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912 F.3d 445

United States Court of Appeals, Eighth Circuit.

B&B HARDWARE, INC.,
a California Corporation, Plaintiff - Appellant
v.

HARGIS INDUSTRIES, INC., a Texas
Corporation, doing business as East Texas
Fasteners, doing business as Sealtite
Building Fasteners, Defendant - Appellee

East Texas Fasteners, a business
entity of form unknown; Does, 1
through 10, inclusive, Defendants

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No. 17-1570, No. 17-1755

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Rehearing and Rehearing En
Banc Denied February 6, 2019

Appeals from United States District Court for
the Eastern District of Arkansas—Little Rock

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Attorneys and Law Firms

Counsel who presented argument on behalf of the appellant was Timothy James Cullen, of Little Rock, AR.

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Before LOKEN, BENTON, and SHEPHERD, Circuit Judges.

Opinion

SHEPHERD, Circuit Judge.

B&B Hardware, Inc. appeals the district court's¹ judgment in favor of Hargis Industries, Inc. on B&B's claim of trademark infringement and request for an accounting of profits. Hargis cross-appeals from the district court's denial of its motion for fees and costs. We have jurisdiction pursuant to 28 U.S.C. § 1291. For the reasons set forth in this opinion, we affirm on all claims.

I.

Although we relate the circumstances underlying this case in great detail in our prior opinions concerning these parties, B&B Hardware, Inc. v. Hargis Indus.,

¹ The Honorable Brian S. Miller, Chief Judge, United States District Court for the Eastern District of Arkansas.

Inc. (Hargis V), 716 F.3d 1020 (8th Cir. 2013); B&B Hardware, Inc. v. Hargis Indus., Inc. (Hargis III), 569 F.3d 383 (8th Cir. 2009); B&B Hardware, Inc. v. Hargis Indus., Inc. (Hargis I), 252 F.3d 1010 (8th Cir. 2001), Justice Alito has succinctly summarized the factual origins of this case and provides apt commentary:

Petitioner B & B and respondent Hargis both manufacture metal fasteners. B & B manufactures fasteners for the aerospace industry, while Hargis manufactures fasteners for use in the construction trade. Although there are obvious differences between space shuttles and A-frame buildings, both aerospace and construction engineers prefer fasteners that seal things tightly. Accordingly, both B & B and Hargis want their wares associated with tight seals. A feud of nearly two decades has sprung from this seemingly commonplace set of facts.

In 1993 B & B registered SEALTIGHT for “threaded or unthreaded metal fasteners and other related hardwar[e]; namely, self-sealing nuts, bolts, screws, rivets and washers, all having a captive o-ring, for use in the aerospace industry.” In 1996, Hargis sought to register SEALTITE for “self-piercing and self-drilling metal screws for use in the manufacture of metal and post-frame buildings.” B & B opposed Hargis’ registration because, although the two companies sell different products, it believes that SEALTITE is confusingly similar to SEALTIGHT.

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The twists and turns in the SEALTIGHT versus SEALTITE controversy are labyrinthine. The question whether either of these marks should be registered, and if so, which one, has bounced around within the [Patent and Trademark Office] for about two decades; related infringement litigation has been before the Eighth Circuit three times; and two separate juries have been empaneled and returned verdicts. The full story could fill a long, unhappy book.

B&B Hardware, Inc. v. Hargis Indus., Inc. (Hargis VI), 135 S. Ct. 1293, 1301 (2015) (first alteration in original) (citations omitted).

In B&B’s trademark infringement action against Hargis in May 2000, a jury found that B&B’s “Sealtight” mark was not entitled to protection because it lacked secondary meaning. We affirmed. Hargis I, 252 F.3d at 1011. In June 2006, B&B filed for incontestability status for its trademark with the Patent and Trademark Office (PTO). The PTO issued a Notice of Acknowledgment in September 2006, concluding that B&B’s affidavit of incontestability met the statutory requirements. Incontestability provided B&B with a presumption that its “Sealtight” mark carried secondary meaning. This constituted a significant intervening factual change from the 2000 jury trial, which resulted in the finding that “Sealtight” was merely descriptive, and B&B could thus escape the collateral estoppel bar that the 2000 jury verdict imposed on the issue of secondary meaning. See Hargis III, 569 F.3d at 388.

Immediately after its 2006 filing for incontestability, B&B brought suit against Hargis again for trademark infringement, unfair competition, trademark dilution, and false designation of origin. The case currently before us arises out of this second suit. However, only the period between June 2006, when B&B overcame collateral estoppel by filing for incontestability, see Dist. Ct. Dkt. 422; see also Hargis III, 569 F.3d at 388-89, and October 2013, when B&B allowed its trademark registration to expire and therefore no longer had statutory rights in that trademark, is at issue here.

The district court initially dismissed B&B's new suit on collateral estoppel grounds. B&B Hardware, Inc. v. Hargis Indus., Inc. (Hargis II), No. 4:06CV01654 SWW, 2007 WL 2711647, at *12-13 (E.D. Ark. Sept. 13, 2007). B&B appealed and this Court reversed and remanded, finding that incontestability was a significant factual change precluding application of collateral estoppel. Hargis III, 569 F.3d at 389-90. The district court then conducted a jury trial and the jury found against B&B on all claims. B&B Hardware, Inc. v. Hargis Indus., Inc. (Hargis IV), 736 F. Supp. 2d 1212, 1214 (E.D. Ark. 2010). B&B again appealed to this Court, which upheld the jury's verdict. Hargis V, 716 F.3d at 1022. B&B then appealed to the Supreme Court of the United States, which found that the district court should have given preclusive effect to a decision of the Trademark Trial and Appeal Board (TTAB) finding that there was a likelihood of confusion between "Sealtight" and "Sealtite." Hargis VI, 135 S. Ct. at 1299. The

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Supreme Court remanded the case for further proceedings.

We subsequently vacated the district court's judgment and remanded. B&B Hardware, Inc. v. Hargis Indus., Inc. (Hargis VII), 800 F.3d 427, 427 (8th Cir. 2015) (per curiam). Following our remand, the case proceeded in the district court on B&B's claim that Hargis committed trademark infringement under the Lanham Act, false designation of origin, and unfair competition. B&B sought disgorgement of Hargis's profits beginning in June 2006. Hargis counterclaimed for false advertising and false designation of origin. A five-day jury trial ensued.

At trial, Hargis argued that B&B obtained its incontestability status through fraud, presenting evidence that B&B failed to inform the PTO about the 2000 jury verdict that B&B's "Sealtight" mark was merely descriptive. Hargis also presented evidence that all of its profits stemmed from its personal relationships with its customers, exemplary customer service, and the quality of its products, rather than the "Sealtite" name.

At the close of evidence, B&B moved for judgment as a matter of law on Hargis's counterclaims but failed to do so on its own claims. The jury found that Hargis infringed on B&B's trademark but did not do so willfully, awarded B&B none of Hargis's profits, and found for Hargis on its counterclaims and its affirmative defense of fraud. Based on the jury's fraud finding, the district court found that "Sealtight" was not entitled to

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incontestability status, and that B&B therefore had not pled an intervening change in circumstances allowing it to relitigate claims raised in the 2000 jury trial. The district court therefore entered judgment for Hargis on all claims.

In determining that B&B was not entitled to any of Hargis's profits, the district court recognized that, under 15 U.S.C. § 1117(a), it retained discretion to reduce or increase the jury's profit award or to award profits itself. See Masters v. UHS of Del., Inc., 631 F.3d 464, 474-75 (8th Cir. 2011). Rather than basing its ruling solely on the jury's refusal to award profits, it treated that refusal as advisory, considering it together with the six factors used by the Third, Fourth, and Fifth Circuits in balancing the equities. See, e.g., Synergistic Int'l, LLC v. Korman, 470 F.3d 162, 175 (4th Cir. 2006). The district court concluded that, because B&B did not lose sales, Hargis did not represent that its products were B&B's products, and Hargis's infringement was not willful, it would be inequitable to award B&B any of Hargis's profits. It therefore refused to disgorge Hargis of its profits.

Hargis then filed a motion seeking attorneys' fees, nontaxable litigation costs, and an injunction as sanctions against B&B. The district court awarded Hargis taxable litigation costs but otherwise denied Hargis's motion, finding that protracted litigation, on its own, does not make a case an exceptional case justifying fee-shifting under the Lanham Act.

B&B appeals to this Court, arguing (1) the jury verdict finding fraud and a lack of willfulness was clearly erroneous; and (2) the district court abused its discretion in refusing to disgorge Hargis of its profits. On cross-appeal, Hargis argues that the district court abused its discretion in denying Hargis's motion for fees and costs.

II.

B&B challenges the jury's fraud finding, arguing that the verdict was not supported by sufficient evidence. Because B&B failed to file a Rule 50(b) motion as to the sufficiency of the evidence at the close of evidence, "our review is strictly limited. We cannot test the sufficiency of the evidence to support the jury's verdict beyond application of the 'plain error' doctrine in order to prevent a manifest miscarriage of justice." Karjala v. Johns-Manville Prods. Corp., 523 F.2d 155, 157 (8th Cir. 1975) (citations omitted); see also Pulla v. Amoco Oil Co., 72 F.3d 648, 655 (8th Cir. 1995). "Under this standard we can only grant [B&B] relief if [we find error that] would result in a miscarriage of justice if left uncorrected." Fin. Holding Corp. v. Garnac Grain Co., 965 F.2d 591, 595 (8th Cir. 1992) (internal quotation marks omitted) (quoting United States v. Schmidt, 922 F.2d 1365, 1369 (8th Cir. 1991)). We find no such plain error in the jury's verdict.

Under Section 15 of the Lanham Act, Pub. L. No. 79-489, § 15, 60 Stat. 427, 433-34 (1946) (codified as amended at 15 U.S.C. § 1065), a registrant of a valid

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trademark who has continually utilized that trademark for five years after registration may have his mark declared incontestable. Incontestability provides “conclusive evidence of the validity of [a] registered mark . . . and of the registrant’s exclusive right to use the registered mark in commerce.” 15 U.S.C. § 1115(b). In order to obtain incontestability, an applicant must file an affidavit with the PTO declaring that “there has been no final decision adverse to [his] claim of ownership of such mark . . . or to [his] right to register the same or to keep the same on the register. . . .” 15 U.S.C. § 1065(1), (3). At least one circuit treats a district court’s finding of mere descriptiveness at summary judgment as such an adverse decision. See OBX-Stock, Inc. v. Bicast, Inc., 558 F.3d 334, 342-43 (4th Cir. 2009). Failure to disclose an adverse decision is critical because “the PTO does not examine the merits of a § 15 affidavit, which is entered into PTO records ‘without regard to its substantive sufficiency’ as long as it is received at the proper time and lacks facial inconsistencies or omissions.” Gutier v. Hugo Boss Trade Mark Mgmt. GmbH & Co. KG, 555 Fed.Appx. 947, 949 (Fed. Cir. 2014) (quoting 3 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 19:140 (4th ed. 2013)).

Complying with the Lanham Act’s affidavit requirement is especially important because a defendant accused of infringing an incontestable trademark may raise an affirmative defense that “the registration or the incontestable right to use the mark was obtained fraudulently.” 15 U.S.C. § 1115(b)(1). “[T]he

words ‘obtained fraudulently’ comprehend not only the initial securance of a registration, but also the maintenance thereof, i.e., the securance of continuing rights of registration, by fraud.” Crown Wallcovering Corp. v. Wall Paper Mfrs. Ltd., 188 U.S.P.Q. (BNA) 141, at *3-4 (T.T.A.B. 1975) (“[T]he filing of a fraudulent Section 15 affidavit would enable a registrant to obtain a new right, namely, incontestability, to which he would not otherwise be entitled. . . .”). Fraud on the PTO consists of willfully withholding material information that, if disclosed, would result in an unfavorable outcome. Id. at *2. We define “material information” in this context as “information that a reasonable examiner would have considered important” when making her decision. Gilbert/Robinson, Inc. v. Carrie Beverage-Mo., Inc., 989 F.2d 985, 992 (8th Cir. 1993) (applying the Federal Circuit’s patent materiality definition to the trademark context), abrogated on other grounds by Lexmark Int’l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 124-25, 134 S.Ct. 1377, 188 L.Ed.2d 392 (2014).

It is undisputed that B&B failed to inform the PTO of the 2000 jury verdict finding the “Sealtight” trademark merely descriptive. B&B raises two arguments defending its failure to disclose. It argues first that the 2000 verdict was not a final adverse decision. However, in its August 28, 2007 decision refusing to register Hargis’s “Sealtite” mark, the TTAB, a separate division of the PTO from that which handles incontestability affidavits, explicitly stated that the 2000 jury verdict was an adverse decision that extinguished B&B’s common-law rights in the “Sealtight” name.

B&B Hardware, Inc. v. Sealrite Bldg. Fasteners, Opp. No. 91155687 to App. No. 75129229, 2007 WL 2698310, at *6 (T.T.A.B. Aug. 28, 2007). We therefore conclude that the district court did not plainly err in finding that the 2000 jury verdict was a prior adverse decision.

B&B next argues that its failure to disclose was not willful because it did not realize the jury verdict was a final adverse decision and it did not disclose that verdict based on the advice of counsel. B&B's owner so testified at trial. However, the jury was entitled to disbelieve him if it chose. See Willis v. State Farm Fire & Cas. Co., 219 F.3d 715, 720 (8th Cir. 2000) (“[A] jury is free to disbelieve any witness, even if the testimony is uncontradicted or unimpeached.”). Thus, we cannot say that the district court plainly erred in finding that B&B acted willfully.

Because we find no plain error in the district court's determination that B&B willfully failed to disclose a prior adverse decision, it follows that the district court did not err in its determination that B&B committed fraud on the PTO and that Hargis was therefore entitled to the affirmative defense of fraud under 15 U.S.C. § 1115(b)(1).

III.

We turn now to the district court's conclusion that B&B's claims were barred by collateral estoppel. Finding that B&B failed to present evidence of any significant intervening factual change from the date of the 2000 jury verdict, we affirm.

We review the District Court's legal conclusions regarding preclusion de novo, Knutson v. City of Fargo, 600 F.3d 992, 995 (8th Cir. 2010), and may affirm on any basis in the record. Wycoff v. Menke, 773 F.2d 983, 986 (8th Cir. 1985). There are two types of preclusion—claim preclusion, or res judicata, and issue preclusion, or collateral estoppel. See Knutson, 600 F.3d at 995. Claim preclusion “provides that ‘a final judgment on the merits bars further claims by parties or their privies based on the same cause of action.’” Klipsch, Inc. v. WWR Tech., Inc., 127 F.3d 729, 733 (8th Cir. 1997) (quoting Montana v. United States, 440 U.S. 147, 153, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979)). Collateral estoppel generally provides that “[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.” Hargis VI, 135 S. Ct. at 1303 (alteration in original) (quoting Restatement (Second) of Judgments § 27, at 250 (1980)); see also Knutson, 600 F.3d at 996. Collateral estoppel, in the Eighth Circuit, has five elements:

- (1) the party sought to be precluded in the second suit was a party . . . in the prior suit;
- (2) the issue sought to be precluded is the same as the issue involved in the prior action;
- (3) the issue was actually litigated in the prior action;
- (4) the issue was determined by a valid and final judgment; and
- (5) the determination

in the prior action was essential to the judgment.

Morse v. Comm’r of Internal Revenue Serv., 419 F.3d 829, 834 (8th Cir. 2005) (internal quotation marks omitted).

In Hargis III, we identified incontestability as “a significant intervening factual change” precluding application of collateral estoppel. 569 F.3d at 388. In other words, obtaining incontestability allowed B&B to escape the preclusive effects of the 2000 jury’s finding that “Sealtight” lacked secondary meaning. Secondary meaning is part of validity; a descriptive trademark that lacks secondary meaning is not protectible. Schwan’s IP, LLC v. Kraft Pizza Co., 460 F.3d 971, 974 (8th Cir. 2006) (stating that a descriptive mark is only protectible if it is “so associated with the product that it becomes a designation of the source rather than of a characteristic of the product”—thus, if it has acquired secondary meaning). However, incontestability entitles a trademark owner to a presumption that “it has a valid, protectible mark and there is a likelihood of confusion between its mark and the defendant’s mark.” Id. at 389. Thus, when B&B obtained incontestability for “Sealtight,” its factual circumstances changed because, unlike at the 2000 trial, it could rely on a presumption that “Sealtight” carried a secondary meaning.

Once Hargis proved its affirmative defense of fraud in this case, B&B lost the benefits of incontestability, including the presumption of validity. See 15 U.S.C. § 1115(b); Hargis III, 569 F.3d at 389. The district court

found that, without incontestability, B&B was in the same situation as it was at the 2000 jury trial because it failed to plead *any other* intervening change in transactional facts. See Test Masters Educ. Servs., Inc. v. Singh, 428 F.3d 559, 572-75 (5th Cir. 2005) (“In [a prior case], the critical issue before the court was whether [plaintiff’s] trademark had acquired secondary meaning. In the present case, [plaintiff] is requesting protection against unfair competition, infringement, and false and deceptive advertising, based on his central argument that his . . . mark has now acquired secondary meaning. The issues of law in both cases are incontrovertibly identical. . . .” (footnote omitted)); see also id. at 575 (“The thrust of our holding is that [plaintiff] has not alleged in his pleadings any significant intervening factual change.”). Therefore, the district court held that collateral estoppel mandated judgment for Hargis. See B&B Hardware, Inc. v. Hargis Indus., Inc. (Hargis VIII), No. 4:06-CV-01654 BSM, 2017 WL 957548, at *4-5 (E.D. Ark. Feb. 16, 2017).

B&B’s sole argument against preclusion on appeal is that the 2000 district court lacked subject matter jurisdiction to determine whether “Sealtight” had secondary meaning. It claims that the Lanham Act prevents any review of descriptiveness after the mark has become incontestable. However, it fails to acknowledge that its mark was not incontestable in 2000. It also points out that no governmental body attempted to cancel the “Sealtight” mark’s registration after the 2000 trial, but it cites no authority implying that this

failure indicates the 2000 district court lacked subject matter jurisdiction.

In any event, we find that the 2000 district court had jurisdiction to consider the issue of secondary meaning. B&B does not dispute that, under 28 U.S.C. § 1331, the 2000 court had jurisdiction over its trademark infringement claim, which arose under 15 U.S.C. § 1114. Given this unrefuted fact, B&B offers nothing to support its claim that the district court lacked subject matter jurisdiction in that proceeding, and we therefore reject its contention.

We further agree with the district court that, without incontestability, B&B is collaterally estopped from pursuing its claims. There is no dispute that B&B was a party to the 2000 litigation. In Hargis III, we explicitly noted that the 2000 jury verdict considered secondary meaning—the same issue in question here. 569 F.3d at 389. We also noted that the 2000 district court’s decision—a valid and final judgment—hinged solely on the jury’s finding that the “Sealtight” mark had no secondary meaning. Id. We thus found there that the elements of collateral estoppel were satisfied as to the issue of secondary meaning, and we again so conclude.

There, however, we refused to apply collateral estoppel because B&B had shown an intervening factual change—incontestability—that allowed it to overcome issue preclusion on secondary meaning. Id. at 388. There, we referenced with approval the Fifth Circuit’s decision in Test Masters Educational Services v. Singh, which concluded that issue preclusion depends not on

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the passage of time but on whether the plaintiff alleges “an intervening factual change” in its pleadings. 428 F.3d at 575; Hargis III, 569 F.3d at 388. Here, other than incontestability and the passage of time, B&B has failed to allege *any* intervening factual change that would allow it to escape the application of collateral estoppel. Absent any evidence that B&B’s mark has developed secondary meaning since the 2000 trial, we decline to allow B&B to relitigate that issue. We thus uphold the district court’s application of collateral estoppel.

IV.

Because disgorgement under the Lanham Act requires that a plaintiff establish that the defendant has violated its trademark rights, see 15 U.S.C. § 1117(a), and because we have concluded that the district court did not err in finding that B&B’s trademark infringement claims are barred by collateral estoppel, the district court made no error in declining to order disgorgement of Hargis’s profits.

V.

In its cross-appeal, Hargis argues the district court improperly denied its motion for fees and costs. “We review the district court’s decision on whether to award attorney’s fees under an abuse-of-discretion standard.” Cnty. of Christ Copyright Corp. v. Devon Park Restoration Branch of Jesus Christ’s Church, 634 F.3d 1005, 1013 (8th Cir. 2011).

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Prevailing trademark defendants only receive fees and costs in exceptional cases. 15 U.S.C. § 1117(a). “An exceptional case is one in which a plaintiff brought an action that ‘was groundless, unreasonable, vexatious, or was pursued in bad faith.’” Hartman v. Hallmark Cards, Inc., 833 F.2d 117, 123 (8th Cir. 1987) (quoting Hodge Chile Co. v. KNA Food Distribs., Inc., 575 F. Supp. 210, 214 (E.D. Mo. 1983)); see also Sturgis Motorcycle Rally, Inc. v. Rushmore Photo & Gifts, Inc., 908 F.3d 313, 346 (8th Cir. 2018) (“[W]e hold that the district court did not abuse its discretion in finding that SMRI’s case was not ‘exceptional’ with respect to either the ‘substantive strength of [its] litigating position’ or ‘the unreasonable manner in which the case was litigated.’” (second alteration in original) (quoting Octane Fitness, LLC v. ICON Health & Fitness, Inc., 572 U.S. 545, 554, 134 S.Ct. 1749, 188 L.Ed.2d 816 (2014))). This case does not present an example of groundless, unreasonable, or vexatious litigation, as it has arguable merit on both sides—evidenced by the fact that both parties have prevailed at various times throughout its 12-year history. We cannot say that B&B pursued litigation in bad faith, as it received a favorable Supreme Court ruling and reasonably believed it could prevail. Therefore, the district court did not abuse its discretion in finding this an unexceptional case, and we affirm its denial of Hargis’s motion for attorney fees and nontaxable litigation costs.

The judgment of the district court is affirmed.

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2017 WL 957548

United States District Court,
E.D. Arkansas, Western Division.

B&B HARDWARE, INC, Plaintiff

v.

HARGIS INDUSTRIES, INC., Defendant

CASE NO. 4:06-CV-01654 BSM

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Signed 02/16/2017

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ORDER

BRIAN S. MILLER, UNITED STATES DISTRICT
JUDGE

Plaintiff B&B Hardware, Inc.’s (“B&B”) motion to substitute briefs [Doc. No. 447] is granted, and its motion for judgment notwithstanding the verdict and/or to alter or amend judgment [Doc. No. 446] is denied.

I. BACKGROUND

This case’s long, protracted history has been previously described and need not be repeated. *See, e.g.*, Doc. No. 411 at 1-4 (describing history); *B&B Hardware v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1301-02 (2015) (same). Suffice it to say that the twenty-plus year dispute ended in another jury verdict and judgment for defendant Hargis Industries, Inc. (“Hargis”), the outcome of which B&B argues was faulty for a variety of reasons.

After a five-day trial, a jury found for B&B and against Hargis on B&B’s claims for federal trademark infringement, false designation of origin, and unfair competition. Jury Verdict at 1, Doc. No. 429. The jury found for Hargis on B&B’s claim of unfair competition under California law, and for Hargis on its counterclaims for false advertising and false designation. *Id.* at 1-2. The jury also found that Hargis’s infringement was not willful, and that B&B engaged in fraud to obtain incontestability status. *Id.* at 3. As a result of the fraud finding, judgment was entered for Hargis on all claims, and the order directing judgment explained

that even if B&B had been successful, it had no remedy. *See* Doc. Nos. 438, 439.

B&B moves for judgment or to alter the existing judgment for seven reasons: (1) the jury's fraud finding was erroneous; (2) the jury's finding for Hargis on the unfair competition claim under California law is factually and legally incorrect; (3) the jury was wrong in finding none of Hargis's profits were attributable to infringement; (4) the order finding preclusion because B&B's trademark was no longer incontestable was in error; (5) Hargis is not entitled to judgment on its counterclaims for failing to show damages; (6) B&B should receive judgment on Hargis's affirmative defenses; (7) the analysis finding B&B was entitled to no disgorgement of Hargis's profits was incorrect. *See generally*, Doc. No. 447-1. Hargis argues that many of these issues have been waived because B&B did not properly raise them at trial or alternatively, that they fail on the merits. *See* Doc. No. 455. Although Hargis's position of waiver is certainly valid, the issues will also be addressed on the merits below.

II. LEGAL STANDARD

Admittedly, the standard for reviewing B&B's motion is complicated by the mixture of jury and court determinations. The parties agreed to submit claims and certain factual determinations to the jury, whether by demand or by consent. *See* Fed. R. Civ. P. 39(a), (c) (jury may be demanded or by consent); Fed. R. Civ. P. 49(b) (permitting general verdict with answers to written

questions); Am. Compl. 14, Doc. No. 114 (jury demanded); Jury Verdict at 3 (written questions). After the jury reached a verdict on the parties' claims and answered written questions, an appropriate judgment was entered applying those determinations to the law. Doc. No. 438 (order directing judgment); Fed. R. Civ. P. 58(b)(2)(A) (court must direct entry of appropriate judgment after jury returns general verdict with answers to written questions). Therefore, the appropriate standard of review depends on whether B&B is attacking a jury determination or the subsequent order and judgment.

When B&B attacks issues decided by the jury, B&B's motion is brought under Rule 50, which should only be granted if the jury's verdict is utterly lacking in evidentiary support. *In re Prempro Products Liability Litigation*, 586 F.3d 547, 572 (8th Cir. 2009). When evaluating a Rule 50 motion, evidence is construed most favorably to the prevailing party and all inferences are drawn in its favor, denying the motion "if reasonable persons could differ as to the conclusions to be drawn from the evidence." *Western American, Inc. v. Aetna Cas. and Sur. Co.*, 915 F.2d 1181, 1183 (8th Cir. 1990). Indeed, "where conflicting inferences reasonably can be drawn from evidence, it is the function of the jury to determine what inference shall be drawn." *Canny v. Dr. Pepper/Seven-Up Bottling Group, Inc.*, 439 F.3d 894, 900 (8th Cir. 2006).

When B&B attacks the final judgment and not a jury finding, B&B's motion is brought under Rule 59. See Fed. R. Civ. P. 54(a) (defining "judgment" as "a

decree and any order from which an appeal lies”); *Jackson v. Schoemehl*, 788 F.2d 1296, 1298 (8th Cir. 1986) (“[W]here a postjudgment motion is timely filed and calls into question the correctness of that judgment it should be treated as a motion under Rule 59(e).” (internal quotations omitted)). Rule 59(e) permits a district court to correct its own mistakes immediately following entry of judgment. *Innovative Health Care, Inc. v. P.T.-O.T. Assocs.*, 141 F.3d 1284, 1286 (8th Cir. 1998). The motion “cannot be used to introduce new evidence, tender new legal theories, or raise arguments which could have been offered or raised prior to entry of judgment,” *id.*, but rather “serve[s] the limited function of correcting manifest errors of law or fact or to present newly discovered evidence,” *United States v. Metro. St. Louis Sewer Dist.*, 440 F.3d 930, 933 (8th Cir. 2006). B&B has only argued for legal errors.

III. DISCUSSION

A. Fraud Finding

The jury found that B&B committed fraud on the Patent and Trademark Office (“PTO”), which B&B argues was erroneous because it lacks “legal and/or factual justification.” *See* Doc. No. 447-1 at 2, 4. The jury was required to find (1) a material misrepresentation or the failure to disclose material information (2) made with the intent to deceive. Instruction No. 19, Doc. No. 430. B&B’s argument is difficult to follow, but it appears to make a two-fold attack: (a) the jury instruction was legally wrong and (b) the evidence does not support

that the allegedly false declaration was “material” or that the declarant had an intent to deceive. Neither argument is compelling.

As an initial matter, B&B references a trademark treatise to explain the fraud claim, as if to suggest that the jury instruction was wrong. B&B at no point, however, states the instruction was improper, nor could it. The instruction mirrored the Seventh Circuit’s model instruction and is supported by case law. *See* Federal Civil Jury Instructions of the Seventh Circuit § 13.5.8; *Aromatique, Inc. v. Gold Seal, Inc.*, 28 F.3d 863, 877-78 (8th Cir. 1994).

B&B’s second argument about the insufficiency of the evidence is more interesting, but equally unavailing. Hargis’s position at trial was that Larry Bogatz, B&B’s president, misled the PTO—and thus committed fraud—by signing a declaration in support of his incontestability petition. That declaration required Bogatz to declare that B&B had not received a final decision on the merits adverse to its claim of ownership of the trademark that affected its right to register that mark. *See* Def. Ex. 69 (declaration of incontestability). Of course, B&B cannot reasonably dispute that Bogatz’s declaration was false: the 2000 jury verdict found B&B’s mark to be merely descriptive and devoid of secondary meaning which, under the law, means the mark could not be registered. *See Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 769 (1992) (“Section 2 of the Lanham Act provides that a descriptive mark that otherwise could not be registered under the Act may be registered if it has become distinctive of the

applicant's goods in commerce. This acquired distinctiveness is generally called 'secondary meaning.' (internal quotations omitted)). The issue, then, is whether there was sufficient evidence to suggest this false representation was fraudulent.

B&B focuses its argument on whether (a) the Trademark Trial and Appeal Board ("TTAB") had knowledge of the 2000 verdict and thus could not be misled by Bogatz's statement or (b) that Bogatz had no intent to deceive because he was acting on counsel's advice. *See* Doc. No. 447-1 at 6-7. It is true that the TTAB—an entirely different office than the PTO—referenced the 2000 verdict in its correspondence. *See, e.g.,* Pl.'s Ex. 22. But the same treatise B&B relies on to explain the law also explains that the process of filing for incontestability does not include a review of the merits of Bogatz's declaration. Specifically, "[t]he [PTO] does not examine the merits of a[n incontestability] affidavit. If the affidavit is received at a proper time, it is entered in the [PTO's] records without regard to its substantive sufficiency, although it is inspected for facial inconsistencies or omissions." 5 McCarthy on Trademarks and Unfair Competition § 19:140 (4th ed.). Therefore, the TTAB's reference to the verdict does not mean that the PTO was aware or that the PTO considered the verdict and still converted B&B's mark to incontestable status. *See, e.g., Robi v. Five Platters, Inc.*, 918 F.2d 1439, 1444 (9th Cir. 1990) (omitting information on prior adverse ruling resulted in cancellation of mark for fraudulent activity).

B&B’s argument that reliance on legal counsel precludes a fraudulent intent finding ignores other circumstances upon which the jury could find an intent to deceive. The jury was free to reject Bogatz’s testimony about his intent and reliance on counsel. *See Willis v. State Farm Fire and Cas. Co.*, 219 F.3d 715, 720 (8th Cir. 2000) (“[A] jury is free to disbelieve any witness, even if the testimony is uncontradicted or unimpeached.”). That is especially true in situations where, as is the case here, the jury was permitted to draw a reasonable inference of intent considering the timing of the declaration occurring mere weeks before filing a new lawsuit, the witnesses’ testimony about their interactions in the past, and Bogatz’s admitted knowledge of the 2000 jury’s findings. *See Robi*, 918 F.2d at 1444 (affiant’s knowledge of an adverse decision permits finding of fraudulent intent); *e.g.*, *Orient Express Trading Co. v. Federated Dep’t Stores, Inc.*, 842 F.2d 650, 653-54 (2d Cir. 1988) (considering totality of circumstances to determine elements of fraud).

It appears B&B did not raise this argument in a motion for a judgment as a matter of law under Rule 59(a). Nevertheless, B&B has not shown that it is entitled to post-judgment relief because the jury’s verdict has “a legally sufficient evidentiary basis” to find for Hargis on those issues. *See Fed. R. Civ. P. 50(b)(3)* (permitting entry of judgment as a matter of law); *Fed. R. Civ. P. 50(a)(1)* (judgment as a matter of law asks if court finds a reasonable jury would have a sufficient basis for verdict).

B. Unfair Competition Claim

B&B next argues that an inconsistent verdict must be corrected because the jury found for B&B on the trademark infringement and false designation of origin claim, which means that it “must” also find for B&B on the unfair competition claim under California law. This claim required the jury to find (1) Hargis engaged in unlawful business practices in California and (2) B&B was damaged or harmed. Instruction No. 13. Notably, B&B does not argue that this instruction was invalid, thus the only issue is whether the verdict was inconsistent or B&B is otherwise entitled to judgment notwithstanding the verdict.

As Hargis correctly points out, B&B waived this “inconsistent verdict” argument by failing to raise the objection before the jury was discharged. *Yazdianpour v. Safeblood Techs., Inc.*, 779 F.3d 530, 538 (8th Cir. 2015). Even if B&B had raised the issue, the verdict was not inconsistent. Assuming B&B is still entitled to judgment on the Lanham Act claims—which, as described throughout this order, is not the case—then B&B met the first element requiring business activity that “violated state or federal law.” Although B&B’s brief [Doc. No. 447-1] and reply brief [Doc. No. 459] spend considerable time emphasizing Hargis’s business practices in California, B&B points to no evidence that it was harmed by this activity, as required by the second element. Even if it had, the jury was free to accept that Hargis conducted business in California, that infringement occurred, but that B&B was not harmed or did not suffer damages.

Finally, it is worth noting that B&B incorrectly recites the law in its reply brief. B&B states that the jury instruction instructs the jury that if it found unfair business practices to have occurred [*i.e.*, Hargis committed trademark infringement], then the jury “*must* find in favor of B&B.” Doc. No. 459 at 6 (emphasis in original). This is inaccurate. This “must” instruction does not appear in instruction number 13—the “unfair competition under California law” instruction—but appears in instruction number 12—the “unfair competition under federal law” instruction. This could explain B&B’s position that the jury had to find for it on both unfair competition claims. The instruction, however, is clear that the California claim includes the extra element of damages.

Accordingly, the motion is denied because there is no inconsistency and no reason to direct judgment in B&B’s favor on the unfair competition claim under California law.

C. Lost Profits

B&B argues there was insufficient evidence to support the jury’s finding that none of Hargis’s profits were attributable to Hargis’s infringement. *See* Doc. No. 447-1 at 13-15. Hargis argues B&B is precluded from advancing this argument because the jury received B&B’s proposed jury instruction describing the law, or alternatively, that there was more than enough evidence to permit the jury to find that Hargis’s profits

were attributable to factors other than using a specific mark. *See* Doc. No. 455 at 14-15.

Regardless of whether B&B can properly raise the argument, the point is not compelling. The jury was required to determine the amount of Hargis's profits "attributable to the infringement[.]" Instruction No. 16. The jury's starting point was Hargis's total profit; then, the jury could deduct all or a part of profit "attributable to factors other than use of the trademark." *Id.*

B&B argues that the expert witnesses "essentially agreed" on Hargis's profits, but that "Hargis made no effort to prove that any of those profits came from anything other than its Sealtite products . . . There is simply no evidence in the record to quantify any dollar amount of Hargis profits that are not attributable to the Sealtite mark without sheer speculation." Doc. No. 447-1 at 14.

The problem with B&B's position is that it presupposes *some* of Hargis's profits were attributable to infringement, when Hargis's position was that it did not infringe, and thus *none* of its profits are attributable to infringement. Indeed, Hargis presented testimony from several of its customers to explain that the customers' motivation for purchasing Hargis products was not connected with the Sealtite name—thus, not connected with the allegedly infringing trademark—but rather other characteristics such as customer service experience and quality of product. There was evidence to support the conclusion that none of Hargis's profits were attributable to infringement and the jury

accepted it. *See White v. Pence*, 961 F.2d 776, 780-81 (8th Cir. 1992) (recognizing juries can draw difference conclusions and judge should not usurp the jury's function simply because another conclusion was possible).

Accordingly, the motion is denied because the evidence supports the jury's finding.

D. Preclusion for Incontestability

B&B next attacks the post-trial order holding that collateral estoppel barred the action after the jury found that B&B committed fraud on the PTO. By way of background, a trademark infringement claim requires (1) a valid, protectible mark and (2) a likelihood of confusion between plaintiff and defendant's marks. *B&B Hardware, Inc. v. Hargis Indus.*, 569 F.3d 383, 389 (8th Cir. 2009). To demonstrate a mark is valid and protectible (first element), B&B must establish, in the case of a descriptive mark, that its mark had acquired a secondary meaning. *Id.* In 2000, however, a jury found that B&B's mark was descriptive and had not acquired a secondary meaning. Jury Verdict, *B&B Hardware, Inc. v. Hargis Indus., Inc.*, Case No. 4:98-CV-00372 (E.D. Ark. May 12, 2000), Doc. No. 68. Consequently, the mark was not entitled to protection, and thus there was no need to determine whether B&B met the second element of likelihood of confusion. *B&B Hardware*, 569 F.3d at 389.

When B&B filed this present lawsuit and alleged trademark infringement (again), B&B alleged new circumstances, namely that its trademark had become

incontestable. *Id.* Incontestability prohibits Hargis from arguing that the mark was merely descriptive; essentially, B&B is given a “pass” on the first element—the element that doomed its prior case—and allows a jury to consider the second. *Id.* Indeed, this incontestability status was the “significant intervening factual change” that rendered collateral estoppel inappropriate. *Id.* at 388.

The problem now is that the jury determined B&B committed fraud on the PTO when B&B acquired incontestable status, which under federal law, removes the benefits of incontestability. Fraud removes the conclusiveness of protectibility and downgrades the status of the mark to the same status it had prior to incontestability—*i.e.*, the same status it had when the jury rendered its verdict in 2000. *Park n’ Fly, Inc. v. Dollar Park & Fly*, 469 U.S. 189, 196 (1985); *Dakota Indus. v. Bever Best Ltd.*, 28 F.3d 910, 912-13 (8th Cir. 1994). Without incontestability, B&B no longer had that “significant intervening factual change” that was presumed true when the Eighth Circuit remanded to permit B&B to have another bite at the proverbial apple. *See B&B Hardware*, 59 F.3d at 388.

B&B argues this is a manifest error of law because the TTAB did not apply issue preclusion in its own proceedings. *See* Doc. No. 447-1 at 16-17. It is unclear whether B&B is arguing that the fraud finding is wrong—which, as explained above, is not the case—or whether the analysis and application of collateral estoppel is incorrect. It is also unclear how the TTAB’s decision has any impact on whether the present civil

action in federal court is barred when the 2000 verdict and the present case both fail on the first element of infringement: protectibility. Nevertheless, after scrutinizing the prior decision, there appears to be no manifest error of law necessitating modification.

Accordingly, B&B has not pointed to any error in law that would not bar it from bringing this action, and thus the judgment for Hargis stands.

E. Hargis's Counterclaims

As B&B correctly observes, judgment was entered for Hargis “on all claims,” Doc. No. 439, which includes Hargis’s counterclaims. B&B argues Hargis was not entitled to judgment as a matter of law because “Hargis failed to present any evidence of damages,” Doc. No. 447-1 at 18, though this argument is expanded to challenge whether evidence supported multiple elements in the relevant claims, *see, e.g., id.* at 19 (“Hargis failed to present any testimony regarding elements 2, 3, and 4 of this claim.”).

As an initial matter, money damages were not necessary, but only that Hargis was “injured” or “is or is likely to be damaged.” *See* Doc. No. 447-1 at 18-19 (quoting jury instructions); *cf.* 5 McCarthy on Trademarks and Unfair Competition § 30:2 (4th ed.) (“In trademark cases, it is not necessary for plaintiff to prove actual damage or injury to state a *prima facie* case of infringement. Injunctive relief does not require injury be proven.”); *Sweetarts v. Sunline, Inc.*, 380 F.2d 923, 927 (8th Cir. 1967) (In infringement actions,

plaintiff need not show actual confusion “[n]or need plaintiff show actual or possible monetary injury.”). This is especially true in cases where, as is the case here, Hargis was not seeking monetary damages. The treatise B&B relies on states this explicitly: “Injunctive relief does not require that injury be proven. In effect, injury to the trademark owner is presumed.” 5 McCarthy on Trademarks and Unfair Competition § 30:10 (4th ed.).

Even if B&B were correct, there was evidence for the jury to infer injury and damages. Based on the verdict, it is clear the jury accepted Hargis’s argument that B&B copied photos, text, or size and weight charts from Hargis’s website and posted them to B&B’s website as B&B’s fasteners. *See* Instruction No. 17(1). Assuming this is true, *Hallmark Cards, Inc. v. Monitor Clipper Partners, LLC*, 758 F.3d 1051, 1056 (8th Cir. 2014) (viewing evidence in the light most favorable to prevailing party), Hargis suffered injury when it had to engage experts and combat B&B’s activity. *See* Doc. No. 455 at 19 (recounting testimony and use of experts and counsel to respond to website); *Nat’l Fed’n of the Blind v. Loompanics Entersp.*, 936 F. Supp. 1232, 1245-46 (D. Md. 1996) (“[A] plaintiff does not have to await the consummation of threatened injury to obtain preventative relief” under the Lanham Act.); 15 U.S.C. § 1116 (authorizing injunctive relief “to prevent the violation” of the registrant of a mark). To the extent B&B is extending this argument to include other elements, that attempt also fails because there was sufficient

evidence in the record to find the other elements were met.

Accordingly, B&B's argument is without merit and the motion is denied.

F. Affirmative Defenses

B&B argues that it is entitled to judgment on Hargis's affirmative defenses (unclean hands, estoppel, laches, and acquiescence) "to the extent that those defenses made up any part of the court's reasoning in how it applied the equities." Doc. No. 447-1 at 21. As Hargis correctly identifies (and B&B concedes), the equitable defenses were not sent to the jury and were never analyzed in the order discussing disgorgement. *See* Doc. No. 455 at 21; Doc. No. 447-1 at 21 (B&B stating that "[t]he court's order does not mention any specific reliance or findings on those defenses."). The order denying Hargis's motion for judgment required Hargis to "move for judgment on the basis of [the] defenses after an adverse finding of liability at trial." Doc. No. 411. Hargis made no such motion, and thus the affirmative defenses have never been considered. Accordingly, the motion is denied.

G. Disgorgement of Profits

Finally, B&B argues that the order deciding that it was not entitled to disgorgement was in error because: (a) contrary to the jury's finding, it presented "overwhelming evidence of willful infringement"; (b) it

was entitled to money damages as a matter of law; and (c) considering whether B&B lost sales as a result of Hargis's actions is contrary to law. *See* Doc. No. 447-1 at 25-26, 29.

First, B&B argues there was overwhelming evidence of intentional infringement to suggest the jury's finding to the contrary was erroneous. Of course, B&B's failure to raise this point prior to submission to the jury waives the argument now. *See* Fed. R. Civ. P. 50(b); *Pulla v. Amoco Oil Co.*, 72 F.3d 648, 655 (8th Cir. 1995). Notwithstanding that obstacle, B&B's position also fails on the merits. Willful infringement means that (a) Hargis knew it was infringing on B&B's mark or (b) acted with indifference toward B&B's rights. Instruction No. 20. Although it is clear that Hargis had, at the very least, constructive notice of B&B's registration, willfulness can require more than knowledge of registration. *See, e.g., Kemin Foods, L.C. v. Pigmentos Vegetales Del Centro S.A. de C.V.*, 357 F. Supp. 2d 1105, 1129 (S.D. Iowa 2005) (citing factors to consider); *3M v. Johnson & Johnson Orthopaedics, Inc.*, 976 F.2d 1559, 1581 (Fed. Cir. 1992) ("When determining whether infringing conduct warrants a finding of willfulness the court must examine the totality of the circumstances of the case."). Although B&B presents several circumstances to suggest Hargis willfully infringed, there was also evidence, such as the ongoing litigation repeatedly finding no infringement and the fact that the two companies engaged in different markets, to suggest unintentional conduct. Appropriately, then, the issue was submitted to the jury and the jury's determination

need not be disturbed. *See Cass Cty. Music Co. v. C.H.L.R., Inc.*, 88 F.3d 635, 644 n.7 (8th Cir. 1996) (“[I]t necessarily follows that the willful or innocent nature of the infringement . . . would be [a] jury question[.]”).

B&B is correct that the order denying Hargis’s motion for judgment presumed willfulness. *See* Doc. No. 447-1 (“Again, the Court’s order denying summary judgment . . . [found] knowledge of B&B’s registration, and thus B&B’s right of exclusive ownership . . . [to] create a jury question on whether Hargis willfully infringed on B&B’s mark.”); Doc. No. 411 at 14. Of course, this assumption must be kept in the context of those pending motions, the resolution of which assumes certain inferences to be true and gave B&B, the non-movant, the benefit of the doubt. *See Holland v. Sam’s Club*, 487 F.3d 641, 643 (8th Cir. 2007). Although it is true that *Masters v. UHS of Delaware, Inc.*, 631 F.3d 464 (8th Cir. 2011), found that knowledge of a violation creates an inference of willfulness, *id.* at 471-72, this merely presents the jury with an alternative inference that it was free to accept or reject. *See Canny*, 439 F.3d at 900 (“where conflicting inference reasonably can be drawn from evidence, it is the function of the jury to determine what inference shall be drawn”).

Second, B&B claims it was automatically entitled to a disgorgement of some amount of profits by proving a Lanham Act violation. Before B&B can advance this argument, it must have succeeded on an infringement claim, which as discussed above, B&B is precluded from advancing. Nonetheless, the argument fails because the Lanham Act explicitly makes disgorgement

discretionary: “[Upon a finding of infringement,] the plaintiff shall be entitled . . . *subject to the principles of equity*” to recover profits. 15 U.S.C. § 1117(a) (emphasis added); *Masters*, 631 F.3d at 474-75 (“Under 15 U.S.C. § 1117(a), the district court has *discretion* to award monetary relief itself or to increase or decrease the jury’s award of profits.” (emphasis added)).

Finally, B&B argues the disgorgement analysis was improper because considering whether B&B lost sales due to Hargis’s infringement was improper. *See* Doc. No. 447-1 at 29-30. It is true that evidence of B&B’s lost sales was considered in the analysis. *See, e.g., id.* at 5. This was not dispositive, however, and was included in balancing many factors to determine whether equity favored disgorging Hargis of any of its profits. *See* Doc. No. 438 at 4-5 (noting “whether sales have been diverted” is one of several factors considered by the Third, Fourth, and Fifth Circuits). If B&B’s lost sales could never be considered, disgorgement could only stand as a penalty, which undermines B&B’s unjust enrichment theory and the purpose of disgorgement in infringement cases. *See* Doc. No. 447-1 at 30 (B&B’s status report stating it was seeking an award of “Hargis’s profits for its unjust enrichment”); *Masters*, 631 F.3d at 474 (monetary relief must be “compensatory, not a penalty.”).

Accordingly, the motion is denied because B&B has not shown that any manifest error occurred to modify the judgment.

IV. CONCLUSION

For the reasons set forth above, B&B's motion for judgment notwithstanding the verdict and/or to alter judgment [Doc. No. 446] is denied. B&B's motion to substitute briefs [Doc. No. 447] is granted, and its amended brief [Doc. No. 447-1] was considered.

IT IS SO ORDERED this 16th day of February 2017.

App. 38

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 17-1570

B&B Hardware, Inc., a California Corporation
Appellant

v.

Hargis Industries, Inc., a Texas Corporation,
doing business as East Texas Fasteners, doing
business as Sealtite Building Fasteners
Appellee

East Texas Fasteners, a business entity of form
unknown and Does, 1 through 10, inclusive

No: 17-1755

B&B Hardware, Inc., a California Corporation
Appellee

v.

Hargis Industries, Inc., a Texas Corporation,
doing business as East Texas Fasteners, doing
business as Sealtite Building Fasteners
Appellant

East Texas Fasteners, a business entity of form
unknown and Does, 1 through 10, inclusive

Appeal from U.S. District Court for the
Eastern District of Arkansas - Little Rock
(4:06-cv-01654-BSM)
(4:06-cv-01654-BSM)

App. 39

ORDER

The petition for rehearing en banc is denied in 17-1570. The petition for rehearing by the panel is also denied in 17-1570.

February 06, 2019

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans
