that the two composite marks "looked exactly alike," strongly supporting likelihood of confusion. We agree.

In assessing mark similarity, we "compar[e] the marks' appearance, sound, and meaning." *Elvis Presley Enters. Inc. v. Capece*, 141 F.3d 188, 201 (5th Cir. 1998). "Similarity of appearance is determined on the basis of the total effect of the designation, rather than on a comparison of individual features," but "courts should give more attention to the dominant features of a mark." *Xtreme Lashes*, 576 F.3d at 228 (internal quotation marks and citations omitted); *see also, e.g., Sun-Fun Prods.*, 656 F.2d at 189 (noting the "well-established proposition that similarity of design stems from the overall impression conveyed by the mark and not a dissection of individual features") (citations omitted). The inquiry focuses, not on whether two marks are identical in every respect, but on "whether, under the circumstances of the use, the marks are sufficiently similar that prospective purchasers are likely to believe that the two users are somehow associated." *Capece*, 141

F.3d at 201 (citing RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 21 cmt. c (1995)); *see also, e.g., Xtreme Lashes*, 576 F.3d at 229 (“Confusion of origin, not the identity of marks, is the gravamen of trademark infringement”) (citing *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111, 117 (2004)).

To cut to the chase: Alliance and Coalition *have the same logo*. Same shape (rectangular). Same lines in the same place (two parallel, horizontal lines over and under the bird). Same arrangement of words (one big word above the top line; three smaller words below the bottom line). Same colors (one, blue on a white background; the other, white on a blue background). And, of course, the same birds. Not *similar* birds; the *same* birds—with the same down-pointed beak, gazing over the same wing (the right), sporting the same number of identically-stylized feathers (forty-three). As Alliance’s brief succinctly puts it, “Coalition . . . uses a virtual copy of Alliance’s trademarked logo[.]” It is no answer that Coalition’s name is slightly different from Alliance’s (“COALITION” instead of “ALLIANCE”; “BETTER” government instead of “good” government), or that the two logos use obverse color schemes. Rather than focusing on “a comparison of individual features,” the district court correctly focused on the “total effect” of the logos and on their “dominant features.” *Xtreme Lashes*, 576 F.3d at 228. The district court could not have said it better: “It looks like if [you] place one over the other[,] it would be virtually identical. Maybe exactly identical.”

We must focus, of course, not merely on whether the marks are identical, but on whether the virtually-identical marks are used in a manner that prospective “purchasers” of the two organizations’ services (i.e., voters who rely on Alliance and Coalition endorsements) are “likely to believe that the two users are somehow associated.” *Capece*, 141 F.3d at 201. Here we also find the evidence uncontested and overwhelming. It is undisputed that Alliance and Coalition work in the same field (elections), operate in the same market (New Orleans), use the same advertising channels (newspapers, sample ballots, flyers), and sometimes endorse the same or opposing candidates. Consequently, there is no question that the overall similarity of the marks, in the context of their use, creates a likelihood in the minds of voters that the two organizations are “somehow associated.” *Capece*, 141 F.3d at 201.

Finally, we observe that Coalition attempted to distinguish the two logos—not by appearance, design, color, or font—but by the birds’ *species*:

DISTRICT COURT: They look exactly alike to me, the two birds.

COUNSEL: [. . .] [N]o, they really aren’t, your Honor, if you look at the wing span. The wing span of the eagle is different from the hawk. It’s much larger and it fans out, and that’s just the way the hawk looks.

COURT: I’ll tell you, unless my eyes are deceiving me, . . . those two look exactly alike. They even look like the same feathers, same

number of feathers, same arrangement, head is facing the same way, the same beak. I don't know if you call them—I don't know technically what kind of bird it is, but whatever they are, they look exactly alike to me.

COUNSEL: Well, they're both birds of prey; one is an eagle and one is a hawk.

COURT: Okay.

COUNSEL: And when we filed with the Secretary of State to get our font, we said it was a hawk. We were represented by a hawk, not an eagle.

We agree with the district court: the birds are identical. Whether that bird is a *haliaeetus leucocephalus* (bald eagle), a *buteo jamaicensis* (red-tailed hawk), or some other bird, we need not determine.

Product or service similarity. “The greater the similarity between the products and services, the greater the likelihood of confusion.” *Xtreme Lashes*, 576 F.3d at 229 (quoting *Exxon Corp. v. Tex. Motor Exch. of Houston, Inc.*, 628 F.2d 500, 505 (5th Cir. 1980)). The district court found the services provided by the two organizations—endorsement of candidates—are “exactly the same.” On appeal Coalition offers no response. The district court was correct.

Outlet and purchaser identity. The district court found that the outlet and purchaser identity for the two organizations was the same, and again Coalition offers no argument to the contrary. We agree with the district court. The undisputed evidence shows that

Alliance and Coalition both target New Orleans voters, often through the same local channels. The greater the overlap between the outlets for, and consumers of, the services, the greater the potential for confusion. *See, e.g., Exxon*, 628 F.2d at 505 (finding similarity of products where both plaintiff and defendant were involved in “car care”); *cf. Amstar Corp. v. Domino’s Pizza, Inc.*, 615 F.2d 252, 262 (5th Cir. 1980) (explaining that “[d]issimilarities between the retail outlets for and the predominant consumers of plaintiff’s and [defendant’s] goods lessen the possibility of confusion, mistake, or deception”).

Advertising media identity. The district court found that the two organizations advertised on behalf of candidates “in the same or similar media.” Coalition again fails to dispute this finding. We agree with the district court. The undisputed evidence shows both organizations advertised in New Orleans newspapers using the same means, such as sample ballots in the newspaper and flyers distributed by mail or by hand. “[A]dvertising in similar media [i]s an indication that consumers might be confused as to the source of similar products.” *Am. Rice*, 518 F.3d at 332 (brackets added); *see also, e.g., Xtreme Lashes*, 576 F.3d at 229 (inferring similar advertising and marketing channels where both parties targeted the same class of buyers using “print advertisements, direct mailings, and Internet promotion”).

Defendant’s intent to infringe. “[I]f the [challenged] mark was adopted with the intent of deriving benefit from the reputation of (the plaintiff,) that fact

alone may be sufficient to justify the inference that there is confusing similarity.’” *Chevron Chem. Co. v. Voluntary Purchasing Grps., Inc.*, 659 F.2d 695, 703-04 (5th Cir. Unit A Oct. 1981) (quoting *Amstar Corp.*, 615 F.2d at 263) (brackets added). The district court found that, while there was no evidence of “actual intent to infringe,” Coalition’s logo “was certainly intended to mimic, and largely mimic[s] . . . Alliance’s logo.” In response, Coalition argues this issue should not have been resolved on summary judgment because Alliance did not introduce evidence of intent to infringe.

The district court correctly inferred from the striking similarity between the marks that Coalition’s later mark was adopted “with the intent of deriving benefit from [Alliance].” *Chevron*, 659 F.2d at 704. “[A]s soon as we see that a second comer in a market has, for no reason that he can assign, plagiarized the ‘make-up’ of an earlier comer, we need no more[.]” *Id.* (quoting *American Chicle Co. v. Topps Chewing Gum, Inc.*, 208 F.2d 560, 563 (2nd Cir. 1953)). Coalition’s own evidence bolsters this conclusion. At oral argument, Coalition drew our attention to a 1992 version of its logo featuring a slightly different stylized bird. But the mark challenged here is Coalition’s 2008 mark, which features a newer iteration of the bird *exactly* like Alliance’s. “[W]e can think of no other plausible explanation for such behavior” than Coalition’s intent to benefit from Alliance’s pre-existing reputation. *Chevron*, 659 F.2d at 704.

Actual confusion. Alliance admitted, and the district court acknowledged, that there was no evidence of

actual confusion. On appeal Coalition relies heavily on this point, to no avail. “Although actual confusion is the ‘best evidence’ of confusion, it ‘is not necessary to a finding of likelihood of confusion.’” *Am. Rice*, 518 F.3d at 333 (quoting *Amstar*, 615 F.2d at 263); *see also, e.g., Exxon*, 628 F.2d at 506 (explaining that “evidence of actual confusion . . . is not essential to a finding of likelihood of confusion”) (citation omitted).

Care exercised by potential purchasers. The district court did not analyze this factor and Coalition does not address it on appeal. *See, e.g., Smack Apparel*, 550 F.3d at 483 (explaining that, “[w]here items are relatively inexpensive, a buyer may take less care in selecting the item, thereby increasing the risk of confusion”). We need not consider this factor, since no one factor is dispositive, *Am. Rice*, 518 F.3d at 329, and since the balance of the factors point overwhelmingly in Alliance’s favor.

* * *

In sum, we agree with the district court that Alliance established likelihood of confusion as a matter of law. *See, e.g., Viacom*, 891 F.3d at 192 (affirming summary judgment on likelihood of confusion even though “every digit” of confusion did not weigh in movant’s favor) (emphasis in original). We therefore affirm the district court’s injunction as to Alliance’s composite mark.

C.

We modify the district court’s injunction in one respect. The injunction restrains Coalition from using “the Coalition Marks,” which are defined to encompass not only Coalition’s logo, but also its “designation ‘Coalition for Better Government.’” To the extent the injunction restrains Coalition from using the name “Coalition for Better Government” in connection with endorsing candidates or its other activities, we find the injunction overbroad. Based on our own review of the record, we conclude that Coalition’s use of its trade name (as distinct from its logo) does not create a likelihood of confusion with Alliance’s differently-worded trade name.¹⁵ In other words, Coalition may continue to use its name—provided it disassociates the name from its current logo or develops a different logo that does not create confusion with Alliance’s composite mark. We therefore modify the injunction only to the

¹⁵ See, e.g., *Holiday Inns, Inc. v. Holiday Out in Am.*, 481 F.2d 445 (5th Cir. 1973) (affirming conclusion that “Holiday Inn” and “Holiday Out” were not confusingly similar); see also, e.g., *W.L. Gore & Assoc., Inc. v. Johnson & Johnson*, 882 F. Supp. 1454 (D. Del. 1995) (concluding “‘Easy Slide’ is dissimilar from ‘Glide’ in appearance and sound, tipping the balance against a finding of likelihood of confusion”), *aff’d*, 77 F.3d 465 (3rd Cir. 1996); *Coca-Cola Co. v. Essential Prods. Co.*, 421 F.2d 1374, 1376 (C.C.P.A. 1970) (holding Coca-Cola and Coco Loco not confusingly similar because, *inter alia*, “the articulate utterance of one mark is far from identical with that of the other mark”); see also generally 4 McCarthy § 23:30 (collecting cases holding word marks not confusingly similar). We reach this conclusion based solely on the record before us and offer no view regarding Alliance’s pending opposition to Coalition’s PTO application, which was stayed pending this lawsuit.

extent that it restrains the use of Coalition's name. We leave the injunction intact in all other respects. *See, e.g., Wynn Oil Co. v. Purolator Chem. Corp.*, 536 F.2d 84, 86 (5th Cir. 1976) (modifying injunction on appeal by deleting one subsection).

IV.

For the foregoing reasons, we AFFIRM the district court's summary judgment ruling, but MODIFY the injunction to restrain only the use of Coalition's logo.

AFFIRMED AS MODIFIED

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ALLIANCE FOR GOOD
GOVERNMENT

CIVIL ACTION

VERSUS

No. 17-3679

COALITION FOR BETTER
GOVERNMENT

SECTION: "J"(2)

AMENDED ORDER AND REASONS*

(Filed Jun. 26, 2018)

Before the Court is Alliance for Good Government's ("Alliance") *Motion for Attorney's Fees* (**Rec. Doc. 61**) and Coalition for Better Government's ("Coalition") related *Motion to Strike* (**Rec. Doc. 64**). Both sides were allowed opportunity to file opposition and reply memoranda regarding each of these motions and did so. Having considered the motions, memoranda, and the applicable law, the Court finds that Alliance's motion should be **GRANTED** and Coalition's motion should be **DENIED**.

FACTS AND PROCEDURAL HISTORY

This case arises from a trademark dispute between two nonprofit political companies, Alliance and Coalition. Both entities used their marks ("Alliance

* This Amended Order only corrects a typographical error in this Court's Order and Reasons granting attorney's fees (Rec. Doc. 82). At one point in its Order the Court itself mistakenly confused Parties' names.

Marks” and “Coalition Marks,” respectively) or allowed their marks to be used as an indication of endorsement of a particular political candidate. As Coalition’s counsel admitted during oral argument, Alliance is the senior trademark holder to its mark.

In 2016, Coalition used the Coalition Marks to endorse several political candidates. Alliance filed a complaint alleging among other claims, that Coalition had infringed its trademark under the Lanham Act, 15 U.S.C. § 1114. Coalition responded with its own counterclaim, motion to dismiss, and motion for summary judgment. On October 11, 2017, the Court heard oral argument on the parties’ cross-motions for summary judgment.

At the hearing the Court ruled from the bench that Plaintiff was entitled to summary judgment for trademark infringement under 15 U.S.C. § 1114. The Court found that despite Coalition’s assertions that one mark featured a “hawk” and the other an “eagle,” the birds that formed the centerpiece of each mark were virtually identical, if not exactly. The Court further found that the only discernable difference in the marks was that “Coalition” was substituted for “Alliance” and that “better” was substituted for “good,” each being a synonym for the word it replaced. The Court subsequently entered its written judgment granting an injunction against Coalition’s use of the Coalition Marks or any other similar marks likely to give rise to confusion and dismissed all other claims.

Following final judgment, Plaintiff motioned for attorney's fees. Defendant in turn motioned to strike language from Plaintiff's motion and in opposition, requested the Court bifurcate the determination of whether to grant fees from the calculation of amount of fees and requested a hearing to determine the amount in fees through oral testimony.

PARTIES' ARGUMENTS

Plaintiff requests sixty-eight thousand two hundred thirty-seven dollars and twenty-five cents (\$68,237.25) in attorney's fees pursuant to section 1117(a) of the Lanham Act. Plaintiff argues that this case meets the bar for "exceptional" in the plain-meaning sense: this case stands out from others. Plaintiff further argues it wins on two independent grounds: the (1) strength of its litigating position against defendant and (2) the unsuccessful party's unreasonable litigation of the case.

In support of its argument, Plaintiff claims that Coalition unnecessarily expanded the litigation by (1) filing baseless motions to dismiss and (2) counter-claims, (3) motioning for summary judgment without record evidence, (4) issuing redundant subpoenas, and (5) unreasonably refusing to postpone depositions. Alliance further maintains that it had an exceptionally strong case and that Defendant did all of the above not with a reasonable expectation of succeeding on the merits, but instead with the hope of bankrupting Plaintiff with a deluge of court and attorney's fees.

In support of its accusation, Alliance notes that as a nonprofit its funding was a matter of public record and prior to litigation, its available funds were listed at only \$31,275. Coalition's lead counsel (also its president and director) on the other hand, "earns millions of dollars as a highly successful plaintiff's attorney as well as from significant real estate holdings." Alliance attached the state court decision that was the basis for this statement regarding Coalition's lead counsel's income to its Motion.

Coalition takes exception to all of Alliance's accusations, but particularly the quoted language above. Coalition claims that this egregious conduct-Alliance's paraphrasing of the public state court decision will harm Coalition's lead counsel's reputation by being a part of this matter's public record.

LEGAL STANDARD

Attorney's fees are not normally granted to the winner in the American system, but the Lanham Act specifically provides, "The court in exceptional cases may award reasonable attorney fees to the prevailing party." 15 U.S.C. § 1117(a). "Exceptional" is to be given its plain-meaning: "'out of the ordinary course,' unusual,' or 'special.'" *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1756-57 (2014) (quoting 3 Oxford English Dictionary 374 (1933)). It does not mean "bad faith," because the "long-established American common-law rule already provides an award in such an instance" and it would therefore render

Congress’s decision to include a fee-switching provision in the Lanham Act superfluous. *Baker v. DeShong*, 821 F.3d 620, 624 (5th Cir. 2016).

Rather, our Circuit has adopted a disjunctive standard: “an exceptional case is one where (1) in considering both governing law and the facts of the case, the case stands out from others with respect to the substantive strength of a party’s litigation position; or (2) the unsuccessful party has litigated the case in an unreasonable manner.” *Id.* (citing *Octane Fitness*, 134 S. Ct. at 1756). The Court looks to the totality of the circumstances to determine the appropriateness of fee-switching. *Octane Fitness*, 134 S. Ct. at 1756.¹

DISCUSSION

I.

The Court is persuaded that Plaintiff is entitled to attorney’s fees under both grounds. First, this case stands out due to the strength of Alliance’s litigation position. Alliance adopted the senior mark least 15 years prior to Coalition. The centerpiece of both the Alliance Mark and the Coalition Mark is a bird of prey. It makes no difference whether the bird is characterized as a “hawk” or an “eagle,” what is important is that the centerpiece of the two marks appears identical to the naked eye. Although the names of the entities on the

¹ Furthermore, this Court is free to consider a number of nonexclusive factors in determining whether to provide fees, “including frivolousness, motivation, [and] objective unreasonableness.” *Baker*, 821 F.3d at 624.

respective marks are technically different, they are substantially the same so that the substitution of “Coalition” in the place of “Alliance” and “better” in the place of “good” does little to distinguish the junior mark from the senior. Furthermore, (1) the Alliance mark is very strong, (2) the “product” of Alliance and Coalition is the same, (3) as are the parties’ advertising channels, (4) as well as their “customers.” The likelihood of confusion is so great that it would appear that customer confusion was Coalition’s motivation for adopting the Coalition Mark.

It is true that Coalition asserted a laches defense, but Coalition could not muster any credible evidence to support this affirmative defense at the summary judgment hearing. *Cf. Bailero v. 727 Inc.*, CV 16-16098, 2018 WL 733215, at *2 (F.D. La. Feb. 6, 2018) (“The substantive weakness of Plaintiff’s case was not remarkable; Plaintiff was able to develop some facts to support his argument that he did not abandon the . . . trademark.”). Thus, the Court finds this to be an exceptional case of infringement to which there was no credible defense.

Second, Coalition has litigated this case in an unreasonable manner. The Court finds merit in Alliance’s assertion that it was forced to devote its resources fighting baseless motions and counterclaims. Coalition’s argument for summary judgment by virtue of a laches defense—unsupported by any evidence other than a bare bones affidavit—is but one example of Coalition’s unreasonable trial tactics. Coalition also filed a counterclaim without any actionable conduct (Rec.

Doc. 23). And it also filed a meritless motion to dismiss (Rec. Doc. 20) two weeks before filing its summary judgment motion, rendering the former moot. The Court also finds Coalition's behavior in discovery unreasonable; for example, Coalition's refusal to postpone depositions following this Court's summary judgment finding for Alliance, thereby necessitating a protective order (Rec. Doc. 48).

Examining the totality of the circumstances this case qualifies as "exceptional." The obvious confusion that would result between the marks combined with Coalition's counsel's aggressive motion practice, and Coalition's president/director/counsel's non-credible attempts to distinguish the marks at the summary judgment hearing, bring Coalition's motivations into serious question. *See Vital Pharm., Inc. v. Am. Body Bldg. Products, LLC*, 510 F. Supp. 2d 1043, 1049 (S.D. Fla. 2007) (finding that Plaintiff's CEO's evasive, non-convincing testimony confirmed the court's belief that litigation was initiated in bad faith). The Court however, reserves determination as to whether Coalition has litigated in bad faith, as such a finding is clearly unnecessary under the *Octane Fitness* standard. *Baker*, 821 F.3d at 622.

II.

The Court must now determine the appropriate amount in fees. As a preliminary matter, the Court finds that it would be an unnecessary and wasteful act to grant Coalition's request to bifurcate determination

of whether to grant fees and the calculation of the amount in fees. The Court likewise finds it is unnecessary to take the unusual action of deriving fee amounts through oral testimony. The Court notes that since it finds fee-switching is warranted, any additional expense to determine fee amounts through hearings would be borne at Coalition's expense.

In calculating the appropriate fee, "the 'lodestar' calculation is the most useful starting point." *Who Dat Yat Chat, LLC v. Who Dat, Inc.*, 838 F. Supp. 2d 516, 518 (E.D. La. 2012) (quotation omitted). That is, "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *La. Power & Light Co. v. Kellstrom*, 50 F.3d 319, 324 (5th Cir. 1995). The lodestar determination is presumed reasonable, but may be adjusted upward or downward depending on the weight the Court allots to the various factors elucidated in *Johnson v. Georgia Hwy. Exp., Inc.*, 488 F.2d 714, 717 (5th Cir. 1974). Alliance, as the party requesting fees, bears the burden in establishing the reasonableness of the fees it requests by submitting adequate documentation—namely time records and affidavits. *Who Dat Yat Chat, LLC*, 838 F. Supp. 2d at 518.

Alliance requests \$68,237.25 in attorney's fees. This fee amount is derived from the fees Alliance had already incurred at the time of filing its motion with the addition of \$4,800 in *anticipated* fees that Alliance expected would be incurred in replying to Coalition's expected opposition. Alliance in fact subsequently filed a motion in opposition (Rec. Doc. 69) to Coalition's

Motion to Strike as well as a reply memorandum (Rec. Doc. 78) to Coalition's opposition to Alliance's motion for attorney's fees.

According to Alliance's supporting affidavit (Rec. Doc. 612), Mr. Sahuc, an attorney with 15-years-experience in complex litigation, charged a rate of \$225.00 per hour, an 18% discount from his typical fee. Mr. Latham, an attorney with 20-years-experience in trademark litigation, billed Alliance at \$285.00 per hour, a 26% deduction from his undiscounted rate. Ms. Wiebelt's paralegal services were billed at \$95.00 per hour. The Court is convinced that comparison of these rates with those allowed by this Court in other trademark matters are sufficient evidence to establish the reasonableness of the rates incurred. *See id.* at 520 (finding that \$325 per hour for an attorney with 28 years' experience, \$250 for an attorney with 16 years' experience, \$200 per hour for attorneys with 10 and 9 years' experience respectively, and \$175 per hour for attorneys with 4 and 3 years' experience respectively were reasonable); *see also Bd. of Supervisors of La. State Univ. v. Smack Apparel Co.*, 2009 U.S. Dist. LEXIS 27652 (E.D. La. April 2, 2009) (finding that \$325 was a reasonable hourly rate for an attorney with 10 years' experience in trademark litigation and for an attorney with 20 years of unspecialized legal experience).

Furthermore, a review of the time sheets (Rec. Doc. 61-3) submitted with Alliance's motion reveal the proper exercise of "billing judgment." The timesheets demonstrate that the vast majority of the work was

performed by a single attorney, Mr. Sahuc. This is not a case where “Parties do not address why *six attorneys* were assigned to this one motion to compel.” *Who Dat Yat Chat, LLC*, 838 F. Supp. 2d at 521 (emphasis original).

Furthermore, the Court finds that \$4,800 estimate to be a reasonable addition to the fees that were already incurred by Alliance, especially because that estimate does not appear to anticipate Coalition’s Motion to Strike, and the reply memorandum that Alliance drafted and filed in response. In any case, the Court finds that the amount of \$68,237.25 is appropriate, given consideration of the *Johnson* factors.

CONCLUSION

Accordingly,

IT IS ORDERED that Alliance’s *Motion for Attorney’s Fees* (**Rec. Doc. 61**) is hereby **GRANTED** and Alliance is awarded \$68,237.25 in attorney’s fees.

IT IS FURTHER ORDERED that Coalition’s *Motion to Strike* (**Rec. Doc. 64**) is hereby **DENIED**.

New Orleans, Louisiana this 26th day of June, 2018.

/s/ Carl L. Barbier

CARL J. BARBIER
UNITED STATES
DISTRICT JUDGE

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA**

**ALLIANCE FOR
GOOD GOVERNMENT**
Plaintiff

v.

**COALITION FOR
BETTER GOVERNMENT**
Defendant

CASE NO.: 17-3679

**JUDGE
CARL. J. BARBIER**

**MAGISTRATE
JUDGE WILKINSON**

SECTION: "J"(2)

**FINAL JUDGMENT AND
PERMANENT INJUNCTION**

(Filed Oct. 23, 2017)

Before the Court is Plaintiff Alliance For Good Government's ("Alliance") Motion for Dismissal of Remaining Claims and for Entry of Final Judgment Including a Permanent Injunction (the "Motion").

Plaintiff Alliance commenced this action for an injunction and other relief against Defendant Coalition For Better Government ("Coalition"), pursuant to the Lanham Act, 15 U.S.C. § 1051, *et seq.*, as amended by the Trademark Counterfeiting Act of 1984, Public Law 98-473, and under the laws of the State of Louisiana, alleging that Coalition's use of the designation "Coalition For Better Government," which is subject to United

States Trademark Application Serial No. 87375772, and the logo seen at right, which is subject to United States



Trademark Application Serial No. 87375806, (collectively, the “Coalition Marks”) in connection with association services, namely, promoting the active engagement of citizens in the selection, election and promotion of public officials, has infringed Alliance’s United States Trademark Registrations, including the word mark ALLIANCE FOR GOOD GOVERNMENT (U.S. Reg. No. 4,330,957) and the composite mark ALLIANCE FOR GOOD GOVERNMENT SINCE 1967 (U.S. Reg. No. 4,349,156) (collectively, the “ALLIANCE MARKS”).

On October 11, 2017, the Court held oral argument on the parties’ cross-motions for summary judgment and issued its rulings from the bench. The Court denied Coalition’s motion for summary judgment and granted summary judgment in favor of Alliance with respect to liability on Alliance’s trademark infringement claim under 15 U.S.C. § 1114, Count I of Alliance’s Complaint. (Rec. Doc. 43.) In its Motion, Alliance asserts that it will not be pursuing its remaining claims or any monetary damages against Coalition and that it wishes to dismiss its remaining claims without prejudice.

Accordingly,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. The Court has subject matter jurisdiction over this matter and personal jurisdiction over the parties.

2. The Court shall retain jurisdiction over this matter for purposes of interpretation and enforcement of the provisions of this Judgment.

3. Counts II, III, IV, V, and VI of Alliance's Complaint [Rec. Doc. 1] are hereby DISMISSED WITHOUT PREJUDICE.

4. Defendant Coalition, its officers, agents, servants, employees, and attorneys, and other persons who are in active concert or participation with any of them, are permanently ENJOINED AND RESTRAINED from (i) using the Coalition Marks, or any other mark that is confusingly similar, in connection with endorsing candidates for public office and promoting the active engagement of citizens in the selection, election and promotion of public officials, (ii) advertising or marketing the Coalition Marks or any other mark that is confusingly similar, in signage, sample election ballots, letterhead, business cards, marketing materials, websites, domain names, or social media, (iii) publicly representing, or otherwise stating or implying, that Coalition or its services are in any way affiliated with or endorsed by Alliance, and (iv) assisting, aiding, or abetting any other person or entity in engaging in or

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performing any activities referred to in (i), (ii) or (iii) above.

New Orleans, Louisiana, this 23rd day of October, 2017.

/s/ Carl L. Barbier

CARL J. BARBIER

UNITED STATES

DISTRICT JUDGE

MINUTE ENTRY
BARBIER, J.
OCTOBER 11, 2017
JS-10: 1 hr. 10 min.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ALLIANCE FOR GOOD GOVERNMENT	CIVIL ACTION
VERSUS	NUMBER: 17-3679
COALITION FOR BETTER GOVERNMENT	SECTION: "J"(2)
COURTROOM DEPUTY: Gail Chauvin	COURT REPORTER: Karen Ibos

WEDNESDAY, OCTOBER 11, 2017 AT 9:30 A.M.
JUDGE CARL J. BARBIER PRESIDING

MOTION HEARING

(Filed Oct. 11, 2017)

Case called at 9:44 a.m.

MOTION for Summary Judgment by Coalition for Better Government. [26]; and MOTION for Partial Summary Judgment by Alliance for Good Government. [28].

Argued; ORDERED that Coalition for Better Government's motion for summary judgment is DENIED and Alliance for Good Government's motion for partial summary judgment is GRANTED as stated on the record.

FURTHER ORDERED that Alliance for Good Government is to submit to the Court a proposed judgment within seven (7) days.

FURTHER ORDERED that MOTION to Dismiss for Failure to State a Claim by Coalition for Better Government, [20] is DENIED AS MOOT.

FURTHER ORDERED that MOTION to Dismiss Coalition's Counterclaims for Failure to State a Claim by Alliance for Good Government, [34] is GRANTED.

Hearing ended at 10:50 a.m.

ATTORNEYS: Richard Sahuc, for plaintiff
Darleen Jacobs, Hunter Harris, IV,
for defendant
