

APPENDIX

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APPENDIX A

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

No. 19-20482

[Filed: June 30, 2020]

CONSTRUCTION COST DATA, L.L.C.;)
THE JOB ORDER CONTRACT GROUP,)
L.L.C.; MANAGED J.O.C.)
SOLUTIONS, L.L.C.,)
)
Plaintiffs - Appellants)
Cross-Appellees)
)
v.)
)
THE GORDIAN GROUP,)
INCORPORATED; R.S. MEANS)
COMPANY, L.L.C.,)
)
Defendants - Appellees)
Cross-Appellants)
)

Appeals from the United States District Court
for the Southern District of Texas
USDC No. 4:16-CV-114

Before DAVIS, GRAVES, and DUNCAN, Circuit
Judges.

PER CURIAM:*

Plaintiffs, Construction Cost Data, L.L.C., and Job Order Contracting Group, L.L.C. (collectively “CCD”), appeal the district court’s judgment in favor of Defendants, The Gordian Group, Inc., and R.S. Means Company, L.L.C. (collectively “Gordian”). CCD argues that (1) the district court violated Rule 48, which requires a unanimous verdict and a polling of the jury upon a party’s request, when it issued its judgment; (2) the district court erred in entering judgment for Defendants based on the unanimous answer to Jury Question 12, which related to the *Noerr-Pennington* affirmative defense, because the answers to the jury interrogatories were irreconcilable and/or indicated jury confusion; (3) the district court abused its discretion in excluding evidence at trial of Defendants’ alleged fraudulent procurement of their trademark and copyright registrations; and (4) the district court erred in concluding that *Noerr-Pennington* immunity was applicable here. Defendants cross-appeal the district court’s summary-judgment dismissal of their trademark infringement claim against Plaintiffs. For the reasons set forth below, we conclude that the parties’ various challenges to the district court’s judgment are without merit. Therefore, we AFFIRM.

I. BACKGROUND

Job order contracting is a construction procurement method allowing multiple jobs from a single bid

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

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contract. An integral component of job order contracting is the “unit price book,” which provides all of the relevant preset prices, including but not limited to labor, material, and equipment costs, for construction tasks a contractor might be called upon to provide during the course of the contract. In 2015, CCD introduced a unit price book called the “Construction Cost Catalogue” into the job order contracting industry.

Gordian contended that Plaintiffs’ Construction Cost Catalogue infringed on the copyright and trademark of its unit price book, the “Construction Task Catalog.” Gordian sent cease-and-desist letters to CCD and a cooperative association working with CCD, asserting that CCD was improperly using Gordian’s proprietary material and intellectual property through its Construction Cost Catalogue. As a result of the cease-and-desist letters, CCD lost contracts and future business opportunities. CCD subsequently filed suit in state court against Gordian for tortious interference with contract, antitrust violations, and business disparagement. Gordian removed the case to federal court and filed counterclaims against CCD for copyright and trademark infringement, as well as unfair competition.¹

CCD filed an amended complaint, which Gordian moved to dismiss under Rule 12(b)(6). Gordian argued that it was immune from any liability resulting from its cease-and-desist letters pursuant to the *Noerr-Pennington* doctrine and that the “sham” exception to

¹ Gordian also filed a third-party demand against Benjamin Stack and Mark Powell, who were alleged to have formed CCD.

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the doctrine did not apply because the letters were not objectively baseless.² The magistrate judge issued a report recommending that Gordian's motion to dismiss be denied, which the district court adopted. Gordian later filed a motion for summary judgment, reasserting that it was entitled to *Noerr-Pennington* immunity and that therefore Plaintiffs' claims should be dismissed. The district court denied the motion.

CCD also filed a motion for partial summary judgment seeking dismissal of Gordian's counterclaims of copyright and trademark infringement. The district court determined that "Construction Task Catalog" was not entitled to trademark protection because it was a generic term. Consequently, the district court granted

² The *Noerr-Pennington* doctrine comes from two Supreme Court cases: *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965). "The essence of the doctrine is that the parties who petition the government [including the courts] for governmental action favorable to them cannot be prosecuted under the antitrust laws even though their petitions are motivated by anticompetitive intent." *Video Int'l Prod., Inc. v. Warner-Amex Cable Commc'n, Inc.*, 858 F.2d 1075, 1082 (5th Cir. 1988). The doctrine has been expanded to include more than just antitrust claims, but also state law claims such as tortious interference with contract. *Id.* at 1084. It has also been interpreted to cover pre-litigation conduct such as cease-and-desist letters. *Coastal States Mktg., Inc. v. Hunt*, 694 F.2d 1358, 1367-68 (5th Cir. 1983). The doctrine is inapplicable, however, if Defendants' activities were "objectively baseless in the sense that no reasonable litigant could reasonably expect success on the merits" and, if so, the baseless activities conceal an attempt to harass or interfere directly with the business relationships of a competitor. *Profl Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60-61 (1993) (describing "sham" exception).

summary judgment in favor of CCD and dismissed Gordian's trademark infringement claim. As to Gordian's copyright infringement claim, however, the district court concluded that there were genuine issues of material fact for trial and denied summary judgment.

The case then proceeded to trial before a jury. The jury charges were lengthy, and there were twenty-seven special jury interrogatories. The jury could not reach a unanimous decision on five of the questions. Although instructed not to do so, the jury indicated the number of jurors voting "yes" and the number voting "no" next to the non-unanimous answers. After the district court read the jury's answers on the record, the court noted that the verdict was "not immediately comprehensible" and excused the jury "so the lawyers [could] debate the verdict form."

Gordian argued that the case was over because the jury's unanimous answer to Question 12 entitled Gordian to *Noerr-Pennington* immunity from all of CCD's claims, and the jury's unanimous answer to Question 22 required dismissal of Gordian's copyright infringement claim against CCD. CCD asserted that the answer to Question 12 was inconsistent with the answers to Questions 9, 10, and 11. CCD further requested that the district court give the jury a charge under *Allen v. United States*³ and allow the jury to deliberate further regarding the non-unanimous answers, but the district court denied the request. Instead, the district court ordered the parties to submit

³ 164 U.S. 492 (1896).

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briefs regarding how it thereafter should proceed and stated that “if we’ll have the jury back, let’s do it quickly.”

CCD filed a motion requesting that the jury be recalled to continue deliberations or that a new trial be ordered under Rule 49. CCD reasserted that the jury’s response to Question 12 contradicted the responses to Questions 9-11. CCD further argued that the jury’s award of \$2.33 million dollars in damages in favor of CCD and the jury’s responses on the whole showed that the jury believed Gordian unjustifiably harmed CCD and that Gordian should be ordered to pay damages as a result. Gordian reasserted that the district court should enter judgment in accordance with the jury’s unanimous answer to Question 12 calling for application of *Noerr-Pennington* immunity and its unanimous answer to Question 22 in which the jury determined that Gordian failed to prove copyright infringement.

After hearing argument on CCD’s motion, the district court agreed with Gordian and entered a final judgment in favor of Gordian on CCD’s claims of tortious interference with contract, antitrust violations, and business disparagement, and in favor of CCD on Gordian’s counterclaim of copyright infringement. The district court also issued a lengthy memorandum and order denying CCD’s Rule 49 motion for continued jury deliberations or new trial.

CCD then filed a Rule 59 motion for new trial or alternatively motion to modify judgment. CCD re-urged the grounds for a new trial set forth in its Rule 49 motion. Additionally, CCD argued that under Rule 48,

which requires a unanimous verdict unless the parties stipulate otherwise, the district court had only two options in the face of the non-unanimous answers returned by the jury: recall the jury and encourage further deliberations or declare a mistrial. The district court denied CCD's Rule 59 motion, noting that it previously addressed many of CCD's arguments in its decision denying CCD's Rule 49 motion. CCD and Gordian filed timely notices of appeal.

II. DISCUSSION

A. Rule 48

On appeal, CCD reasserts its argument that the district court violated Rule 48 of the Federal Rules of Civil Procedure when it issued its judgment. Under Rule 48, “[u]nless the parties stipulate otherwise, the verdict must be unanimous”⁴ The rule further provides:

After a verdict is returned but before the jury is discharged, the court must on a party's request, or may on its own, poll the jurors individually. If the poll reveals a lack of unanimity or lack of assent by the number of jurors that the parties stipulated to, the court may direct the jury to deliberate further or may order a new trial.⁵

CCD argues that the district court's judgment violates the above provisions of Rule 48 because the verdict was not unanimous and because it was “deprived of the

⁴ FED. R. CIV. P. 48(b).

⁵ FED. R. CIV. P. 48(c).

right to conduct a jury poll.” It further contends that in violating Rule 48, the district court also violated its Seventh Amendment right to a jury trial, and that this error is per se reversible.

1. Unanimity Requirement

CCD is correct that Rule 48 requires a unanimous verdict. Under this court’s precedent, however, “a jury’s failure to reach a verdict on every interrogatory does not prevent a court from accepting the properly-answered interrogatories.”⁶ Specifically, “[p]roperly-answered interrogatories may support a verdict on the issues to which they respond. This is true even if other claims in the case remain unsettled.”⁷

Other circuits have noted the various options available to a district court when a jury fails to agree unanimously on all interrogatory answers.⁸ These options include (1) resubmitting the issues to the jury for further deliberation in the hope of obtaining unanimous answers, (2) asking the parties if they would be willing to forego the requirement of unanimity and accept a majority verdict, (3) entering judgment on the basis of the unanimous verdicts if they are dispositive of the case, (4) declaring the entire case a mistrial and ordering the case reheard in its entirety,

⁶ *Bridges v. Chemrex Specialty Coatings, Inc.*, 704 F.2d 175, 180 (5th Cir. 1983) (citations omitted).

⁷ *Id.*

⁸ *Baxter Healthcare Corp. v. Spectramed, Inc.*, 49 F.3d 1575, 1580-81 (Fed. Cir. 1995).

and (5) ordering a partial retrial only as to those issues which were not unanimously agreed upon by the jury.⁹

In this matter, the district court entered judgment on the basis of the jury's unanimous answer to Question 12, which it held established that the "sham" exception to *Noerr-Pennington* immunity did not apply and consequently required dismissal of all of CCD's claims against Gordian. The district court also entered judgment on the basis of the jury's unanimous answer to Question 22, which established that Gordian did not meet its burden of proof on its claim of copyright infringement and consequently required dismissal of Gordian's claim against CCD. Because the jury's unanimous answers to Questions 12 and 22 were dispositive of all claims in this matter, the district court rightly entered judgment in reliance on those answers.¹⁰ Therefore, CCD's argument that the district court violated Rule 48 in entering judgment because not all of the jury's answers were unanimous is without merit.

2. Polling of the Jury

CCD argues that the district court also violated Rule 48 by denying CCD an opportunity to poll the jury. CCD maintains that, contrary to Gordian's contention, it did not waive its right to poll the jury, but that such right was taken away "when the court secretly discharged the jury."

⁹ *Id.* at 1581.

¹⁰ *See id.*; *Bridges*, 704 F.2d at 180.

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As reflected above, Rule 48 specifies that a party may request the district court to poll the jury “[a]fter a verdict is returned but before the jury is discharged,” and that if a party makes such request within that time period, “the court *must*” poll the jurors individually. The trial transcript reveals that after the jury returned its verdict and the district court read the verdict on the record, the district court asked the forewoman if its reading was correct, and the forewoman answered affirmatively. Immediately thereafter, the district court stated: “I think what we need to do right now is excuse the jury so the lawyers can debate the verdict form.” After the jury exited, the district court said: “I think it’s going to take us a long time to figure this out. Some of the questions were not answered unanimously. I would propose that we send the jury home today with the possibility of recalling them. But what are your thoughts on it?”

CCD agreed with the court’s suggestion. Gordian asserted that because the jury answered Question 12 unanimously, it was immune from all of CCD’s claims under the *Noerr-Pennington* doctrine. The district court responded, “That’s what we got to figure out. This verdict is not immediately comprehensible.” The district court then stated: “Normally at the end of a trial, the Court, I, shake hands with the jury, and we offer them a chance to take a photo, group photo. I’m inclined to think I should do that, and then I’ll tell them we may need them back another day.” Neither party objected.

When the district court returned, the court stated that it did not know “quite what to do with [the

verdict]” and that it did “think there is some inconsistency.” Gordian reasserted that that the unanimous answer to Question 12 meant Gordian was immune from all of CCD’s claims and that the unanimous answer to Question 22 “found against [Gordian] on copyright infringement.” Gordian posited that “the case is therefore over.” CCD disagreed, contending that the jury should continue to deliberate the non-unanimous answers, and that, in any event, the non-unanimous answers to Questions 9-11 were inconsistent with the unanimous answer to Question 12. The district court denied CCD’s request to give the jury an *Allen* charge, and it requested briefing on how to proceed. The court stated: “If we’ll have the jury back, let’s do it quickly.”

CCD argues that based on the above, it reasonably understood that after briefing was submitted, the jury would be re-called, and trial would resume to determine if a complete and unanimous verdict could be obtained. It asserts that “[t]he verdict was not final and a request to poll the jury was premature.”

CCD is mistaken that a request to poll the jury would have been premature. Rule 48 specifically denotes the time period for requesting a poll: “[a]fter a verdict is returned but before the jury is discharged.”¹¹ In this case, a verdict was clearly returned and read aloud by the district court, with the forewoman confirming that the district court read the verdict correctly. CCD could have requested a poll of the jury starting at that point.

¹¹ FED. R. CIV. P. 48(c).

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CCD's argument that the district court "deprived" it of its "opportunity to request a jury poll" is also without merit. CCD had the opportunity to request a poll any time after the verdict was read. Moreover, the district court did not "secretly" discharge the jury. Although the district court "excused" the jury after reading the verdict, the district court solicited the parties' consent to proceed with what it would normally do "at the *end* of a trial" and that it would inform the jurors that they "*may*" need to come back another day. CCD did not object to this procedure. The district court's actions and statements should have put CCD on notice that the jury was potentially being discharged. Under these circumstances, CCD's argument that it was denied the opportunity to poll the jury in violation of Rule 48 is without merit.

B. District Court's Reliance on Answer to Jury Question 12

CCD reasserts its argument that the jury's interrogatory answers were irreconcilable and/or indicated jury confusion such that the district court erred in entering judgment for Defendants based on the unanimous answer to Question 12, which related to *Noerr-Pennington* immunity. Specifically, CCD asserts that Jury Questions 9-12 substantively address the same factual determination, i.e., whether there was any merit to Gordian's allegations of infringement as stated in its cease-and-desist letters. CCD submits that the jury's responses to Questions 9, 10, and 11 directly contradict the answer to Question 12; therefore, the judgment should be reversed and the conflicting issues retried. As explained below, we disagree.

1. Standard of Review

This court “grant[s] considerable latitude to the trial court when interpreting special interrogatories since it is in a better position to analyze the jury’s intention[s] and thus is charged, in the first instance, with the obligation of giving effect to those intentions in light of the surrounding circumstances.”¹² Therefore, we review the “trial court’s treatment of special interrogatories only for abuse of discretion.”¹³ Similarly, we review the trial court’s denial of a motion for new trial only for abuse of discretion.¹⁴

2. Jury Questions 9-12

Jury Questions 9-11 were included under the section of the jury packet entitled “Defenses,” and the subsection entitled “Legal Justification.” The questions asked whether Defendants had a “good-faith belief that they had a valid basis to send cease-and-desist letters regarding their copyrighted material.” Question 12 was included in the jury packet under the subsection entitled “*Noerr-Pennington Doctrine*” and had two parts. The first part asked whether Gordian’s pre-litigation correspondence was “objectively baseless in the sense that no reasonable litigant could reasonably expect success on the merits.” The second part of Question 12 asked: “If the activity of the

¹² *Carr v. Wal-Mart Stores, Inc.*, 312 F.3d 667, 670 (5th Cir. 2002) (internal quotation marks and citation omitted).

¹³ *Id.* (citation omitted).

¹⁴ *Id.*

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[Defendants] was objectively baseless, was the subjective intent merely to interfere with the CCD parties?”

The court’s charges immediately preceding Question 12 specifically described the circumstances under which a lawsuit was “objectively baseless”—“no reasonable litigant could realistically expect to win.” The charges instructed the jurors that if they found Gordian’s lawsuit “not objectively baseless,” then they did not need to consider the second part of Question 12, whether the lawsuit was “an attempt to harass or interfere with the business relationships of the Plaintiffs.”

The jury unanimously answered “no” to the first part of Question 12, which asked: “Was the [Defendants] pre-litigation correspondence objectively baseless in the sense that no reasonable litigant could reasonably expect success on the merits?” The jury put a slash next to the answer to the second part of Question 12, indicating that, as instructed, it did not consider whether the Defendants’ “subjective intent [was] merely to interfere with the CCD Parties” because it found that Defendants’ lawsuit was not objectively baseless.

CCD argues that Questions 9-11, which asked whether Defendants had “a good-faith belief that they had a valid basis to send cease-and-desist letters regarding their copyrighted material,” presented a similar factual question as the first part of Question 12, which asked whether Defendants’ correspondence was “objectively baseless in the sense that no reasonable litigant could reasonably expect success on the merits.”

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Because the jury answered, by a vote of 11 to 1, “no” to Questions 9-11, and unanimously answered “no” to Question 12, CCD contends that the district court’s judgment must be reversed because it is based on contradictory factual findings.

CCD is correct that if answers to jury interrogatories reflect inconsistent fact findings relating to a claim, the district court may not enter judgment on that claim and instead must order a new trial.¹⁵ This rule, however, applies only when the jury’s inconsistent answers are unanimous.¹⁶ Because the answers to Questions 9-11 were not unanimous, they cannot be considered, in the first instance, as jury findings. But we conclude that even if the jury’s answers to Questions 9-11 were unanimous, there would be no inconsistency with the answer to Question 12. CCD submits that Questions 9-11 essentially asked the jury whether Defendants “believed they had any valid basis” for sending the cease-and-desist letters threatening litigation for infringement. CCD contends that when 11 jurors answered “no” to Questions 9-11, the jurors found that Defendants “knew their infringement claims weren’t valid.” CCD argues that such finding is inconsistent with the jury’s unanimous finding in Question 12 that the cease-and-desist letters were not objectively baseless.

¹⁵ See *Guidry v. Kem Manufacturing, Co.*, 598 F.2d 402, 408 (5th Cir. 1979).

¹⁶ See FED. R. CIV. P. 48(b) (“Unless the parties stipulate otherwise, the verdict must be unanimous . . .”).

In *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, the case in which the Supreme Court set forth the elements needed to establish the “sham” exception to the *Noerr-Pennington* doctrine, the petitioner similarly argued that the respondent was not entitled to *Noerr-Pennington* immunity because the respondent “did not honestly believe that the infringement claim was meritorious.”¹⁷ The Court described the question presented by the case as: “whether litigation may be sham merely because a subjective expectation of success does not motivate the litigant.”¹⁸ The Court “answered this question in the negative and h[e]ld that an objectively reasonable effort to litigate cannot be sham regardless of subjective intent.”¹⁹

The Court’s decision in *Professional Real Estate Investors* makes clear that even if a party does not believe its infringement claim has merit, he may still be entitled to *Noerr-Pennington* immunity if the claim has objective merit.²⁰ We disagree that the jury’s 11-1 answer that Defendants did not “have a good-faith belief that they had a valid basis to send cease-and-desist letters regarding their copyrighted material” indicates jury confusion or is inconsistent with the jury’s unanimous finding that the letters were not

¹⁷ 508 U.S. 49, 54 (1993) (internal quotation marks and citation omitted).

¹⁸ *Id.* at 57.

¹⁹ *Id.* (footnote omitted).

²⁰ *Id.* at 60.

“objectively baseless.” The Court in *Professional Real Estate Investors* considered such a possibility and held that a party’s subjective expectation, intent, and/or motivation regarding its infringement claim were not relevant if there was proof of the “objective legal reasonableness of the litigation.”²¹

Based on the foregoing, we conclude that it was not an abuse of discretion for the district court to rely on the unanimous answer to Question 12 and render judgment for Gordian based on the jury’s unanimous finding that the cease-and-desist letters were not objectively baseless.²²

C. Alleged Evidence of Fraud

CCD argues that the district court abused its discretion when it excluded evidence at trial regarding Gordian’s procurement of trademark and copyright registrations. CCD asserts that Gordian lied in its applications and obtained the registrations through fraud. It further contends that the exclusion of this evidence prevented it from showing that Gordian’s litigation was a “sham.”

CCD contends that when Gordian applied for a trademark registration, it stated in its application that

²¹ *Id.* at 66.

²² At oral argument, CCD raised for the first time that the jury’s unanimous answer to Question 8, in which the jury determined that Defendants committed business disparagement, precluded application of *Noerr-Pennington* immunity. We do not generally consider points raised for the first time at oral argument. *Bartel v. Alcoa S.S. Co., Inc.*, 805 F.3d 169, 174 (5th Cir. 2015).

it previously held a trademark for Construction Task Catalog on the Principal Register, when in fact the mark was on the Supplemental Register. As Gordian argues, Gordian's registration of the Construction Task Catalog on the Supplemental Register was a matter of public record. Gordian states that this was an "unintentional error" that an examiner with the Trademark Office would easily check as all trademark registrations are public record.

In order to prove fraud on the Trademark Office, CCD would need to show that the Trademark Office reasonably relied on a false representation of material fact.²³ CCD would be unable to do so here because it would not be reasonable for the Trademark Office to rely on the error in Gordian's application when the public record would clearly show that its trademark was previously on the Supplemental Register. Moreover, as Gordian points out, CCD did not call any witnesses from the Trademark Office, or any experts in the field, who could testify that such reliance would be reasonable. Allowing introduction of this evidence and argument that such error constituted fraud would, as the district court determined, be highly prejudicial to Gordian under a Rule 403²⁴ balancing test.

²³ See *Tex. Pig Stands, Inc. v. Hard Rock Café Int'l, Inc.*, 951 F.2d 684, 693 n.14 (5th Cir. 1992)

²⁴ FED. R. EVID. R. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.").

The same is true with respect to Gordian's applications for copyright registration. CCD contends that Gordian lied in its second copyright application that its first application had been approved and that only "minor" portions of its data were provided by a third party. Again, as Gordian alleges, CCD did not have an expert on this issue and it did not seek testimony from the examiners involved from the Copyright Office to testify regarding any reasonable reliance on such alleged "lies." As the district court determined, raising the issue of fraud under these circumstances would be highly prejudicial to Gordian. In sum, the district court did not abuse its discretion in excluding such evidence.

D. Applicability of *Noerr-Pennington*

CCD argues that *Noerr-Pennington* immunity in this matter was misapplied and is not dispositive. Specifically, CCD asserts that the district court erroneously focused on whether the "sham" exception to the doctrine was established without first deciding whether the doctrine should have even been applied. It contends that "[b]ecause misrepresentations and false statements are not entitled to First Amendment protections, they cannot be immunized under *Noerr-Pennington* whether or not any exception is applicable."

As discussed above, however, the district court did not abuse its discretion in excluding the evidence of Gordian's alleged fraudulent procurement of trademark and copyright registrations. CCD argues that, nevertheless, the cease-and-desist letters were "false, or at best, misleading" because the jury

unanimously found no copyright infringement and the district court found no trademark infringement. But, these findings do not establish that Gordian lied or made misrepresentations in the cease-and-desist letters; rather, they show that Gordian did not prove the elements of trademark and copyright infringement. The same is true of the jury's favorable findings as to CCD's affirmative claims. Those findings showed that CCD established the elements of its affirmative claims,²⁵ and not that Gordian lied or made misrepresentations in its letters.

In sum, we conclude that the district court properly applied the *Noerr-Pennington* doctrine in this matter, and that CCD's challenges to the application of the doctrine are without merit.

E. Summary Judgment Ruling

On cross-appeal, Defendants argue that the district court erred in dismissing on summary judgment their claim against CCD for trademark infringement. We review a district court's grant of summary judgment de novo.²⁶ Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to

²⁵ Although CCD argued at oral argument that the jury found that Gordian made a false statement in its answer to Question 8, we do not review arguments raised for the first time at oral argument. In any event, CCD is unable to show that the district court plainly erred.

²⁶ *Uptown Grill, L.L.C. v. Camellia Grill Holdings, Inc.*, 920 F.3d 243, 247 (5th Cir. 2019).

any material fact and the movant is entitled to judgment as a matter of law.”²⁷

The district court found, and CCD argues on appeal, that the “Construction Task Catalog” mark is generic and thus not entitled to trademark protection. Gordian contends that the mark is descriptive, and that there was a genuine issue of material fact as to whether it was entitled to trademark protection.

To be protectable, a mark must be “distinctive” in one of two ways—either “inherently” or “by achieving secondary meaning in the mind of the public.”²⁸ A mark is inherently distinctive “if its intrinsic nature serves to identify a particular source,”²⁹ and acquires distinctiveness if, “in the minds of the public, the primary significance of a mark is to identify the source of the product rather than the product itself.”³⁰

²⁷ FED. R. CIV. P. 56(a).

Because the evidence of Defendants’ “alleged fraud” was properly excluded, we need not decide whether misrepresentations and false statements can be immunized under the *Noerr-Pennington* doctrine.

²⁸ *Am. Rice, Inc. v. Producers Rice Mill, Inc.*, 518 F.3d 321, 329 (5th Cir. 2008).

²⁹ *Wal-Mart Stores, Inc. v. Samara Bros.*, 529 U.S. 205, 210 (2000) (quotations omitted).

³⁰ *Id.*

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Trademarks fall into five “categories of generally increasing distinctiveness”:³¹ (1) generic; (2) descriptive; (3) suggestive; (4) arbitrary; and (5) fanciful.³² Suggestive, arbitrary, and fanciful marks are inherently distinctive.³³ Generic marks cannot be distinctive, and descriptive marks are distinctive only if they have acquired a secondary meaning.³⁴

Registration of a mark with the Patent and Trademark Office “constitutes *prima facie* evidence that the mark is valid,”³⁵ but the presumption “may be rebutted by establishing that the mark is not inherently distinctive.”³⁶ There was no dispute on summary judgment that the “Construction Task Catalog” mark is *not* inherently distinctive.³⁷ So, CCD overcame the presumption of validity that accompanied Gordian’s registration of the mark.

³¹ *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 768 (1992).

³² *Nola Spice Designs, L.L.C. v. Haydel Enterprises, Inc.*, 783 F.3d 527, 537 (5th Cir. 2015).

³³ *Id.*

³⁴ *Id.*

³⁵ *Amazing Spaces, Inc. v. Metro Mini Storage*, 608 F.3d 225, 237 (5th Cir. 2010).

³⁶ *Id.*; see also *Vison Ctr. v. Optiks, Inc.*, 596 F.2d 111, 119 (5th Cir. 1979) (“this presumption is rebuttable and may be overcome by establishing the generic or descriptive nature of the mark.”).

³⁷ On the summary judgment, CCD argued the mark was generic, and Gordian argued it was descriptive. Neither category is “inherently distinctive.”

“A generic term is one which identifies a genus or class of things or services, of which the particular item in question is merely a member.”³⁸ Essentially, a mark is generic if it describes “what the product or service is, not its source or where it came from.”³⁹ In contrast, a descriptive mark is one that “identifies a characteristic or quality of an article or service, such as its color, odor, function, dimensions, or ingredients.”⁴⁰

The district court did not err in dismissing on summary judgment Gordian’s trademark infringement claim based on its determination that “Construction Task Catalog” is a generic term not entitled to trademark protection. The “Construction Task Catalog” mark is generic because it is exactly that: a catalog of construction tasks.⁴¹ Gordian argues the actual name of the product is a “job order contracting unit price book.” But, as the district court noted, a term need not be a product’s only possible name to be generic.⁴²

³⁸ *Union Nat. Bank of Texas, Laredo, Tex. v. Union Nat. Bank of Texas, Austin, Tex.*, 909 F.2d 839, 845 (5th Cir. 1990).

³⁹ McCarthy on Trademarks and Unfair Competition § 12:1 (4th ed. 2010).

⁴⁰ *Amazing Spaces*, 608 F.3d at 241 (citation omitted).

⁴¹ *See, eg., Blinded Veterans Ass’n v. Blinded Am. Veterans Found.*, 872 F.2d 1035, 1041 (D.C. Cir. 1989) (“It is difficult to imagine another term of reasonable conciseness and clarity by which the public refers to former members of the armed forces who have lost their vision.”).

⁴² *See, eg., McCarthy* § 12:9 (“There is usually no one, single and exclusive generic name for a product. Any product may have many

What's more, the district court's reasoning was supported by record evidence that "job order contracting unit price books" "are often referred to as construction catalogs."

Because the "Construction Task Catalog" mark simply describes the nature of the product in common industry terms, the district court did not err in classifying it as "generic." And because a generic term can never be trademarked, summary judgment dismissing Gordian's trademark infringement claim was appropriate.

III. CONCLUSION

Based on the foregoing, the district court's judgment is AFFIRMED.

generic designations"); *Blinded Veterans Ass'n*, 872 F.2d at 1041 ("A term need not be the sole designation of an article in order to be generic").

APPENDIX B

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

CIVIL ACTION NO. 4:16-CV-0114

[Filed: February 22, 2019]

CONSTRUCTION COST DATA,)
LLC, <i>et al</i>,)
)
Plaintiffs,)
VS.)
)
THE GORDIAN GROUP, INC., <i>et al</i>,)
)
Defendants.)

MEMORANDUM AND ORDER

Now pending before the Court is Plaintiffs' Rule 49 Motion for Continued Jury Deliberations or for a New Trial, in which Plaintiffs argue that the jury verdict contained irreconcilable conflicts. (Doc. No. 139.) Following a seven-day trial, the jury returned a verdict (1) without unanimous answers to each special interrogatory (Doc. No. 137 at 30, 31, 45, 66); (2) which disclosed its numerical division on those questions (Doc. No. 137 at 30, 31, 45, 66); and (3) which simultaneously found that Defendants' conduct was immunized and returned damages of over two million

dollars for Plaintiffs (Doc. No. 137 at 50-57.) As Defendants conceded that the jury verdict clearly and unanimously rejected their counterclaim of copyright infringement, this Memorandum and Order focuses only on Plaintiffs' claims. (Doc. No. 140; Doc. No. 137 at 73.)

Because the jury violated the Court's clear instruction to "never disclose to anyone, not even to [the Court], [its] numerical division on any question," the Court denies the motion for continued jury deliberations. (Doc. No. 137 at 30, 31, 45, 66, 87.) The Court finds that recalling the jury to continue deliberations on the questions that were not answered unanimously would be unacceptably coercive to the individual¹ who cast the single contrary vote on three questions. (Doc. No. 137 at 30, 31, 45.) This Memorandum and Order instead considers the Motion for New Trial.

I. BACKGROUND

Plaintiffs Construction Cost Data, LLC, The Job Order Contracting Group, LLC, and Managed JOC Solutions, LLC (collectively "Plaintiffs") filed suit in state court against Defendants The Gordian Group, Inc. and R.S. Means Co., LLC ("Defendants"), on December 1, 2015, seeking relief under state law. (Doc. No. 1-1.) Defendants removed the case to federal court on January 15, 2016. (Doc. No. 1.) Defendants filed a counterclaim against Plaintiffs, Mark Powell,

¹ It is entirely possible that different individuals gave the singular "no" votes on each of these questions. For ease of reference, the Court assumes that it was same individual.

Benjamin Stack, and All Cost Data Info, LLC (“Third-Party Defendants”) on February 12, 2016, seeking relief under the common law, and federal copyright and trademark law. (Doc. No. 7.)

The Court commenced a jury trial on January 14, 2019. Plaintiffs presented to the jury claims of (1) tortious interference with existing contract, (2) tortious interference with prospective business relations, (3) business disparagement, (4) monopolization, and (5) attempted monopolization. (Doc. No. 137 at 20-29, 37-50.) On January 23, 2019, the jury returned a special verdict. (Doc. No. 137.) The jury found the following facts:

1. Defendants intentionally interfered with Plaintiff JOC Group’s contract with KATA Management, LLC. (Doc. No. 137 at 23.)
2. Defendants intentionally interfered with Plaintiff Construction Cost Data, LLC’s contract with 4Clicks Solutions, LLC. (Doc. No. 137 at 24.)
3. Defendants intentionally interfered with Plaintiff JOC Group’s contract with TCPN. (Doc. No. 137 at 24.)
4. Defendants wrongfully interfered with Plaintiff JOC Group’s prospective business relationship with KATA. (Doc. No. 137 at 26.)
5. Defendants wrongfully interfered with Plaintiff Construction Cost Data, LLC’s

prospective business relationship with 4Clicks Solutions, LLC. (Doc. No. 137 at 26.)

6. Defendants wrongfully interfered with Plaintiff JOC Group's prospective business relationship with TCPN. (Doc. No. 137 at 27.)
7. Defendants wrongfully interfered with Plaintiffs' prospective business relationship with Region 5. (Doc. No. 137 at 27.)
8. Defendants disparaged the business of Plaintiffs. (Doc. No. 137 at 29.)
9. The jury could not reach a verdict on the question whether Defendants had a good-faith belief that they had a valid basis to send cease-and-desist letters regarding their copyrighted material to KATA Management, LLC. (Doc. No. 137 at 30.) The jury reported that it was split eleven to one, with the majority finding no good faith. (Doc. No. 137 at 30.)
10. The jury could not reach a verdict on the question whether Defendants had a good-faith belief that they had a valid basis to send cease-and-desist letters regarding their copyrighted material to 4Clicks Solutions, LLC. (Doc. No. 137 at 31.) The jury reported that it was split eleven to one, with the majority finding no good faith. (Doc. No. 137 at 31.)

11. The jury could not reach a verdict on the question whether Defendants had a good-faith belief that they had a valid basis to send cease-and-desist letters regarding their copyrighted material to TCPN.(Doc. No. 137 at 31.) The jury reported that it was split eleven to one, with the majority finding no good faith. (Doc. No. 137 at 31.)
12. Defendants' pre-litigation correspondence was not objectively baseless in the sense that no reasonable litigant could reasonably expect success on the merits. (Doc. No. 137 at 36.) As instructed, the jury did not go on to answer the second part of Question 12, which asked if Defendants' subjective intent was to interfere.
13. The jury could not reach a verdict on the question whether Defendants possessed monopoly power over the job order contracting unit price book ("JOC UPB") market in Texas and willfully acquired or maintained its monopoly power in the JOC UPB market in Texas by engaging in anticompetitive conduct. (Doc. No. 137 at 45.) The jury reported that they were split eleven to one, with the majority finding monopolization. (Doc. No. 137 at 45.)
14. Defendants engaged in predatory or anticompetitive conduct with a specific intent to achieve monopoly power in the JOC UPB market in Texas, and a

dangerous probability of achieving monopoly power. (Doc. No. 137 at 48.)

15. Plaintiffs' damages, caused by certain instances of Defendants' tortious interference, for the lost vendor fees for TCPN KATA JOC Projects, lost sales for KATA Audits, and lost sales from 4Clicks Solutions, LLC licenses totaled \$1,471,000. (Doc. No. 137 at 50-51.)
16. Plaintiffs' damages, caused by certain instances of Defendants' tortious interference, for the lost sales from 4Clicks Solutions, LLC licenses were \$0.00. (Doc. No. 137 at 52.)
17. Plaintiffs' damages, caused by certain instances of Defendants' tortious interference, for the lost vendor fees for TCPN KATA JOC Projects, lost sales for KATA Audits, and lost sales from 4Clicks Solutions, LLC licenses were \$0. (Doc. No. 137 at 52-53.)
18. Plaintiffs' damages, caused by certain instances of Defendants' tortious interference, from lost sales from Region 5 ESC work totaled \$29,000. (Doc. No. 137 at 54.)
19. Plaintiffs' damages from Defendants' business disparagement was \$0.00. (Doc. No. 137 at 55-56.)

20. Plaintiffs' damages from Defendants' anticompetitive conduct totaled \$1.5 million. (Doc. No. 137 at 57.)

II. WHETHER THE FINDING OF NOERR-PENNINGTON IMMUNITY DISPOSES OF ALL PLAINTIFFS' CLAIMS

Plaintiffs argue that, even if the jury correctly answered Question 12, which they dispute, that answer is not dispositive of their claims, because evidence of conduct beyond the cease-and-desist letters was presented to the jury. Portions of this argument are easily dismissed; the Court specifically changed the phrase “cease-and-desist letters” in the Court’s proposed jury instructions to “pre-litigation correspondence” upon Plaintiffs’ suggestion, in order to better capture the scope of the material they referred to in their case, including emails to third parties like 4Clicks Solutions, LLC. Thus, the question is whether any evidence falling outside the scope of the term “pre-litigation correspondence” was presented to the jury that may have formed the basis of their responses.

Resolving this question requires a more substantive discussion of *Noerr-Pennington* immunity and its exceptions. Plaintiffs have long maintained that misrepresentations do not qualify for immunity under *Noerr-Pennington*. The Court reiterates its position that the Fifth Circuit has not adopted this exception.

A. NOERR-PENNINGTON IMMUNITY

Noerr-Pennington immunizes from antitrust liability” [t]hose who petition government for redress.”

Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 56 (1993). The doctrine is rooted in the “First Amendment right to petition.” *Id.* Courts have expanded the immunity from the antitrust context to business tort claims, *Video Int'l Prods., Inc. v. Warner-Amex Cable Commc'ns, Inc.*, 858 F.2d 1075, 1084 (5th Cir. 1988), and to petitioning administrative agencies and courts in addition to legislative branches, *Prof'l Real Estate Inv'rs, Inc.*, 508 U.S. at 56 (citing *Cal. Motor Trans. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972)). Additionally, threats of litigation “reasonably and normally attendant upon effective litigation,” including cease-and-desist letters, are entitled to immunity. *See Coastal States Mktg., Inc. v. Hunt*, 694 F.2d 1358, 1367 (5th Cir. 1983); *Source Network Sales & Mktg., LLC v. Ningbo Desa Elec. Mfg. Co., Ltd.*, 2015 WL 2341063, at *8 (N.D. Tex. May 15, 2015).

The Supreme Court has explicitly recognized one exception which removes *Noerr-Pennington* immunity under the circumstances now before the Court: the sham exception. *See Prof'l Real Estate Inv'rs, Inc.*, 508 U.S. at 60–61. The Supreme Court has also established a *Walker-Process* patent fraud exception. *See Walker Process Equip., Inc v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 177 (1965). Although some circuits have added a general “fraud” exception, the Fifth Circuit has not. *See e.g., Mercatus Grp., LLC v. Lake Forest Hosp.*, 641 F.3d 834, 842 (7th Cir. 2011) (adopting fraud exception).

1. “*Sham Exception*” to Noerr-Pennington Immunity

The Supreme Court has carved out a “sham exception” to *Noerr-Pennington* immunity. Application of the “sham exception” involves a two-step test:

First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under *Noerr*, and an antitrust claim premised on the sham exception must fail. Only if challenged litigation is objectively meritless may a court examine the litigant’s subjective motivation. Under this second part of our definition of sham, the court should focus on whether the baseless lawsuit conceals “an attempt to interfere *directly* with the business relationships of a competitor,” through the” use [of] the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon.”

Prof'l Real Estate Inv'rs, Inc., 508 U.S. at 60–61 (citations omitted).

2. Walker-Process *Patent Fraud Exception* to Noerr-Pennington Immunity

Courts have identified another exception to *Noerr-Pennington* immunity that applies in the patent context—the *Walker-Process* exception. In *Walker Process Equipment, Inc v. Food Machinery & Chemical*

Corp., the Supreme Court discussed the standard for establishing fraudulent procurement of a patent for the purposes of substantive antitrust violation. 382 U.S. 172, 177 (1965). The Court required that the fraud be “knowing and willful” to form the basis of an antitrust violation. The Federal Circuit discussed this exception in *C.R. Bard, Inc. v. M3 Sys., Inc.*, 157 F.3d 1340, 1360 (Fed. Cir. 1998).

Conduct prohibited under antitrust law includes bringing suit to enforce a patent with knowledge that the patent is invalid or not infringed, and the litigation is conducted for anti-competitive purposes. In such events the antitrust immunity of *Noerr–Pennington* . . . does not apply to those who seek redress through judicial process.

Fraud in the procurement of a patent is governed by *Walker Process* [as opposed to the *Professional Real Estate* objective-baselessness inquiry] and, as in *PRE*, the complainant “must still prove a substantive antitrust violation.”

Id. at 1360; see also *In re Relafen Antitrust Litig.*, 346 F. Supp. 2d 349, 365 (D. Mass. Nov. 29, 2004) (“For *Walker Process* to apply, an antitrust plaintiff must establish, by clear and convincing evidence, (1) a misrepresentation or omission, (2) made with intent to deceive the Patent Office, (3) on which the Patent Office justifiably relied, and (4) but for which the patent would not have issued.”); *Rohm & Hass Co. v. Dawson Chem. Co., Inc.*, 635 F. Supp. 1211 (S.D. Tex. 1986).

Plaintiffs in this case alleged fraudulent procurement of only a trademark and a copyright. The Court could not find any instance of a court explicitly expanding the *Walker Process* patent fraud exception outside of the patent context. *See, e.g., Consumerinfo.com, Inc. v. Chang*, 2009 WL 10673581, at *3 (C.D. Cal. Sept. 14, 2009). The Court thus finds that the *Walker-Process* patent fraud exception is unavailable to the Plaintiffs.

3. *Fraud Exception to Noerr-Pennington Immunity*

Other circuits have discussed a general “fraud or misrepresentation exception to the *Noerr-Pennington* doctrine,” especially in contexts outside the doctrine’s core, political speech. There is substantial variation between the circuits, because “the Supreme Court declined to decide ‘whether and, if so, to what extent *Noerr* permits the imposition of antitrust liability for a litigant’s fraud or other misrepresentations.’” *C.R. Bard, Inc.*, 157 F.3d at 1360 (citing *Profl Real Estate Inv’rs, Inc.*, 508 U.S. at 62 n.6).

Courts view this either as a second exception to *Noerr-Pennington* in addition to the “sham exception,” or as a subset of the “sham exception” providing another method by which to prove that litigation was a sham. *See Mercatus Grp., LLC v. Lake Forest Hosp.*, 641 F.3d 834, 842 (7th Cir. 2011) (“[C]ourts have recognized two specific kinds of conduct that can trigger the sham exception: (1) sham lawsuits; and (2) fraudulent misrepresentations.”); *Waste Mgmt. of La., LLC v. River Birch, Inc.*, 2014 WL 1329780, at *4 (E.D. La. Mar. 31, 2014) (collecting cases).

In *Mercatus*, the Seventh Circuit discussed the “fraud exception” at length while considering whether to adopt it.

Mercatus relies on the fraud branch of the sham exception to *Noerr–Pennington*. This exception traces its origins back to the Supreme Court’s hint that “[t]here are many ... forms of illegal and reprehensible practice which may corrupt the *administrative or judicial processes* and which may result in antitrust violations. Misrepresentations, condoned in the political arena, are not immunized when used in the *adjudicatory process*.” The Court later added that “unethical and deceptive practices can constitute abuses of administrative or judicial processes that may result in antitrust violations.”

Although these statements were technically dicta—neither *California Motor Transport* nor *Allied Tube* involved perjury or false statements before an adjudicative or administrative body—there is little doubt that fraudulent misrepresentations may render purported petitioning activity a sham not protected from antitrust liability.

Mercatus Grp., 641 F.3d at 842–43 (citing to cases from the Third, Fourth, Sixth, Eleventh, and D.C. Circuits).

Unlike the Third, Fourth, Sixth, Seventh, Eleventh, and D.C. Circuits, the Fifth Circuit has not clearly adopted the “fraud exception,” although some district courts appear to have done so. *See e.g. Flywheel*

Fitness, LLC v. Flywheel Sports, Inc., 2013 WL12138589, at *4 (E.D. Tex. July 18, 2013) (“Thus, any alleged misrepresentations, such as those alleged here, are not entitled to *Noerr-Pennington* immunity.”), *report and recommendation never adopted due to settlement; Pension Advisory Grp., Ltd. v. Country Life Ins. Co.*, 771 F. Supp. 2d 680, 699 (S.D. Tex. 2011) (“The law is clear that *Noerr-Pennington* does not protect deliberately false or misleading statements.” (internal quotation marks omitted)); *Livingston Downs Racing Ass’n, Inc. v. Jefferson Downs Corp.*, 192 F. Supp. 2d 519, 535 (M.D. La. 2001) (“Absent a more direct statement from the Supreme Court that the ‘fraud exception’ to *Noerr-Pennington* immunity is no longer viable, the Court will presume that it remains intact.”).

The most relevant cases from the Fifth Circuit are *Woods Exploration & Producing Co. v. Aluminum Co. of America*, 438 F.2d 1286, 1298 (5th Cir. 1971), and *Bayou Fleet, Inc. v. Alexander*, 234 F.3d 852, 861 (5th Cir. 2000). *Woods Exploration* was decided prior to the Supreme Court’s decision in *Professional Real Estate*, and its continuing validity is uncertain. See *Music Center S.N.C. Di Luciano Pisoni & C. v. Prestini Musical Instruments Corp.*, 874 F. Supp. 543 (E.D.N.Y. 1995) (recognizing *Woods Exploration*’s abrogation by *Professional Real Estate*). *Woods Exploration* is likely the closest the Fifth Circuit has ever gotten to recognizing the “fraud exception.” The court found *Noerr-Pennington* immunity inapplicable “to the alleged filing of false nominations by defendants because this conduct was not action designed to influence policy, which is all the *Noerr-Pennington* rule

seeks to protect. In light of this determination we hold that the abuse of the administrative process here alleged does not justify antitrust immunity.” *Woods Exploration*, 438 F.2d at 1298. These statements do not distinguish this exception from the sham exception. *Woods Exploration*’s formulation of the standard is thus likely inapplicable post-*Professional Real Estate*, which established the test for sham litigation.

Bayou Fleet, Inc., decided shortly after *Professional Real Estate*, supports the conclusion that *Woods Exploration* does not set out a distinct “fraud exception” to *Noerr-Pennington*. In dicta, the Fifth Circuit stated that the Supreme Court “has allowed *only one* exception to the *Noerr-Pennington* doctrine—the ‘sham’ exception.” *Bayou Fleet*, 234 F.3d at 861. The court then went on to state that the standard for the “sham exception” is whether the allegedly anticompetitive activities were objectively baseless. *Id.* The court ultimately rejected a request to “create a new exception to the *Noerr-Pennington* doctrine” for retaliatory conduct. *Id.*

As noted above, some district courts in this circuit have referenced the fraud exception. Some of these courts appear to be referencing the *Walker-Process* exception—which does not apply in this case. *Pension Advisory Group* specifically dealt with misleading statements in the context of a patent application to the U.S. Patent and Trademark Office (“USPTO”). 771 F. Supp. 2d 680, 699 (S.D. Tex. 2011) (“The law is clear that *Noerr-Pennington* does not protect deliberately false or misleading statements [in a patent application to the USPTO].” (internal quotation marks omitted))).

Flywheel considered the application of *Noerr-Pennington* immunity to claims between companies of fraud and conspiracy to defraud. *Flywheel Fitness, LLC v. Flywheel Sports, Inc.*, 2013 WL12138589, at *4 (E.D. Tex. July 18, 2013), *report and recommendation never adopted due to settlement*. The case quotes authoritatively *Pension Advisory Group's* statement that “[t]he law is clear that *Noerr-Pennington* does not protect deliberately false or misleading statements.” Although this is a significant expansion of *Walker Process* outside the patent context, the Court made no mention of it and did not appear aware that *Flywheel* discussed an exception specific to the patent context. The Court therefore does not find this case persuasive.

The only district court case from within the Fifth Circuit the Court found that was referencing the fraud exception relevant to this case, not the *Walker Process* exception, appears to have construed *Woods Exploration* differently than this Court does above. *Livingston Downs Racing Ass’n Inc. v. Jefferson Downs Corp.*, 192 F. Supp. 2d 519, 535 (M.D. La. 2001) (“Absent a more direct statement from the Supreme Court that the ‘fraud exception’ to *Noerr-Pennington* immunity is no longer viable, the Court will presume that it remains intact.”). This court started with the assumption that, prior to *Professional Real Estate*, there existed a “fraud exception” to the application of *Noerr-Pennington* immunity. *Id.* It based this belief in part on dicta in earlier Supreme Court cases and in part in *Woods Exploration. Id.* The court then decided that *Professional Real Estate* did not state it was eliminating the “fraud exception” with sufficient specificity, so the court would assume it continued to

apply. *Id.* For the reasons discussed in the summary of *Woods Exploration*, the Court believes this argument began from a faulty assumption that the “fraud exception” clearly existed in the Fifth Circuit prior to *Professional Real Estate*.

Thus, the Court finds that the “fraud exception” as distinct from the “sham exception” does not exist in the Fifth Circuit, and that any allegations of misrepresentation must be fit into the *Professional Real Estate* inquiry. Any argument by Plaintiffs that Question 12 would not immunize “misrepresentations” is rejected.

B. ANALYSIS

Plaintiffs claim that the additional evidence presented that fell outside the scope of *Noerr-Pennington* immunity included:

[B]uying out competition, bullying vendors (such [as] the email threat from Defendants to Michael Brown of 4Clicks Solutions, LLC, which was Exhibit P-115), raising prices without fear of consequence (Exhibit P-143), shutting off avenues to other markets, withholding business, excluding competition, prior threats against Mark Powell, threatening phone calls and warnings, and the general ongoing disparagement of Plaintiffs through avenues other than the cease and desist letters.

(Doc. No. 139 at 18.)

Plaintiffs’ theme throughout the trial was that the Defendants’ business strategy was to “bully or buy”

competitors. However, the critical evidence they presented depicted Defendants' bullying as grounded in threats of litigation—in emails, phone calls, and cease-and-desist letters. The two exhibits Plaintiffs cite in their brief are Plaintiffs' Exhibits 115 and 143. The Court will address each of these exhibits in turn.

1. Plaintiffs' Exhibit 115

Plaintiffs' Exhibit 115 is an email from Defendant The Gordian Group's CEO William Pollak to Michael Brown of 4Clicks Solutions, LLC. As Plaintiffs suggest, the email threatens Michael Brown based on his involvement with Plaintiffs. However, these threats were consistently rooted in the allegations of copyright and trademark infringement.

Michael,

At this point I'm sure you are aware that we have taken steps to protect the copyrights and trademarks we hold on R.S. Means Construction Cost Data to ensure that none of our proprietary data is used by third parties without our express approval. We take this matter extremely seriously and are prepared to defend our business interests as necessary.

Given our past discussions, I am particularly disappointed in your involvement with Mark Powell and his associates. Through our recent RS Means licensing agreement with 4Clicks and the discussions we have held regarding a license for Gordian CTC data, I had thought that 4Clicks could be a valued partner for The Gordian Group in mutually building our businesses going forward. That you have taken such a prominent role in

promoting an alternative product—*particularly one built on data which we believe to have been misappropriated*—would seem to indicate otherwise.

I have instructed my colleagues to cease any discussions with 4Clicks regarding a license to Gordian CTC data. And *I have asked our attorneys to review the licensing agreement between The Gordian Group and 4Clicks covering RS Means data to see if there has been any violation of its terms.*

If you would like to discuss this matter, let me know.

Bill

(Plaintiffs' Exhibit 115 (emphasis added).) This email specifically references the threatened litigation in its first sentence, and then continues to ground its threats in the alleged copyright infringement. At trial, Mr. Pollak testified that the first line of the final paragraph, stating that he stopped discussions about another lease with 4Clicks Solutions, LLC, was also related to the threatened litigation: "we should stop talking about that while we resolve this other matter." Thus, the Court concludes that it qualifies as "pre-litigation correspondence."

2. Plaintiffs' Exhibit 143

Plaintiffs' Exhibit 143 is an email from Michael Brown of 4Clicks Solutions, LLC to representatives of Defendant The Gordian Group. It is reproduced in relevant part below.

App. 43

Here are examples of the pricing impacts to our clients.

The removal of discounts for concurrent users, removal of the static RSMeans Assemblies product and our bundled pricing that we offered to our clients.

For years we've had a lot of success selling users the static RS Means Assemblies with no component database.

We've also bundled this well with the Assemblies, Facilities and Master Composite.

Example is we offered this bundle for \$3000 [and] it will now cost \$6063 (\$1650+\$2195+\$2218). It will be a challenge for our current clients and as we acquire new clients with up sale opportunities.

(Plaintiffs' Exhibit 143.) This exhibit provides evidence that Defendants raised the prices of their products and is unrelated to the threatened litigation against Plaintiffs. Therefore, it falls outside the scope of "pre-litigation correspondence."

Further, *Noerr-Pennington* immunity in this context only protects conduct that can be classified as "reasonably and normally attendant upon effective litigation." *Coastal States Mktg., Inc. v. Hunt*, 694 F.2d 1358, 1367 (5th Cir. 1983). It does not extend to anticompetitive conduct that does not relate to the threatened litigation, like raising prices or buying out competitors.

Evidence that Defendants raised prices was relevant to Plaintiffs' monopoly claim. As described in the jury instructions, monopoly claims require proof of (1) possession of monopoly power and (2) willfully acquiring or maintaining the monopoly power by engaging in anticompetitive conduct. (Doc. No. 137 at 36.) The jury was also instructed that possession of monopoly power may be proven by showing that Defendants had the ability to control prices in the market.² (Doc. No. 137 at 37-39.) Importantly, the instructions provided that evidence that Defendants raised prices was insufficient to make out a monopoly claim.

² In the past, the Fifth Circuit has directed courts to proceed cautiously when a plaintiff uses evidence of price increases to prove possession of monopoly power.

Transitory control over prices, ever present in a competitive economy—in large part due to lags in the responses of other buyers or producers—is not the subject of the completed monopolization offense. For this reason, [commentators] conclude that evidence of actual control over prices—conduct evidence—is inherently weak,

giving no reliable clue to the degree of market power that the actor possesses, and he may even have none. Relatively slight economic advantages are typically worth the legal or other costs of protecting them.... Conduct, in short, will rarely if ever establish substantial market power. Where power is relevant to an antitrust defense, conduct can be taken as sufficient proof only where the power requirement itself is highly attenuated.

Dimmitt Agri Indus., Inc. v. CPC Int'l, Inc., 679 F.2d 516, 530 (5th Cir. 1982). Because the jury may also have credited Plaintiffs' assertions that Defendants had no competitors in the relevant market, the Court continues its analysis.

As a general rule, businesses are free to choose the parties with whom they will deal, as well as the prices, terms, and conditions of that dealing. Anticompetitive conduct must represent something more than the conduct of business that is part of the normal competitive process or commercial success. Anticompetitive conduct must represent conduct that has made it very difficult or impossible for competitors to compete and that was taken for no legitimate business reason.

(Doc. No. 137 at 44.)

The jury may have considered Exhibit 143 evidence that Defendants possessed monopoly power, but—without the evidence of immunized conduct—there was insufficient evidence of anticompetitive conduct. Exhibit 143 alone does not constitute evidence of anticompetitive conduct—if anything, the increase in prices would have made it *easier* for competitors to compete. See *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) (“To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct.”); *Taylor Publ'g Co. Jostens, Inc.*, 36 F. Supp. 2d 360, 369 (E.D. Tex. 1999), *aff'd*, 216 F.3d 465 (5th Cir. 2000) (“[N]o reasonable jury could have found that the evidence supported a finding of anticompetitive conduct based on predatory pricing.”); *Coca-Cola Co. v. Harmar Bottling Co.*, 218 S.W.3d 671, 690 (Tex. 2006). Therefore, Exhibit 143 alone could not have formed the basis of a jury finding on Plaintiffs’ monopoly claim.

Similarly, power to control prices is relevant to Plaintiffs' attempted monopoly claim. The jury was instructed that to succeed on their claim of attempted monopoly, Plaintiffs must (1) engage in anticompetitive conduct (2) with the specific intent to achieve monopoly power and (3) with a dangerous probability of achieving monopoly power. (Doc. No. 137 at 48.) Once again, Exhibit 143 cannot alone establish anticompetitive conduct. *See Taylor Publ'g Co.*, 36 F. Supp. 2d at 372.

3. Other Evidence of Anticompetitive Conduct

As noted above, Exhibit 143 may have formed the basis of the jury's finding of monopoly power. The Court now searches the record for evidence of anticompetitive conduct that was not immunized. After a review of the trial transcripts, the Court identifies Plaintiffs' evidence of anticompetitive conduct as: (1) cease-and-desist letters sent by Defendants to Plaintiffs and their business contacts; (2) Defendants' emails to Plaintiffs' business contacts regarding the suspected plagiarism; (3) telephone calls between Plaintiffs' business contact and Defendants; (4) Defendants' purchase of R.S. Means, which may or may not have been a competitor; (5) Defendants' purchase of 4Clicks Solutions, LLC; and (6) unspecified threats made by Defendant The Gordian Group to Mark Powell prior to Powell's founding of Construction Cost Data.

The cease-and-desist letters, emails, and phone calls are all subsumed within the term "pre-litigation correspondence," and are all entitled to immunity. The purchase of 4Clicks Solutions, LLC was not

anticompetitive, because 4Clicks Solutions, LLC was not a competitor in the JOC UPB market. It licensed Defendants' data and hosted a program that enabled companies to use the data sets in making their bids on construction projects.

Plaintiffs also mentioned threats made by Defendant The Gordian Group to Mark Powell while he was working with a third party. Powell testified that The Gordian Group sent him a threatening letter while he was doing estimating work for a third party on a bid for the Department of Homeland Security. No evidence was presented that the third party was a competitor of The Gordian Group in Texas, or that Powell's estimates were part of a JOC UPB. In other words, no evidence was presented that this alleged anticompetitive conduct occurred in the relevant market.

Thus, the only remaining evidence of anticompetitive conduct that was not subject to immunity was Defendants' purchase of R.S. Means. Although Plaintiffs claimed throughout the trial that R.S. Means was a "competitor," they never disputed Defendants' evidence that, before its purchase by The Gordian Group, R.S. Means was focused on construction cost estimating—not on creating JOC UPBs. The Court defined the relevant product market—at Plaintiffs' urging—as JOC UPBs. Plaintiffs spent a great deal of time during Mr. Stack's testimony at trial drawing out the specific differences between construction cost estimating and JOC UPBs. Plaintiffs emphasized that creators of construction cost estimating books are not competitors in the JOC UPB market. This distinction was critical to Plaintiffs' case,

because Defendants had offered numerous examples of construction cost estimating competitors, which would have precluded a finding that Defendants possessed monopoly power. Plaintiffs cannot claim construction cost estimators are not competitors for the purpose of determining market power, while maintaining that they *are* competitors for the purposes of determining anticompetitive conduct. Therefore, this evidence cannot support Plaintiffs' monopoly claims.

Further, a single instance of purchase of a competitor is not sufficient evidence to prove anticompetitive conduct, especially where, as here, the products or services offered by the two companies are not identical. No evidence was presented to establish that the purchase of R.S. Means lacked a rational business purpose or was against The Gordian Group's normal economic interest. *See Stearns Airport Equip. Co., Inc. v. FMC Corp.*, 170 F.3d 518, 523 (5th Cir. 1999); *Great W. Directories v. Sw. Bell Tel. Co.*, 63 F.3d 1378, 1386 (5th Cir. 1995), *modified on other grounds*, 74 F.3d 613 (5th Cir. 1996). Mr. Pollak testified that the purchase of R.S. Means and 4Clicks were both done to diversify The Gordian Group. Thus, even if the jury had found for Plaintiffs on their monopoly claims without relying on evidence of immunized conduct, the Court would have had to grant Defendants' motion for judgment as a matter of law on Plaintiffs' monopolization claims. Question 12 is therefore dispositive of all Plaintiffs' claims.

III. WHETHER THE JURY'S RESPONSE TO QUESTION 12 IRRECONCILABLY CONFLICTS WITH THE REST OF THE VERDICT

The aberration in the verdict, according to Plaintiffs, is Question 12, which found that Defendants were entitled to immunity under the *Noerr-Pennington* doctrine. It is undisputed that the jury failed to follow the Court's instruction to find against Plaintiffs if the jury found that the pre-litigation correspondence was not objectively baseless. (Doc. No. 137 at 33 ("If you find that the Gordian Parties' threatened suit was not objectively baseless, . . . you must find for the Gordian Parties and against Plaintiffs on Plaintiffs[] charges that the Gordian Parties violated the laws by threatening a lawsuit.")) Instead, it proceeded to award damages to Plaintiffs. (Doc. No. 137 at 50-57.)

A. LEGAL STANDARD

Both the Supreme Court and the Fifth Circuit urge courts to attempt to reconcile any inconsistencies with a jury's interrogatory answers. The Seventh Amendment requires courts to "attempt to harmonize the answers, if it is possible under a fair reading of them." *Gallick v. Balt. & Oh. R.R. Co.*, 372 U.S. 108, 119 (1963); *White v. Grinfas*, 809 F.2d 1157, 1161 (5th Cir. 1987) ("When the jury's answers appear to conflict, we are obliged to reconcile the answers, if possible, in order to validate the jury's verdict. Indeed, this effort is required by the Seventh Amendment." (internal citations omitted)).

Inconsistencies may be reconciled without a new trial when “the answers may fairly be said to represent a logical and probable decision on the relevant issues as submitted, even though the form of the issue or alternative selective answers prescribed by the judge may have been the likely cause of the difficulty and largely produced the apparent conflict.” *Griffin v. Matherne*, 471 F.2d 911, 915 (5th Cir. 1973). In contrast, the Fifth Circuit will reverse a district court’s decision not to retry the case when “there is no view of the case which makes the jury’s answers consistent and [t]he inconsistency is such that the special verdict will support neither the judgment entered below nor any other judgment.” *Id.*

In crafting jury instructions, courts must consider a range of possible outcomes. Each question a jury answers may necessitate certain follow-up questions and make other questions superfluous. For example, in a negligence case, a finding that the defendant was not negligent would make a question about damages irrelevant. Conversely, a finding that the defendant was negligent might require an additional question apportioning responsibility between the parties. Because the court cannot know how the jury will answer these questions in advance, it must submit to the jury all interrogatories that could be implicated by their responses, including some questions that certain responses will render superfluous.

Apparent conflicts often arise when a jury answers a superfluous question in violation of the court’s instructions. In such circumstances, the Fifth Circuit instructs courts that “[i]f the jury’s answer to a

question that was supposed to pretermite further inquiry is clear and disposes of the legal issues, we must ignore the jury's conflicting answers to any other questions, as they are irrelevant." *Nat'l Hispanic Circus, Inc. v. Rex Trucking, Inc.*, 414 F.3d 546, 551 (5th Cir. 2005); *see also White*, 809 F.2d at 1161 ("[I]f the district court has correctly found that the jury's answer to a question that was supposed to terminate further inquiry is clear and disposes of the legal issues, on review we must ignore the jury's necessarily conflicting answers to any other questions."); *Willard v. John Hayward*, 577 F.2d 1009, 1011 (5th Cir. 1978) ("Even a jury verdict inconsistent on its face is not inconsistent if it can be explained by assuming the jury reasonably misunderstood the instructions.").

B. ANALYSIS

Plaintiffs argue that the response to Question 12 conflicts with the response to virtually every other question submitted to the jury. (Doc. No. 142 at 13.) This section will therefore analyze the potential conflict between Question 12 and each of the other responses.

1. *Questions 1-8, 13-14*

Plaintiffs claim that Question 12 conflicts with the findings that they had proven the elements of each of their claims. Questions 1-3 found that Defendants had intentionally interfered with certain of Plaintiffs' contracts. (Doc. No. 137 at 23-24.) Questions 4-7 found that Defendants had intentionally interfered with certain of Plaintiffs' prospective business relationships. (Doc. No. 137 at 26-27.) Question 8 found that Defendants had disparaged Plaintiffs' business. (Doc.

No. 137 at 29.) Question 13 found that Defendants had unlawfully monopolized the relevant market.³ (Doc. No. 137 at 45.) Question 14 found that Defendants had unlawfully attempted to monopolize the relevant market. (Doc. No. 137 at 48.)

The Court finds Plaintiffs' argument inconsistent with the nature of an affirmative defense. There is nothing irreconcilable about finding the elements of, for example, business disparagement, and also finding that the elements of an affirmative defense were met. *See e.g.*, Charles Arthur Wright & Arthur R. Miller, 5 Federal Practice and Procedure § 1270 (3d ed. 2018) ("Rule 8(c) is a lineal descendent of the common law plea by way of 'confession and avoidance,' which permitted a defendant who was willing to admit that the plaintiff's declaration demonstrated a prima facie case to then go on and allege additional new material that would defeat the plaintiff's otherwise valid cause of action."). The Court submitted to the jury a special verdict, not a general verdict, so there was no general response from the jury for or against each of Plaintiffs' claims. Thus, there was no point at which the jury was asked to reconcile its findings on the elements of Plaintiffs' claims and its finding on Defendants' affirmative defenses to those claims. The Court finds no conflict between Question 12 and Questions 1-8 and 13-14.

³ This response was not unanimous, and thus does not constitute an actual finding by the jury. *See* Fed. R. Civ. P. 48; *see also Fox v. United States*, 417 F.2d 84, 89 (5th Cir. 1969). The Court will discuss the response as if it were a finding for the purposes of addressing Plaintiffs' argument.

2. *Questions 9-11*

Plaintiffs argue that Question 12 directly contradicts the jury's findings in Questions 9-11 that the Defendants did not have a good-faith basis for sending the cease-and-desist letters that formed the basis of Plaintiffs' claims. (Doc. No. 139 at 12.) First, the Court notes that there can be no conflict between these responses and Question 12, because the responses to Questions 9-11 were not unanimous and thus were not findings at all. *See* Fed. R. Civ. P. 48 (requiring that verdicts be unanimous); *see also Fox v. United States*, 417 F.2d 84, 89 (5th Cir. 1969) ("Unless otherwise stipulated, the verdict in a civil case must be the unanimous verdict of twelve jurors. Likewise, the verdict in a criminal case must be unanimous or it constitutes no verdict at all." (internal citations omitted).)

Second, there would be no conflict even if the jury unanimously found that Defendants had no good-faith basis for sending the cease-and-desist letters. The affirmative defense of good faith places the burden of persuasion on Defendants and uses a subjective standard. The affirmative defense of *Noerr-Pennington* immunity, on the other hand, applies unless the Plaintiffs prove that the threatened litigation was objectively baseless (the "sham exception"). The second, subjective prong of the "sham exception" test is only considered after a finding of objective baselessness. *See Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 61 (1993) ("This two-tiered process requires the plaintiff to disprove the challenged lawsuit's *legal* viability before the court will entertain

evidence of the suit's *economic* viability."); *Bryant v. Military Dep't of Miss.*, 597 F.3d 678, 690 (5th Cir. 2010) ("The plaintiff bears the burden to disprove the challenged lawsuit's legal viability before subjective intent can be considered."). Indeed, the mere fact that the test for the "sham exception" has both objective and subjective prongs is evidence that a finding that a lawsuit was threatened in bad faith is not dispositive of whether that lawsuit was objectively baseless. Thus, the Court rejects Plaintiffs' argument that Question 12 conflicts with Questions 9-11.

3. Question 12

Plaintiffs additionally argue that in answering "no" to the question of whether the pre-litigation correspondence was "objectively baseless," the jury was *actually* answering "no" to an entirely different question—whether the pre-litigation correspondence "had an objective basis." (Doc. No. 139 at 15.) Plaintiffs hypothesize that the jury misread Question 12 because it was given immediately after Questions 9-11 on good faith. (Doc. No. 139 at 15.)

This is a bridge too far. The Court's job is to "harmonize" the jury's verdict, not to rewrite it. *Gallick v. Balt. & Oh. R.R. Co.*, 372 U.S. 108, 119 (1963). The instruction on *Noerr-Pennington* immunity was detailed and relatively long, over three pages. (Doc. No. 137 at 30-33.) It hewed closely to the ABA Model Jury Instructions on Civil Antitrust Cases and contained a specific explanation of objective baselessness. (Doc. No. 137 at 33.) The jury demonstrated that it understood other portions of the instruction stating that it did not have to proceed to the second step of Question 12, if it

did not find the threatened litigation “objectively baseless.” (Doc. No. 137 at 35.) Further, the jury could not unanimously answer the questions on good faith, which appear analogous to what Plaintiffs argue the jury misunderstood Question 12 to be asking. In contrast, the answer to Question 12 was unanimous. If the jury truly believed that Question 12 was identical to Questions 9-11, the Court would expect the jury’s eleven-to-one split to be recreated in Question 12.

For these reasons, the Court refuses to impeach the jury’s clear and unanimous response on Question 12. *See Carr v. Wal-Mart Stores*, 312 F.3d 667, 673-74 (5th Cir. 2002) (reversing a district court’s decision to credit a later question entered against the court’s instructions, instead of the clear response of the jury to an earlier question that rendered the later question superfluous).

4. Questions 15-20

Plaintiffs assert that the jury’s damages findings in Questions 15-20 are further evidence that the jury intended to rule for the Plaintiffs, and that those findings are thus inconsistent with Question 12. (Doc. No. 142 at 13.) Plaintiffs are correct that, by finding damages, the jury failed to follow the Court’s instruction to find against the Plaintiffs if it found that *Noerr-Pennington* immunity applied in Question 12. (Doc. No. 137 at 34.) Further, the instructions specifically listed the claims to which this immunity would apply, which include all Plaintiffs’ claims for relief. (Doc. No. 137 at 36.) Thus, the Court must analyze whether the apparent conflict is reconcilable. Several cases prove instructive.

In *Gallick v. Baltimore & Ohio Railroad Co.*, the Supreme Court considered the claims of a railroad worker who was bitten by an insect while working on the railroad's line near by a pool of fetid water teeming with insects and vermin. 372 U.S. 108 (1963). The insect bite became infected and eventually necessitated amputation of the plaintiff's legs. *Id.* at 109-110. Under federal law, the railroad was liable for injury or death resulting from its negligence. *Id.* at 110. The defendant argued that the injury was not foreseeable. *Id.* The district court submitted to the jury a special verdict form. *Id.* The jury found for the plaintiff on almost every question except on foreseeability. *Id.* at 110-111. The jury specifically found for plaintiff on questions of proximate cause and negligence. *Id.* at 111.

On appeal, the Supreme Court found that the verdict was not inconsistent. *Id.* at 120. Because the concept of negligence includes a finding of foreseeability, the jury's answer finding no foreseeability may have meant that only the severity of the harm was not foreseeable— which does not preclude a plaintiff's recovery under well-established tort law. *Id.* at 120-121. The Court reviewed the inconsistent question in the context of the charge and of the special verdict as a whole, and found that it was not sufficiently inconsistent to overturn the judgment of the trial court, which was entered for plaintiff pursuant to the special verdict. *Id.* at 120.

Similarly, the Fifth Circuit in *National Hispanic Circus, Inc. v. Rex Trucking, Inc.*, refused to order a new trial despite alleged inconsistencies in the jury's verdict. 414 F.3d 546, 551 (5th Cir. 2005). In *National*

Hispanic Circus, a shipping company (defendant) lost the circus's custom-made bleachers while transporting them across the country. *Id.* at 548. The circus sued for the cost of replacement custom bleachers. *Id.* at 548-49. A federal statute allowed the circus to recover damages from the carrier for actual loss of property, if the loss was reasonably foreseeable. *Id.* The charge instructed the jury that, if it found the damages were *not* reasonably foreseeable, it should proceed to consider whether the defendant had actual notice of the circus's potential damages, which might provide an alternative basis for liability. *Id.* at 550. The jury returned a verdict finding that the circus's damages were reasonably foreseeable. *Id.* at 551. In violation of the instructions, the jury proceeded to find that the defendant had actual notice. *Id.* The defendant argued that there was no evidence in the record to support a finding of actual notice, and that therefore "the jury's verdict may have rested on a theory that lacked adequate support in the record." *Id.* The Fifth Circuit reconciled the allegedly inconsistent verdict as follows:

Even if the jury's answers were inconsistent,—a highly implausible contention—a new trial still was not required if the verdict can be explained by assuming that the jury misunderstood the question. *If the jury's answer to a question that was supposed to pretermit further inquiry is clear and disposes of the legal issues, we must ignore the jury's conflicting answers to any other questions, as they are irrelevant.* As the jury's answer to the second question [on actual damages] was superfluous to its finding that Mason could reasonably have

foreseen the damages to the Circus, Mason is not entitled to a new trial or a judgment as a matter of law.

Id. at 551 (emphasis added).

In an earlier case, the Fifth Circuit also reconciled apparent inconsistencies in the jury's verdict. *White v. Grinfas*, 809 F.2d 1157, 1161 (5th Cir. 1987). In *White*, purchasers of an apartment complex filed counterclaims against the seller, alleging a breach of implied warranties and fraud. *Id.* at 1158. Specifically, they claimed that the sellers knew that the foundation of the apartment complex was structurally defective. *Id.* A prior settlement agreement between the parties was at issue in addition to the actual sale of the apartment complex. *Id.*

On appeal, the buyers complained that the jury verdict returned was irreconcilable in finding simultaneously that (1) the sellers did not know about the structural defects at the time the parties entered into the settlement (Question 3), (2) that the sellers failed to disclose the structural defects with the intention of inducing the buyers to enter into the settlement (Question 5); and (3) that the sellers failure to disclose the structural defects with the intention of inducing the buyers to purchase the apartment complex (Question 14). *Id.* at 1162-64. The instructions included a direction from the trial court not to answer any further questions if it found that the sellers were unaware of the structural defects before settlement was executed (Question 3). *Id.* at 1161.

The Fifth Circuit noted that the problems with the verdict were “caused by the jury’s failure to follow the court’s instructions.” The court noted an apparent conflict between Question 3 and all other questions, “[b]ecause all the questions subsequent to question 3 were predicated on an affirmative response to that question.” *Id.* The court reconciled the verdict by ignoring the responses the jury submitted in violation of the trial court’s instructions.

To effectuate best the intent of the jury, we hold that if the district court has correctly found that the jury’s answer to a question that was supposed to terminate further inquiry is clear and disposes of the legal issues, on review we must ignore the jury’s necessarily conflicting answers to any other questions. The subsequent questions are by definition irrelevant in these circumstances, and cannot be used to impeach the jury’s clear verdict.

Here the jury found in response to question 3 that the [sellers] were unaware of any structural defects at the time of the settlement agreement. *A fortiori*, lacking scienter, the [sellers] could not have fraudulently induced the [purchasers] to enter into the [settlement] Agreement. Consequently, the Agreement barred assertion of the counterclaims as a matter of law, and the jury’s answers to the questions following question 3 cannot be used to cast doubt upon the jury’s clear verdict.

Id.

The above cases do not stand for the proposition that there are no limits to the district court's ability to reconcile inconsistencies in jury verdicts. In *Carr v. Wal-Mart Stores, Inc.*, the Fifth Circuit found that the district court overstepped the bounds of its discretion to reconcile inconsistent findings. 312 F.3d 667, 673 (5th Cir. 2002). The plaintiff in *Carr* brought a tort suit against the defendant for an injury sustained at its store. *Id.* at 669. The jury in *Carr* first found that the defendant was not negligent in causing the accident. *Id.* The jury then proceeded to the next question, in violation of the trial court's instruction, and found that the defendant's negligence had not caused injury to the plaintiff. *Id.* The magistrate judge presiding over the trial found that the jury's finding that the defendant was not negligent was "contrary to the great weight of the evidence," but did not order a new trial. *Id.* Instead, the judge used the jury's—improper—unanimous finding of lack of causation to argue that no retrial was necessary, because any error was harmless. *Id.*

The Fifth Circuit found that the magistrate judge had improperly relied upon the second response, which was answered in violation of the court's instructions. *Id.* at 674. Throughout its discussion in *Carr*, the Fifth Circuit reiterates the instructions given in the cases discussed above: "We have concluded that a district court does not abuse its discretion in reconciling verdicts containing answers to interrogatories that the jury was instructed not to answer, when it either disregards the superfluous answers in their entirety, or resubmits the interrogatories to the jury." *Id.* (citing *Richard v. Firestone Tire & Rubber Co.*, 853 F.2d 1258, 1260 (5th Cir. 1988) ("Thus, in *White* we recognized the

broad discretion the district court enjoys to refuse to consider interrogatories answered in violation of the court's instructions."); *Knowlton v. Greenwood Ind. Sch. Dist.*, 957 F.2d 1172, 1179 (5th Cir. 1992) ("We will not allow a puzzling answer to an irrelevant question to impeach the jury's clear verdict."); *Floyd v. Laws*, 929 F.2d 1390, 1397 (9th Cir. 1991) ("[S]pecial findings issued in violation of the trial court's express instructions do not constitute legitimate or viable findings of fact. The trial court must therefore dismiss them as surplusage, as a matter of law.")).

Here, the apparent conflict is between Question 12 and Questions 15-20. The jury's responses to Questions 15-20 were answered in violation of the Court's instruction that the jury should find for Plaintiffs if it did not find that the threatened litigation was objectively baseless. (Doc. No. 137 at 33.) Thus, the Court finds that the relevant precedent instructs it to disregard the responses to Questions 15-20.

Plaintiffs attempt to differentiate this case from the Fifth Circuit cases discussed above. (Doc. No. 142 at 9.) Plaintiffs argue that in the above-quoted cases, the court's instructions were more explicit that the jury was not to proceed to other questions. Plaintiffs are correct that the instruction accompanying Question 12 did not specifically direct the jury to not answer Questions 15-20. The instruction was admittedly better suited to a general verdict with special interrogatories than the special verdict submitted to the jury here, as it directed the jury to "find for the [Defendants] and against Plaintiffs." (Doc. No. 137 at 33.) While this ambiguity makes it more understandable that the jury

answered the superfluous questions, it does not disturb the rationale of the cases discussed above. The jury's response to Question 12 was clear and disposed of all Plaintiffs' claims.

Plaintiffs additionally cite several cases that hold allegedly inconsistent verdicts irreconcilable and imply that a new trial is required. In *Dawson v. General Motors Corp.*, the Fifth Circuit, without discussion, reversed and remanded a district court's reconciliation of a jury finding that the plaintiff was not "causally negligent" with a finding that she was "5% causally responsible for her injuries." 1995 WL 17788765, at *1 (5th Cir. 1995) (unpublished).⁴ In *Team Contractors, L.L.C. v. Waypoint NOLA, L.L.C.*, a district court cited *Dawson* while holding that it could not reconcile jury findings that there was no breach of contract and that defendant was responsible for damages. 2018 WL 4252553, at *5 (E.D. La. Sept. 6, 2018).

These cases are inapposite, because the juries came to contrary conclusions on the same underlying fact, indicating that they were confused "about the case" itself. *Id.* at *5 n.68. The court in *Team Contractors* itself makes this distinction, differentiating its case from *Smith v. Tidewater Marine Towing, Inc.*, 927 F.2d 838 (5th Cir. 1991), in which "the jury found a defendant in a maritime personal injury case not negligent, but misunderstood the verdict form and erroneously continued answering questions about

⁴ Although this case is unpublished, it is precedent. See Fifth Cir. R. 47.5.3 ("Unpublished opinions issued before January 1, 1996, are precedent.").

damages.” *Team Contractors*, 2018 WL 4252553, at *5 n.68. The *Team Contractors* court noted that “[i]n *Smith*, the jury’s answers reflected a consistent theory of the case: the defendant was not negligent, but the plaintiff did suffer injuries from two accidents.”

It is even clearer in this case that the jury’s answers reflect a consistent theory of the case: Defendants wrongfully interfered with Plaintiffs’ business relationships, disparaged Plaintiffs’ business, and wrongfully attempted to monopolize the market, causing real damage to Plaintiffs to the tune of over two million dollars. However, this wrongful conduct was immunized under the *Noerr-Pennington* doctrine. Affirmative defenses do not discount that damage was done, but only preclude legal recovery. The evidence that the jury “misunderstood the verdict form” does not displace the verdict. *Team Contractors*, 2018 WL 4252553, at *5 n.68.

IV. SUFFICIENCY OF TIME TO REVIEW PROPOSED INSTRUCTIONS

Plaintiffs also seek to challenge the sufficiency of the time their counsel were given to review the jury instructions. A brief review of pertinent facts is in order. Even though the case was almost three years old, it was apparent that Plaintiffs’ counsel had given little thought to their proposed jury instructions. The ninety-three pages of joint proposed jury instructions submitted with the parties’ joint pretrial order often contained no explanation for why certain suggestions were opposed. (Doc. No. 126-3.) The Court was left to do most of the work on its own.

After the presentation of evidence was complete, the Court held a lengthy jury charge conference with counsel on Friday, January 18, 2019. The Court paused halfway through the charge conference to allow the parties additional time to review the proposed jury instructions. All of counsel's objections and inquiries were heard, and the Court ruled on most of them. Despite the Court's warning that the charge conference would be the final chance for objections and argument on the instructions, Plaintiffs emailed the Court and opposing counsel a new draft of the proposed instructions—fifteen hours before the jury was to be charged. As Defendants' counsel were in transit to Houston at the time the email was received, the Court refused to entertain these suggestions.

On January 22, 2019, the Court provided its instructions to counsel prior to the seating of the jury. It is particularly important to note that the instructions on Question 12 were taken from the American Bar Association's Model Jury Instructions in Civil Antitrust Cases, which Plaintiffs had recommended as the appropriate template for the instructions on their monopoly claims. (Doc. No. 126-3 at 35, 37-38, 40.)

V. CONCLUSION

For the foregoing reasons, the Plaintiffs' Motion for Continued Jury Deliberations or for a New Trial is **DENIED**. (Doc. No. 139.)

IT IS SO ORDERED.

SIGNED at Houston, Texas on the 22nd of February, 2019.

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/s/ Keith P. Ellison
HON. KEITH P. ELLISON
UNITED STATES DISTRICT JUDGE

APPENDIX C

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

CIVIL ACTION NO. 4:16-CV-0114

[Filed: February 6, 2019]

CONSTRUCTION COST DATA,)
LLC, <i>et al</i>,)
)
Plaintiffs,)
VS.)
)
THE GORDIAN GROUP, INC., <i>et al</i>,)
)
Defendants.)

FINAL JUDGMENT

Plaintiffs Construction Cost Data, LLC, The Job Order Contracting Group, LLC, and Managed JOC Solutions, LLC (collectively “Plaintiffs”) filed suit in state court against Defendants The Gordian Group, Inc. and R.S. Means Co., LLC (“Defendants”), on December 1, 2015, seeking relief under state law. (Doc. No. 1-1.) Defendants removed the case to federal court on January 15, 2016. (Doc. No. 1.) Defendants filed a counterclaim against Plaintiffs, Mark Powell, Benjamin Stack, and All Cost Data Info, LLC (“Third-Party Defendants”) on February 12, 2016, seeking

relief under the common law, and federal copyright and trademark law. (Doc. No. 7.)

The Court commenced a jury trial on January 14, 2019. The jury returned a special verdict on January 23, 2019. (Doc. No. 137.) The jury found that the Plaintiffs had not proven that the “sham exception” to *Noerr-Pennington* immunity applied, providing Defendants an affirmative defense to Plaintiffs’ claims. (Doc. No. 137 at 35.) The jury also found that Defendants had not proven their sole remaining counterclaim of copyright infringement. (Doc. No. 137 at 73.)

Pursuant to Federal Rule of Civil Procedure 58(a), final judgment is hereby **ENTERED** for Defendants on Plaintiffs’ claims, and for Plaintiffs and Third-Party Defendants on Defendants’ counterclaim of copyright infringement.

IT IS SO ORDERED.

SIGNED at Houston, Texas on this the 6th day of February, 2019.

/s/ Keith P. Ellison
KEITH P. ELLISON
UNITED STATES DISTRICT JUDGE

APPENDIX D

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

CIVIL ACTION NO. 4:16-CV-0114

[Filed: June 24, 2019]

CONSTRUCTION COST DATA,)
LLC, <i>et al</i>,)
)
Plaintiffs,)
VS.)
)
THE GORDIAN GROUP, INC., <i>et al</i>,)
)
Defendants.)

MEMORANDUM AND ORDER

Now pending before the Court is Plaintiffs' Rule 59 Motion for a New Trial, or, Alternatively, Motion to Modify. (Doc. No. 146.) Plaintiffs argue the following: (1) the jury's verdict was defective under Rule 48, (2) the Court should reconsider its ruling on the consistency of the jury's answers to the special interrogatories, (3) the Court should order a new trial because the jury's answers indicate confusion or failure to follow instructions, (4) the Court should modify the final take-nothing judgment entered on February 6, 2019, because *Noerr-Pennington* immunity does not

apply to misrepresentations, and (5) the Court should allow argument on attorneys' fees under 17 U.S.C. §§ 505, 1117(a).

The Court addressed many of these arguments in its February 22, 2019, Memorandum and Order ("Order") explaining its ruling on Plaintiffs' Rule 49 Motion for Continued Jury Deliberations or for a New Trial. (Doc. No. 145.) Now, the Court reaffirms its February 22 Order. The Court finds that the special verdict returned by the jury was unanimous in its response to Question 12, which disposed of the entire case. (Doc. No. 145 at 24-25.) The Court declines to reconsider its ruling on the consistency of the special verdict, which analyzed the jury's responses to each of the interrogatories and addressed Plaintiffs' concerns about juror confusion. (Doc. No. 145 at 20-32.)

The Court declines to modify the final judgment as requested regarding Plaintiffs' business disparagement claim for the reasons described in the Order, namely, that the Fifth Circuit has not indicated that misrepresentations are excepted from *Noerr-Pennington* immunity. (Doc. No. 145 at 5-20.) Plaintiffs are correct that the Court accepted their theory about misrepresentations at the summary judgment stage. (Doc. No. 112 at 15.) However, upon further examination of Fifth Circuit and Supreme Court precedent regarding *Noerr-Pennington* immunity—discussed both during trial and at length in the Order—the Court concluded that the Fifth Circuit has neither adopted a general "fraud exception" to *Noerr-Pennington* immunity, nor expanded the *Walker-*

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Process patent fraud exception to trademark or copyright claims. (Doc. No. 145 at 5-13.)

Finally, the Court notes that Plaintiffs' complaints about the time they were allotted to review the proposed jury instructions were addressed in the Court's February 22 Order. (Doc. No. 145 at 32-33.)

For the foregoing reasons, the Plaintiffs' Motion for a New Trial is **DENIED**. (Doc. No. 146.) Plaintiffs may file their Motion for Exceptional Case Finding and for Attorneys' Fees and Costs, if any, by July 20, 2019.

IT IS SO ORDERED.

SIGNED at Houston, Texas on the 24th of June, 2019.

/s/ Keith P. Ellison
HON. KEITH P. ELLISON
UNITED STATES DISTRICT JUDGE

APPENDIX E

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

No. 19-20482

[Filed: August 11, 2020]

CONSTRUCTION COST DATA, L.L.C.;)
THE JOB ORDER CONTRACT GROUP,)
L.L.C.; MANAGED J.O.C.)
SOLUTIONS, L.L.C.,)
)
<i>Plaintiffs – Appellants</i>)
<i>Cross-Appellees,</i>)
)
<i>versus</i>)
)
THE GORDIAN GROUP,)
INCORPORATED; R.S. MEANS)
COMPANY, L.L.C.,)
)
<i>Defendants – Appellees</i>)
<i>Cross-Appellants.</i>)
)

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:16-CV-114

Before DAVIS, GRAVES, and DUNCAN, *Circuit
Judges.*

PER CURIAM:

Plaintiffs, Construction Cost Data, L.L.C., and Job Order Contracting Group, L.L.C. (collectively “CCD”), argue in their petition for panel rehearing that they properly raised the argument that the jury’s unanimous answer to Question 8 precluded application of the *Noerr-Pennington* doctrine because the jury found that Defendants made false statements. On reconsideration, we agree that CCD raised this argument before the district court in its Rule 59 motion.¹ However, we conclude that the issue was not raised on appeal until oral argument. As stated in our opinion, we do not generally consider points raised for the first time at oral argument.²

The petition for panel rehearing filed by Plaintiffs, Construction Cost Data, L.L.C., and Job Order Contracting Group, L.L.C., is DENIED.

¹ Accordingly, we delete the second sentence of footnote 25 from our June 30, 2020, opinion.

² *Whitehead v. Food Max of Miss., Inc.*, 163 F.3d 265, 270 (5th Cir. 1998).

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C.A. 4:16-cv-00114

[Filed: January 23, 2019]

CONSTRUCTION COST DATA, LLC, JOB)
ORDER CONTRACTING GROUP, LLC,)
AND MANAGED JOC SOLUTIONS, LLC)

the CCD Group,)
Counterclaim the Gordian Group)

v.)

THE GORDIAN GROUP, INC. AND)
R.S. MEANS COMPANY LLC)

the Gordian Group,)
Counterclaim the CCD Group)

v.)

ALL COST DATA INFO, LLC, BENJAMIN)
STACK, AND MARK POWELL)

Counter-the Gordian Group)

**JURY DEMANDED
CHARGE OF THE COURT**

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1. JURY CHARGE

1.1 INTRODUCTORY INSTRUCTION

MEMBERS OF THE JURY:

It is my duty and responsibility to instruct you on the law you are to apply in this case. The law contained in these instructions is the only law you may follow. It is your duty to follow what I instruct you the law is, regardless of any opinion that you might have as to what the law ought to be.

If I have given you the impression during the trial that I favor either party, you must disregard that impression. If I have given you the impression during the trial that I have an opinion about the facts of this case, you must disregard that impression. You are the sole judges of the facts of this case. Other than my instructions to you on the law, you should disregard anything I may have said or done during the trial in arriving at your verdict.

You should consider all of the instructions about the law as a whole and regard each instruction in light of the others, without isolating a particular statement or paragraph.

The testimony of the witnesses and other exhibits introduced by the parties constitute the evidence. The statements of counsel are not evidence; they are only arguments. It is important for you to distinguish between the arguments of counsel and the evidence on which those arguments rest. What the lawyers say or do is not evidence. You may, however, consider their arguments in light of the evidence that has been

admitted and determine whether the evidence admitted in this trial supports the arguments. You must determine the facts from all the testimony that you have heard and the other evidence submitted. You are the judges of the facts, but in finding those facts, you must apply the law as I instruct you.

You are required by law to decide the case in a fair, impartial, and unbiased manner, based entirely on the law and on the evidence presented to you in the courtroom. You may not be influenced by passion, prejudice, or sympathy you might have for the plaintiff or the defendant in arriving at your verdict.

**1.2 BURDEN OF PROOF :
PREPONDERANCE OF THE EVIDENCE**

Plaintiffs, Construction Cost Data, LLC and Job Order Contract Group, LLC (“**CCD Group**”) have the burden of proving their case by a preponderance of the evidence. Likewise, the Defendants, The Gordian Group, Inc. and R.S. Means Company LLC (“**Gordian Parties**”) have the burden of proving their case by a preponderance of the evidence.

To establish by a preponderance of the evidence means to prove something is more likely so than not so. If you find that the CCD Group (Construction Cost Data, LLC and Job Order Contract Group, LLC) or the Gordian Parties (The Gordian Group, Inc. and R.S. Means Company LLC) have failed to prove any element of their claim by a preponderance of the evidence, then they may not recover on that claim.

1.3 PROXIMATE CAUSE

“Proximate cause” means a cause that was a substantial factor in bringing about an event, and without which cause such event would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a person using the degree of care required of him would have foreseen that the event, or some similar event, might reasonably result therefrom. There may be more than one proximate cause of an event.

1.4 EVIDENCE

The evidence you are to consider consists of the testimony of the witnesses, the documents and other exhibits admitted into evidence, and any fair inferences and reasonable conclusions you can draw from the facts and circumstances that have been proven.

Generally speaking, there are two types of evidence. One is direct evidence, such as testimony of an eyewitness. The other is indirect or circumstantial evidence. Circumstantial evidence is evidence that proves a fact from which you can logically conclude another fact exists. As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that you find the facts from a preponderance of all the evidence, both direct and circumstantial.

1.5 WITNESSES

You alone are to determine the questions of credibility or truthfulness of the witnesses. In weighing the testimony of the witnesses, you may consider the

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witness' manner and demeanor on the witness stand, any feelings or interest in the case, or any prejudice or bias about the case, that he or she may have, and the consistency or inconsistency of his or her testimony considered in the light of the circumstances. Has the witness been contradicted by other credible evidence? Has he or she made statements at other times and places contrary to those made here on the witness stand? You must give the testimony of each witness the credibility that you think it deserves.

Even though a witness may be a party to the action and therefore interested in its outcome, the testimony may be accepted if it is not contradicted by direct evidence or by any inference that may be drawn from the evidence, if you believe the testimony.

You are not to decide this case by counting the number of witnesses who have testified on the opposing sides. Witness testimony is weighed; witnesses are not counted. The test is not the relative number of witnesses, but the relative convincing force of the evidence. The testimony of a single witness is sufficient to prove any fact, even if a greater number of witnesses testified to the contrary, if after considering all of the other evidence, you believe that witness.

1.6 IMPEACHMENT BY WITNESS' INCONSISTENT STATEMENTS

In determining the weight to give to the testimony of a witness, consider whether there was evidence that at some other time the witness said or did something, or failed to say or do something, that was different from the testimony given at the trial.

A simple mistake by a witness does not necessarily mean that the witness did not tell the truth as he or she remembers it. People may forget some things or remember other things inaccurately. If a witness made a misstatement, consider whether that misstatement was an intentional falsehood or simply an innocent mistake. The significance of that may depend on whether it has to do with an important fact or with only an unimportant detail.

1.7 EXPERT WITNESSES

When knowledge of technical subject matter may be helpful to the jury, a person who has special training or experience in that technical field is permitted to state his or her opinion on those technical matters. However, you are not required to accept that opinion. As with any other witness, it is up to you to decide whether to rely on it.

1.8 NO INFERENCE FROM FILING SUIT

The fact that a person brought a lawsuit or claim and is in court seeking damages creates no inference that the person is entitled to a judgment. Anyone may make a claim and file a lawsuit. The act of making a claim in a lawsuit, by itself, does not in any way tend to establish that claim and is not evidence.

2. SPECIFIC DEFINITIONS AND INSTRUCTIONS

2.1 DEFINITIONS

As used in throughout this charge and instructions, the following terms have the following meanings:

- a. “**CCD**” means Construction Cost Data, LLC;

- b. **“CCD Group” or “Plaintiffs”** collectively means Construction Cost Data, LLC and The Job Order Contract Group, LLC.
- c. **“CCD Parties”** collectively means Construction Cost Data, LLC, The Job Order Contract Group, LLC, Mark Powell, and Benjamin Stack;
- d. **“Gordian”** means The Gordian Group, Inc.;
- e. **“Gordian Parties” or “Defendants”** collectively means The Gordian Group, Inc. and R.S. Means Company, LLC;
- f. **“JOC Group”** means The Job Order Contract Group, LLC;
- g. **“KATA”** means Kata Management, LLC
- h. **“Powell”** means Mark Powell
- i. **“Region 4”** means Region 4 Education Service Center.
- j. **“Region 5”** means Region 5 Education Service Center.
- k. **“RS Means”** means R.S. Means Company, LLC;
- l. **“Stack”** means Benjamin Stack;
- m. **“TCPN”** Texas Cooperative Purchasing Network and Region 4 Education Service Center.

2.2 DAMAGES

In answering questions about damages, answer each question separately. Do not increase or reduce the

amount in one answer because of your answer to any other question about damages. Do not speculate about what any party's ultimate recovery may or may not be. Any recovery will be determined by the court when it applies the law to your answers at the time of judgment.

3. THE CCD GROUP'S AFFIRMATIVE CLAIMS

3.1 INTRODUCTION

Plaintiffs, Construction Cost Data, LLC and Job Order Contract Group, LLC, (collectively, the "**CCD Group**") seeks damages against Defendants, The Gordian Group, Inc. and R.S. Means Company LLC ("**Gordian Parties**"), for violations of the Texas Antitrust Act, tortious interference with contract and business relationships, and business disparagement. The Gordian Parties deny such claims. To help you understand the evidence in this case, I will explain some of the legal terms you have heard during this trial.

3.2 TORTIOUS INTERFERENCE WITH EXISTING CONTRACT

To prevail on its claim for tortious interference with an existing contract, the CCD Group must prove four elements by a preponderance of the evidence: (1) the existence of a contract subject to interference, (2) an act of interference that was willful and intentional, (3) the act was a proximate cause of the CCD Group's damage, and (4) actual damage or loss occurred.

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Interference is tortious only if it is intentional, and the intent required is the intent to interfere, not just an intent to do the particular acts done.

3.2.1 First Element: Existence of Contract

To be enforceable, a contract must be reasonably definite and certain. Failure to agree on or include an essential term renders a contract unenforceable.

Instruction on Formation of Agreement

In deciding whether the parties reached an agreement, you may consider what they said and did in light of the surrounding circumstances, including any earlier course of dealing. You may not consider the parties' unexpressed thoughts or intentions.

Conditions Precedent

A condition precedent may be either a condition to the formation of a contract or to an obligation to perform an existing agreement. Conditions may, therefore, relate either to the formation of contracts or to liability under them. A condition precedent is an event that must happen or be performed before a right can accrue to enforce an obligation.

Conditions precedent to an obligation to perform are acts or events that are to occur after the contract is made and that must occur before there is a right to immediate performance and before there can be a breach of contractual duty.

Although no particular words are necessary to create a condition, terms such as "if," "provided that," and "on condition that" usually connote a condition

rather than a covenant or promise. Absent such a limiting clause, whether a provision represents a condition or a promise must be gathered from the contract as a whole and from the intent of the parties.

3.2.2 Second Element: Interference with Contract

Interference is intentional if committed with the desire to interfere with the contract or with the belief that interference is substantially certain to result.

Interference can include conduct that prevents performance of a contract or makes performance of a contract impossible, more burdensome, more difficult, or of less or no value to the one entitled to performance.

However, ordinarily, merely inducing a contract obligor to do what it has the right to do is not actionable interference.

QUESTION NO. 1

If the JOC Group had a contract with KATA Management, LLC, did Gordian and/or RS Means intentionally interfere with that contract?

Answer “Yes” or “No” for each of the following:

Gordian: Yes (12)

RS Means: Yes (12)

QUESTION NO. 2

If the Construction Cost Data, LLC had a contract with 4Clicks Solutions, LLC, did Gordian and/or RS Means intentionally interfere with that contract?

Answer “Yes” or “No” for each of the following:

Gordian: Yes (12)

RS Means: Yes (12)

QUESTION NO. 3

If the JOC Group had a contract with TCPN, did Gordian and/or RS Means intentionally interfere with that contract?

Answer “Yes” or “No” for each of the following:

Gordian: Yes (12)

RS Means: Yes (12)

3.3 TORTIOUS INTERFERENCE WITH PROSPECTIVE BUSINESS RELATIONS

Wrongful Interference with Prospective Contractual or Business Relations

The elements of wrongful interference with prospective contractual or business relations are:

(1) there is a reasonable probability that the CCD Group would have entered into a business relationship with a third party;

(2) Gordian and/or RS Means either acted with a conscious desire to prevent the relationship from occurring or knew the interference was certain or substantially certain to occur as a result of the conduct;

(3) Gordian and/or RS Means was independently tortious or unlawful;

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(4) the interference proximately caused the CCD Group's injury, and

(5) the CCD Group suffered actual damage or loss as a result.

QUESTION NO. 4

Did Gordian and/or RS Means wrongly interfere with the JOC Group's prospective business relationship with KATA?

Answer "Yes" or "No" for each of the following:

Gordian: Yes (12)

RS Means: Yes (12)

QUESTION NO. 5

Did Gordian and/or RS Means wrongly interfere with the Construction Cost Data, LLC's prospective business relationship with 4Clicks Solutions, LLC?

Answer "Yes" or "No" for each of the following:

Gordian: Yes (12)

RS Means: Yes (12)

QUESTION NO. 6

Did Gordian and/or RS Means wrongly interfere with the JOC Group's prospective business relationship with TCPN?

Answer "Yes" or "No" for each of the following:

Gordian: Yes (12)

RS Means: Yes (12)

QUESTION NO. 7

Did Gordian and/or RS Means wrongly interfere with the CCD Group's prospective business relationship with Region 5?

Answer "Yes" or "No" for each of the following:

Gordian: Yes (12)

RS Means: Yes (12)

3.4 BUSINESS DISPARAGEMENT

Gordian and/or RS Means disparaged the business of the CCD Group if they published a disparaging false statement about the business, and when they published the statement, they knew the falsity of the statement or they acted with reckless disregard of whether the statement is false, or if they acted with ill will or intended to interfere with the economic interest of the CCD Group, and their publication of the statement played a substantial part in inducing others not to do business with the CCD Group and resulted in a specific pecuniary loss to the CCD Group.

A statement is "published" if it is intentionally communicated to a person other than the CCD Group who is capable of understanding its meaning.

In answering this question, you may consider only the contents of the prelitigation correspondence.

QUESTION NO. 8

Did Gordian and/or RS Means disparage the business of the CCD Group?

Answer “Yes” or “No” for each of the following:

Gordian: Yes (12)

RS Means: Yes (12)

3.5 DEFENSES

3.5.1 Legal Justification

QUESTION NO. 9

If you answered “Yes” to Question No. 1, then answer the following question. Otherwise, do not answer the following question.

Did the Gordian Parties and R.S. Means have a good-faith belief that they had a valid basis to send cease-and-desist letters regarding their copyrighted material to KATA Management, LLC?

Answer “Yes” or “No:” Yes (1)
No (11)

QUESTION NO. 10

If you answered “Yes” to Question No. 2, then answer the following question. Otherwise, do not answer the following question.

Did the Gordian Parties and R.S. Means have a good-faith belief that they had a valid basis to send cease-and-desist letters regarding their copyrighted material to 4Clicks Solutions, LLC?

Answer “Yes” or “No:” Yes (1)
No (11)

QUESTION NO. 11

If you answered “Yes” to Question No. 3, then answer the following question. Otherwise, do not answer the following question.

Did the Gordian Parties and R.S. Means have a good-faith belief that they had a valid basis to send cease-and-desist letters regarding their copyrighted material to TCPN?

Answer “Yes” or “No:” Yes (1)
No (11)

3.5.2 Noerr-Pennington Doctrine

The Gordian Parties claim that their conduct in sending the cease-and-desist letters, which form the basis of some of Plaintiffs’ claims against them, was a good-faith attempt to enforce their legal rights through the court system. The Constitution ensures the right of everybody, whether acting alone or in combination or agreement with others, to petition or appeal to the courts for judicial action, recognizing that when people do so, they will naturally seek judicial action that favors them and also may be unfavorable to others. The law provides that the right to use the courts to seek judicial action is an important right, and that the exercise of that right, does not normally violate the law. This principle extends to threats to litigate, such as cease-and-desist letters.

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Bringing or threatening to bring one or more lawsuits against the Plaintiffs does not violate the laws unless the suit or suits were a sham. To prove that the litigation or threatened litigation they challenge was a sham, and that the litigation thus can be the basis for its legal claim, Plaintiffs must prove two things: (1) that the Gordian Parties' threatened suit was objectively baseless; and (2) the baseless suit threatened was an attempt to harass or interfere directly with the business relationship of the Plaintiffs through the cease-and-desist letters as opposed to through the outcome of the threatened suit.

A lawsuit is objectively baseless only if no reasonable litigant could realistically expect to win. Just because the Gordian Parties' suit was unsuccessful in some ways does not mean that it was objectively baseless. In other words, if someone in the Gordian Parties' position could have had a reasonable belief that there was a realistic chance of winning, the suit was not objectively baseless.

If you find that the Gordian Parties' threatened suit was not objectively baseless, then you do not need to consider whether the Gordian Parties' lawsuit was an attempt to harass or interfere with the business relationships of the Plaintiffs. Instead, you must find for the Gordian Parties and against Plaintiffs on Plaintiffs charges that the Gordian Parties violated the laws by threatening a lawsuit.

If, however, you find that the Gordian Parties' threatened lawsuit was objectively baseless, then you must determine whether the Gordian Parties' primary objective in bringing the lawsuit was to hurt Plaintiffs

by bringing or continuing the lawsuit regardless of the ultimate outcome of the lawsuit, or whether the Gordian Parties' primary objective was to obtain the relief sought in the suit.

The threats of litigation at issue here, that Plaintiffs contend is a sham, sought the following judicial relief: for Plaintiffs to discontinue use of what the Gordian Parties believed to be their proprietary data. The Gordian Parties contend that the true purpose in threatening the lawsuit in the cease-and-desist letters was to secure this relief. Plaintiffs, on the other hand, maintain that the Gordian Parties' true purpose in bringing the suit was not to win a favorable judgment against Plaintiffs; but to harass, bar, or delay Plaintiffs, by the process of litigating, regardless of outcome.

In determining the Gordian Parties' purpose, you may consider whatever direct evidence of the Gordian Parties' motivation for bringing the lawsuit is available to you. Of course, you also may consider circumstantial evidence of the Gordian Parties' true purpose.

If you find that no reasonable person could have realistically expected to succeed in a suit such as the one defendant brought or maintained against Plaintiffs, *and* that Defendants' primary purpose in bringing or continuing it was to inflict harm on plaintiff caused by the suit itself, as opposed to the relief sought, then you must next consider whether defendants' actions in bringing the suit constitute anticompetitive conduct, business disparagement, or tortious interference, that is, whether the remaining elements of (1) tortious interference with contract,

(2) tortious interference with a prospective business relationship, (3) business disparagement, and (4) monopoly or attempted monopoly have been proven.

QUESTION NO. 12

Was the Gordian Group and R.S. Means' pre-litigation correspondence "objectively baseless in the sense that no reasonable litigant could reasonably expect success on the merits?"

Answer "Yes" or "No": No (12)

If the activity of the Gordian Group and R.S. Means was objectively baseless, was the subjective intent merely to interfere with the CCD Parties?

Answer "Yes" or "No": /

3.6 VIOLATIONS OF THE TEXAS ANTITRUST ACT-MONOPOLY

3.6.1 Monopoly Generally

The CCD Group allege that they were injured by the Gordian Parties and R.S. Means' unlawful monopolization of the market for job order contracting unit price books in Texas. To establish a violation of the Texas Antitrust Act, the CCD Group must prove each of the following elements by a preponderance of the evidence:

(1) that the Gordian Parties and R.S. Means possess monopoly power in the relevant market; and

(2) that the Gordian Parties and R.S. Means willfully acquired or maintained monopoly power in that market by engaging in anticompetitive conduct, as

distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

3.6.2 Possession of Monopoly Power

Monopoly power is the power to control prices or exclude competition in a relevant market. The power to control prices is the power of a company to establish and maintain appreciably higher prices for its goods or services, for an appreciable period of time, than those competitively charged for equivalent goods or services without a substantial loss of business to competitors. However, monopoly power, in and of itself, is not unlawful.

There can be both direct and indirect proof of the existence of monopoly power in a market. Here, if the CCD Group prove by a preponderance of the evidence that the Gordian Parties has the power to control prices or exclude competition in the relevant market, then you may conclude that the Gordian Parties had monopoly power in the market. Monopoly power may also be proven indirectly, by evidence of market share or barriers to entry into the market.

DIRECT PROOF

As I instructed you earlier, monopoly power is the power to control prices or exclude competition in a relevant antitrust market. Plaintiffs have the burden of proving that defendant has the ability to raise or maintain the prices that it charges for goods or services in the relevant market about competitive levels. Plaintiff must prove that defendant has the power to do

so by itself—that is, without assistance of, and despite competition from, any existing or potential competitors.

For example, monopoly power may be shown by proving that the Gordian Parties had the power to raise or maintain the prices it charged for goods or services in the relevant market above competitive levels for a significant period of time. The Plaintiffs must prove that the Gordian Parties were able to do so by themselves, without the assistance of, and despite competition from, any existing or potential competitors. On the other hand, if the Gordian Parties attempted to maintain prices above competitive levels, but would lose so much business to other competitors that the price increase would become unprofitable and would have to be withdrawn, then the Gordian Parties do not have monopoly power.

Similarly, monopoly power may be shown by proving that the Gordian Parties had the power to exclude competition from the relevant market. For example, if the Gordian Parties attempted to maintain prices above competitive levels, but new competitors could enter the relevant market or existing competitors could expand their sales and take so much business that the price increase would become unprofitable and would have to be withdrawn, then the Gordian Parties do not have monopoly power.

The ability to earn high profit margins or a high rate of return does not necessarily mean that the Gordian Parties and R.S. Means have monopoly power. Other factors may enable a company without monopoly power to sell at higher prices or earn higher profit margins than its competitors, such as the ability to

offer superior products or services, the ability to maintain an efficient business operation, or superior advertising or marketing. However, an ability to sell at higher prices or earn higher profit margins than other companies for similar goods or services over a long period of time may be evidence of monopoly power.

INDIRECT PROOF

Monopoly power may also be proven indirectly, by evidence of the structure of the market, by evidence of market share, and by barriers to entry into the market. Plaintiff has introduced evidence of the structure of the market to show that defendant has monopoly power. The evidence presented by the parties includes evidence of Defendants' market share. If this evidence establishes that the Gordian Parties has the power to control prices or exclude competition in the relevant antitrust market, then you may conclude that defendant has monopoly power in the market.

Market Share

One factor you should consider is the Gordian Group's market share. Based on the evidence you have heard, you should determine the Gordian Group's market share in the relevant markets. A market share above 50 percent may be sufficient to support an inference that the Gordian Parties have monopoly power. The likelihood that a company has monopoly power is stronger the higher that company's share is above 50 percent.

In considering whether the Gordian Parties have monopoly power it is also important to consider other aspects of the relevant market, such as: the existence

of barriers to entry into the market by potential competitors, entry into and exit from the market by competitors, and the size and number of competitors in the market. Along with the Gordian Group's market share, these factors should inform you as to whether the Gordian Parties have monopoly power.

Market Share Trends

The trend in the Gordian Group's market share is also something you may consider. An increasing market share may strengthen an inference that a company has monopoly power, particularly where that company has a high market share, while a decreasing share might show that a company does not have monopoly power.

Barriers to Entry

You may also consider whether there are barriers to entry into the relevant market. Barriers to entry make it difficult for new competitors to enter the relevant market in a meaningful and timely way. Barriers to entry might include intellectual property rights (such as patents or trade secrets), the large financial investment required to build a plant or satisfy governmental regulations, specialized marketing practices, and the reputation of the companies already participating in the market (or the brand name recognition of their products).

Evidence of low or no barriers may be evidence that defendant does not have monopoly power, regardless of defendant's market share, because new competitors could enter easily if defendant attempted to raise prices for a substantial period of time. By contrast, evidence

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of high barriers to entry along with high market share may support an inference that defendant has monopoly power.

Entry and Exit by Other Companies

The history of entry and exit in the relevant market may be helpful to consider. Entry of new competitors or expansion of existing competitors may be evidence that the Gordian Parties lack monopoly power. On the other hand, departures from the market, or the failure of firms to enter the market, particularly if prices and profit margins are relatively high, may support an inference that the Gordian Parties have monopoly power.

Number and Size of Competitors

You may consider whether defendants' competitors are capable of effectively competing. In other words, you should consider whether the financial strength, market shares, and number of competitors act as a check on defendant's ability to price its products. If defendant's competitors are vigorous or have large or increasing market shares this may be evidence that defendant lacks monopoly power. On the other hand, if you determine that defendant's competitors are weak or have small or declining market shares, this may support an inference that defendant has monopoly power.

CONCLUSION

If you find that defendants have monopoly power in the relevant market, then you must consider the remaining elements of this claim. If you find that

defendant does not have monopoly power, then you must find for defendant and against plaintiff on this claim.

3.6.3 Monopoly–Anticompetitive Conduct

Anticompetitive conduct is acts or practices, other than competition on the merits, that have the effect of preventing or excluding competition or frustrating or foreclosing the efforts of other companies to compete for customers within the relevant market. You must distinguish harm to competition from harm to a single competitor or group of competitors, which in itself, is not harm to competition. Harm to a competitor in the absence of harm to the process of competition and consumer welfare, is not harm to competition.

You should distinguish the acquisition or maintenance of monopoly power through anticompetitive conduct from the acquisition or maintenance of monopoly power by supplying better products or services, possessing superior business skills, or because of luck, which is not unlawful.

The difference between anticompetitive conduct and conduct that has a legitimate business purpose can be difficult to determine. This is because all companies have a desire to increase their profits and increase their market share. These goals are an essential part of a competitive marketplace, and the achievement of these goals is not unlawful as long as a company does not use an anticompetitive means to achieve these goals.

In determining whether the Gordian Group’s conduct was anticompetitive or legitimate business

conduct, you should determine whether the conduct is consistent with competition on the merits of price, quality, or service, whether it provides benefits to consumers, and whether the conduct would make business sense apart from any effect it has on excluding competition or harming competitors.

As a general rule, businesses are free to choose the parties with whom they will deal, as well as the prices, terms, and conditions of that dealing. Anticompetitive conduct must represent something more than the conduct of business that is part of the normal competitive process or commercial success. Anticompetitive conduct must represent conduct that has made it very difficult or impossible for competitors to compete and that was taken for no legitimate business reason.

QUESTION NO. 13

Did Gordian and R.S. Means:

(1) possess monopoly power over the job order contracting unit price book market in Texas; and

(2) willfully acquire or maintain its monopoly power in the job order contracting unit price book market in Texas by engaging in anticompetitive conduct?

Answer "Yes" or "No"

Answer: Yes (11)
No (1)

3.7 VIOLATIONS OF THE TEXAS ANTITRUST ACT-ATTEMPTED MONOPOLY

You must decide if the evidence shows the Gordian Parties acted with the conscious aim of acquiring the power to control prices or exclude competition in the relevant market.

There are several ways in which the CCD Group may prove the Gordian Parties had the specific intent to monopolize. Specific intent may be proven by direct evidence. For example, there may be evidence of direct statements of the Gordian Parties' intent to obtain a monopoly in the relevant market. Such proof of specific intent may be established by documents prepared by responsible officers or employees of the Gordian Parties at or about the time of the conduct in question or by testimony concerning statements made by responsible officers or employees of the the Gordian Group. You must be careful, however, to distinguish between the the Gordian Group's intent to complete aggressively (which is lawful), which may be accompanied by aggressive language, and a true intent to acquire monopoly power by using anticompetitive means.

Even if you decide that the evidence does not prove directly that the Gordian Parties actually intended to obtain a monopoly, specific intent also may be proven by indirect evidence. For example, specific intent may be inferred from what the Gordian Parties did. For example, if the evidence shows that the natural and probable consequence of the Gordian Group' conduct in the relevant market was to give the the Gordian Parties control over prices or to exclude competition,

and that this was plainly foreseeable by the the Gordian Group, then you may (but are not required to) infer the the Gordian Parties specifically intended to acquire monopoly power.

In determining whether there was a dangerous probability that the Gordian Parties would acquire monopoly power in a market, you should consider such factors as the Gordian Group's market share, whether the barriers to entry into the market made it difficult for competitors to enter the market, and the likely effect of any anticompetitive conduct the Gordian Group's share of the market. I have instructed you on these factors above.

A dangerous probability of success need not mean that success was nearly certain, but it does mean that there was a substantial and real likelihood that the Gordian Parties would ultimately acquire market power.

QUESTION NO. 14

Did Gordian and R.S. Means engage in predatory or anticompetitive conduct with a specific intent to achieve monopoly power in the job order contracting unit price book market in Texas, and a dangerous probability of achieving monopoly power?

Answer "Yes" or "No": Yes (12)
No (0)

3.8 DAMAGES

No Duplication

Consider the following elements of damages, if any, and none other. You shall not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss. That is, do not compensate twice for the same loss, if any.

Consequential

If you find for Plaintiffs on their claims, Plaintiffs may collect any lost profits that were a natural, probable, and foreseeable consequence of Defendants' conduct. Lost vendor fees and lost sales are both claims for lost profits.

4.3.8.1 Compensatory Damages

If you answered "Yes" to **Question 1** or **Question 4** as to Gordian and/or RS Means, then answer the following question as to that party. Otherwise, do not answer the following question.

Question No. 15

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate the CCD Group for their damages, if any, proximately caused by such interference?

Consider the following elements of damage, if any, and none other.

Do not add any amount for interest on damages, if any.

App. 105

Answer separately in dollars and cents for damages, if any.

1. Lost vendor fees for TCPN KATA JOC Projects sustained in the past: \$1,095,000
2. Lost vendor fees for TCPN KATA JOC Projects, that, in reasonable probability, will be sustained in the future: \$0
3. Lost sales for KATA Audits sustained in the past: \$128,000
4. Lost sales for KATA Audits, that, in reasonable probability, will be sustained in the future: \$76,000
5. Lost sales from 4Clicks Solutions, LLC licenses sustained in the past: \$172,000
6. Lost sales from 4Clicks Solutions, LLC licenses that, in reasonable probability, will be sustained in the future: \$0

If you answered “Yes” to **Question 2** or **Question 5** as to Gordian and/or RS Means, then answer the following question as to that party. Otherwise, do not answer the following question.

QUESTION NO. 16

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate the CCD Group for their damages, if any, proximately caused by such interference?

Consider the following elements of damage, if any, and none other.

App. 106

Do not add any amount for interest on damages, if any.

Answer separately in dollars and cents for damages, if any.

1. Lost sales from 4Clicks Solutions, LLC licenses sustained in the past: \$0
2. Lost sales from 4Clicks Solutions, LLC licenses that, in reasonable probability, will be sustained in the future: \$0

If you answered “Yes” to **Question 3** or **Question 6** as to Gordian and/or RS Means, then answer the following question as to that party. Otherwise, do not answer the following question.

QUESTION NO. 17

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate the CCD Group for their damages, if any, proximately caused by such interference?

Consider the following elements of damage, if any, and none other.

Do not add any amount for interest on damages, if any.

Answer separately in dollars and cents for damages, if any.

1. Lost vendor fees for TCPN KATA JOC Projects sustained in the past: \$0

App. 107

2. Lost vendor fees for TCPN KATA JOC Projects, that, in reasonable probability, will be sustained in the future: \$0
3. Lost sales for KATA Audits sustained in the past: \$0
4. Lost sales for KATA Audits, that, in reasonable probability, will be sustained in the future: \$0
5. Lost sales from 4Clicks Solutions, LLC licenses sustained in the past: \$0
6. Lost sales from 4Clicks Solutions, LLC licenses that, in reasonable probability, will be sustained in the future: \$0

If you answered “Yes” to **Question 7** as to Gordian and/or RS Means, then answer the following question as to that party. Otherwise, do not answer the following question.

QUESTION NO. 18

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate the CCD Group for their damages, if any, proximately caused by such interference?

Consider the following elements of damage, if any, and none other.

Do not add any amount for interest on damages, if any.

Answer separately in dollars and cents for damages, if any.

App. 108

1. Lost sales from Region 5 ESC work sustained in the past: \$29,000
2. Lost sales from Region 5 ESC work, that, in reasonable probability, will be sustained in the future: \$0

If you answered “Yes” to **Question No. 8** as to Gordian and/or RS Means, then answer the following question as to that party. Otherwise, do not answer the following question.

QUESTION NO. 19

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate the CCD Group for their actual pecuniary loss, if any, that was proximately caused by Gordian and/or RS Means disparagement?

Consider the following elements of damage, if any, and none other.

Do not add any amount for interest on damages, if any.

Answer separately in dollars and cents for damages, if any.

1. Lost vendor fees for TCPN KATA JOC Projects sustained in the past:

Gordian: \$0

R.S.Means: \$0

2. Lost vendor fees for TCPN KATA JOC Projects, that, in reasonable probability, will be sustained in the future:

Gordian: \$0

R.S.Means: \$0

3. Lost sales for KATA Audits sustained in the past:

Gordian: \$0

R.S.Means: \$0

4. Lost sales for KATA Audits, that, in reasonable probability, will be sustained in the future:

Gordian: \$0

R.S.Means: \$0

5. Lost sales from 4Clicks Solutions, LLC licenses sustained in the past:

Gordian: \$0

R.S.Means: \$0

6. Lost sales from 4Clicks Solutions, LLC licenses that, in reasonable probability, will be sustained in the future: \$0

Gordian: \$0

R.S.Means: \$0

7. Lost sales from Region 5 ESC work sustained in the past:

Gordian: \$0

R.S.Means: \$0

8. Lost sales from Region 5 ESC work, that, in reasonable probability, will be sustained in the future:

Gordian: \$0

R.S.Means: \$0

If you answered “Yes” to **Question 13** or **Question 14**, then answer the following question as to that party. Otherwise, do not answer the following question.

QUESTION NO. 20

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate the CCD Group for their damages, if any, proximately caused by the Gordian Group’ anticompetitive conduct?

Consider the following elements of damage, if any, and none other

Do not add any amount for interest on damages, if any.

Answer separately in dollars and cents for damages, if any.

1. Lost vendor fees for TCPN KATA JOC Projects sustained in the past: \$1,095,000
2. Lost vendor fees for TCPN KATA JOC Projects, that, in reasonable probability, will be sustained in the future: \$0

3. Lost sales for KATA Audits sustained in the past: \$128,000
4. Lost sales for KATA Audits, that, in reasonable probability, will be sustained in the future: \$76,000
5. Lost sales from 4Clicks Solutions, LLC licenses sustained in the past: \$172,000
6. Lost sales from 4Clicks Solutions, LLC licenses that, in reasonable probability, will be sustained in the future: \$0
7. Lost sales from Region 5 ESC work sustained in the past: \$29,000
8. Lost sales from Region 5 ESC work, that, in reasonable probability, will be sustained in the future: \$0

4. **THE GORDIAN GROUP'S AFFIRMATIVE CLAIMS**

4.1 **INTRODUCTION**

The Defendants, The Gordian Group and R.S. Means Company, LLC, have brought counterclaims seeking damages against the Plaintiffs, Construction Cost Data, LLC, Job Order Contract Group, LLC, Benjamin Stack, and Mark Powell (collectively, the "CCD Parties") for copyright infringement, unfair competition and unjust enrichment. The CCD Parties deny such claims. To help you understand the evidence in this part of the case, I will explain some of the legal terms you have heard during this trial.

4.2 COPYRIGHT INFRINGEMENT

DEFINITION OF COPYRIGHT. The owner of a copyright has the right to exclude any other person from reproducing, preparing derivative works, distributing, performing, displaying, or using the work covered by copyright for a specific period of time. Copyrighted work can be a literary work, musical work, dramatic work, pantomime, choreographic work, pictorial work, graphic work, sculptural work, motion picture, audiovisual work, sound recording, architectural work, mask works fixed in semiconductor chip products, or a computer program. Facts, ideas, procedures, processes, systems, methods of operation, concepts, principles or discoveries cannot themselves be copyrighted. The copyrighted work must be original. An original work that closely resembles other works can be copyrighted so long as the similarity between the two works is not the result of copying.

In this case, R.S. Means contends that the CCD Parties have infringed R.S. Means' copyright. R.S. Means has the burden of proving by a preponderance of the evidence, first, that R.S. Means is the owner of a valid copyright; and second, that the CCD Parties copied original elements of the copyrighted work. Preponderance of the evidence means that you must be persuaded by the evidence that it is more probably true than not true that the copyrighted work was infringed.

4.3 COPYRIGHT REGISTRATION-SUBJECT MATTER

The work that R.S. Means claims it has a valid copyright to is known as the **“RS Means 2008 Data**

Compilation,” which is Defendants’ Exhibit 23/Plaintiffs’ Exhibit 22A. Only that part of the work comprised of original works of authorship fixed in any tangible form of expression from which it can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device is protected by the Copyright Act.

4.4 COPYRIGHT REGISTRATION-NO PRESUMPTION OF VALIDITY

Copyright automatically exists in a work the moment it is fixed in any tangible medium of expression. The owner of the copyright may register the copyright by delivering to the Copyright Office of the Library of Congress a copy of the copyrighted work. After determining that the material is copyrightable and that legal and formal requirements have been satisfied, the Register of Copyrights registers the work and issues a certificate of registration to the copyright owner. There’s no administrative investigation on the originality or uniqueness of the work or a determination of the claim’s validity. A certificate of copyright registration is refused only if the work falls outside the broad category of matter eligible for copyright registration. The fact that a copyright registration has been issued doesn’t conclusively establish whether the work is entitled to copyright protection.

4.5 COPYRIGHT VALIDITY – REGISTRATION OF COMPILATIONS

An owner is entitled to copyright protection of a compilation. A compilation is a work formed by the

collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.

R.S. Means claims that its work is a compilation and that its selection, arrangement, and coordination of preexisting materials, rather than the materials themselves, are protectable.

The selection, arrangement, and coordination of preexisting materials or data in a compilation does not possess the required degree of creativity for copyright protection if the arrangement or coordination of preexisting materials is typical, commonplace, or expected as a matter of course.

For example, the arrangement of last names in a telephone directory in alphabetical order isn't creative. Similarly, the arrangement of a business telephone directory in an alphabetized list of business types, with individual businesses listed in alphabetical order under the applicable headings, isn't original.

4.6 COPYRIGHT VALIDITY—IDEAS AND EXPRESSION

Copyright law allows the author of an original work to prevent others from copying the way or form the author used to express the ideas in the author's work.

Copyright protection doesn't extend to all the elements of a copyrighted work. Elements covered by the copyright protection are called "protected matter," and noncovered elements are "unprotected matter."

App. 115

Because unprotected matter isn't entitled to copyright protection, another author may copy it.

There are various types of unprotected matter. They include:

- a portion of the work that is not original to the author;
- a portion of the work that is in the public domain;
- an idea, concept, principle, discovery, fact, actual event, process, or method contained in a work; and
- work serving functional purposes or work that is dictated by external factors such as particular business practices.

A work that's "in the public domain" is one that does not have copyright protection, so anyone may use all or part of it in another work without charge.

In copyright law, it's important to distinguish between the ideas in a work and the author's expression of the ideas. Only the particular expression of an idea can be copyrighted. Copyright law does not give the author the right to prevent others from copying or using the underlying ideas contained in the work, such as any procedures, processes, systems, methods of operation, concepts, principles or discoveries. In order to protect any ideas in the work from being copied, the author must secure some other form of legal protection, because ideas cannot be copyrighted.

In other words, the ideas in a work are unprotected matter. But an idea must be expressed in some way, and the expression or means of expression of an idea is protected matter.

For example, copyright law doesn't protect the idea of a determined captain hunting a giant whale. But copyright law does protect the particular expression of this idea in the book *Moby-Dick*.

Put another way, the author of a work has no exclusive right to the underlying ideas, concepts, principles, discoveries, facts, actual events, processes, or methods contained in a work. But the author's copyright does extend to the means by which those are expressed, described, depicted, implemented, or otherwise communicated in the work.

If you find that R.S. Means is seeking copyright protection in:

- a portion of a work that isn't original to the author;
- a portion of the work that's in the public domain;
- an idea, concept, principle, discovery, fact, actual event, process, or method expressed or described in a work, or
- work serving functional purposes or work that is dictated by external factors such as particular business practices.

you should exclude that material from the protected matter R.S. Means' copyright infringement claim can be based on.

QUESTION NO. 21

As discussed in Instruction 4.5, the third-party or preexisting material in a compilation is not entitled to copyright protection, but the selection, arrangement, and coordination may be.

A work in the public domain is not “independently created” by R.S. Means.

Do you find from a preponderance of the evidence that:

(1) the selection, arrangement, and coordination of the preexisting materials or data comprising of the 2008 R.S. Means File was independently created by R.S. Means and not copied from another work; and

(2) the selection, arrangement, and coordination of the preexisting materials or data comprising the 2008 R.S. Means File possess at least some minimal degree of creativity; and

(3) the portion of the work that R.S. Means is seeking copyright protection in is **not** an idea, concept, principle, discovery, fact, actual event, process, or method expressed or described in a work?

Answer “Yes” or “No” Yes (3)
No (9)

If your answer to this question is “No,” don’t continue with your analysis of R.S. Means’ claim for infringement.

4.7 COPYRIGHT INFRINGEMENT— GENERALLY

LIABILITY FOR INFRINGEMENT. One who reproduces a copyrighted work without authority from the copyright owner during the term of the copyright, infringes the copyright.

If you're persuaded that R.S. Means owns a valid copyright, you can consider whether the CCD Parties improperly copied R.S. Means' copyrighted material. It is the burden of R.S. Means to show that the CCD Parties infringed on its valid copyright. This is called "infringement" of a copyright. R.S. Means must show that the CCD Parties infringed on its valid copyright.

In this case, R.S. Means claims that the CCD Parties infringed its copyright in "RS Means 2008 Data Compilation" by copying part[s] of it and including the copied material in the CCD Parties' work, the "Construction Cost Catalogue." To succeed on this claim, R.S. Means must prove that CCD Parties copied the part[s] of the "RS Means 2008 Data Compilation" that the law protects.

There are two ways in which R.S. Means can prove a claim of copyright infringement.

First, R.S. Means can show direct evidence that the CCD Parties actually copied the copyrighted material. For example, R.S. Means could introduce believable eyewitness testimony or an admission by the CCD Parties. Such direct evidence is rare.

Or second, R.S. Means can show indirect or circumstantial evidence that the CCD Parties copied its

work. For example, indirect evidence of infringement may be proof that the CCD Parties tried to get a copy of R.S. Means' work and then published work substantially similar to R.S. Means' work. In general, the two elements of infringement are (1) access and (2) substantial similarity.

4.7.1 Copyright Infringement–Access & Substantial Similarity

R.S. Means has the burden of proving that the CCD Parties copied original elements from R.S Means' copyrighted work. R.S Means may show the CCD Parties copied from the work by showing by a preponderance of the evidence that the CCD Parties had access to R.S Means' copyrighted work and that there are substantial similarities between the "Construction Cost Catalogue" and original elements of the "R.S. Means 2008 Data Compilation".

4.7.2 Copyright Infringement–Access

ACCESS DEFINED

As part of its burden in proving its copyright infringement claim, R.S Means must show by a preponderance of the evidence that the CCD Parties had access to the "R.S. Means 2008 Data Compilation." You may find that the CCD Parties had access to R.S. Means' work if the CCD Parties had a reasonable opportunity to view or access R.S. Means' work before the "Construction Cost Catalogue" was created.

4.7.3 Copyright Infringement–Substantial Similarity

R.S. Means must prove that the CCD Parties' accused work is substantially similar to its copyrightable expression in the "RS Means 2008 Data Compilation." The CCD Parties' accused work is substantially similar in expression to R.S. Means' if an ordinary observer would conclude that the CCD Parties unlawfully took R.S. Means' protectable expression by taking material of substance and value.

Even if the degree of similarity between the RS Means 2008 Data Compilation and the CCD Parties' accused work is small in quantity, you can still find that there's substantial similarity if the copied portions of the RS Means 2008 Data Compilation are important in quality.

But if the CCD Parties' copying is minimal or trivial, you shouldn't find infringement.

SUBSTANTIAL SIMILARITY DEFINED

Substantial similarity is often determined by the "ordinary observer" test, which provides that two works are substantially similar where the ordinary observer, unless purposefully trying to find differences, would overlook them, and believe the two works were the same.

To determine whether an instance of copying is legally actionable, you should do a side-by-side comparison of the "R.S Means 2008 Compilation," Defendants' Exhibit 23/Plaintiffs' Exhibit 22A, and the "Construction Cost Catalogue," Plaintiffs' Exhibit 45, to

determine whether a layman would view the two works as substantially similar. A layman must detect copying without any aid or suggestion or critical analysis by others. Establishing the two works are substantially similar should be spontaneous and immediate.

QUESTION NO. 22

Do you find by a preponderance of the evidence that:

- (1) the CCD Parties had access to the “R.S. Means 2008 Data Compilation” and
- (2) an ordinary observer, upon looking at both the “Construction Cost Catalogue” and the R.S. Means 2008 Data Compilation, would conclude that they are substantially similar?

Answer “Yes” or “No” Yes (0)
No (12)

If you answer “no” to the question above, there is no need to continue on in your analysis of the copyright infringement claim.

**4.8 COPYRIGHT INFRINGEMENT-
VICARIOUS & CONTRIBUTORY
INFRINGEMENT-GENERALLY**

Copyright may also be infringed by vicariously infringing and contributorily infringing.

VICARIOUS INFRINGEMENT. A person is liable for copyright infringement by another if the person has profited directly from the infringing activity and the

right and ability to supervise the infringing activity, whether or not the person knew of the infringement.

CONTRIBUTORY INFRINGEMENT. A person is liable for copyright infringement by another if the person knows or should have known of the infringing activity and causes or materially contributes to the activity.

4.8.1 Derivative Liability–Vicarious Infringement–Elements and Burden of Proof

If you find that there is a direct infringement, you can then consider whether there has also been a vicarious infringement. A “vicarious infringer” is one who profits from a direct infringement while declining to exercise its right and ability to stop or limit the infringement.

Under this doctrine, a party is responsible for the direct infringer’s acts if the party controlled or supervised, or had the right and ability to control or supervise, the direct infringer’s actions.

If you find that there has been a direct infringement of R.S. Means’ copyrighted materials by one party (or third party), you can consider whether there has been “vicarious infringement” by another party.

To find that the CCD Parties are liable for another party’s infringement, you must first find that the CCD Parties had the right and ability to control or supervise the other party’s infringing action and either controlled the action, or failed to exercise its right and ability to prevent the infringement. Also, you must find that the

CCD Parties directly profited from the other's infringement.

QUESTION NO. 23

Do you find by a preponderance of the evidence that any of the following parties vicariously infringed the copyright of the R.S. Means 2008 Data Compilation?

Answer "Yes" or "No" for each:

Construction Cost Data LLC N(12)

Job Order Contract Group, LLC N(12)

Mark Powell N(12)

Benjamin Stack N(12)

4.8.2 Derivative Liability-Contributory Infringement

A defendant may be liable for copyright infringement engaged in by another if it knew or had reason to know of the infringing activity and intentionally induces that infringing activity. If you find that any of the CCD Parties infringed R.S Means' copyright in the R.S. Means 2008 Data Compilation, you may proceed to consider R.S Means' claim that the CCD Parties contributorily infringed that copyright. To prove contributory infringement, the plaintiff must prove both of the following elements by a preponderance of the evidence: (1) the CCD Parties knew or had reason to know of the infringing activity of the infringing party and (2) the CCD Parties intentionally induced the CCD Parties' infringing activity. If you find that any of the CCD Parties

infringed R.S Means' copyright and you also find that R.S Means has proved both of these elements, your verdict should be for R.S Means. If, on the other hand, R.S Means has failed to prove either or both of these elements, your verdict should be for the CCD Parties.

QUESTION NO. 24

Do you find by a preponderance of the evidence that any of the following parties contributorily infringed the copyright of the R.S. Means 2008 Data Compilation? Answer "Yes" or "No" for each:

Construction Cost Data LLC N(12)

Job Order Contract Group, LLC N(12)

Mark Powell N(12)

Benjamin Stack N(12)

4.9 UNFAIR COMPETITION

Unfair competition is the use or simulation by one person of the name, symbols, or devices of a business rival in such a manner as is calculated to deceive and cause the public to deal with the second user when they intended to and would otherwise have dealt with the first user. To prove unfair competition, it is not necessary to prove that any of the CCD Parties intended to deceive the public or that anyone was actually deceived. However, either actual or probable deception must be shown, and a mere possibility of deception is not enough.

Question No. 25

Do you find that any of the following parties engaged in unfair competition against The Gordian Parties or R.S. Means? Answer “Yes” or “No” for each:

Construction Cost Data LLC N(12)

Job Order Contract Group, LLC N(12)

Mark Powell N(12)

Benjamin Stack N(12)

4.10 DEFENSES

4.10.1 Copyright–Independent Work

The CCD Parties contend that there is no copyright infringement. There is no copyright infringement where the CCD Parties independently created the challenged work – without copying R.S. Means’ copyrighted work.

QUESTION NO. 26

Do you find by a preponderance of the evidence that the CCD Parties created the “Construction Cost Catalogue” independently?

Answer “Yes” or “No” No (12)

4.10.2 Copyright–Fair Use

The CCD Parties claim, as an affirmative defense, that its use of R.S. Means’ copyrighted work is a fair use. A fair use isn’t an infringement of copyright. The CCD Parties must prove fair use by a preponderance of the evidence. Certain uses recognized as favoring fair

use include criticism, parody, comment, news reporting, teaching, scholarship, and research. (These examples are illustrative.)

To determine whether the CCD Parties' use of "R.S. Means 2008 Data Compilation" qualifies as a "fair use," consider the following four factors:

1. The Purpose and Character of the CCD Parties' Use.

The first factor looks at whether the CCD Parties' use supersedes the use of R.S. Means' copyrighted work or, instead, adds new meaning, expression, or otherwise uses "R.S. Means 2008 Data Compilation" for a different purpose. It asks whether and to what extent, the CCD Parties' use is transformative. One example of a transformative use is a parody, which uses the original copyrighted work to comment on or criticize it. The first factor also looks at whether the use is commercial or noncommercial. The focus of this distinction isn't whether the motive of the use is monetary gain, but whether the user stands to profit from using the copyrighted work without paying the customary price. Analysis of the first factor can affect the remaining factors. The more transformative the use, the less likelihood that the use substitutes for the copyrighted work, and thus the less significance is to be afforded other factors, such as the effect on the potential market for or value of "R.S. Means 2008 Data Compilation".

2. The Nature of R.S. Means' Copyrighted Work.

The second factor recognizes that some works may be used more freely, or more fairly, than others. Uses

of factual, purely useful, or derivative works are more likely to amount to fair use than uses of works such as fiction. Similarly, uses of published works are more likely to amount to fair use than uses of unpublished works. Also, out-of-print works that are no longer available for purchase through normal channels are more susceptible to fair use.

3. The Amount and Importance of the Portion Used.

The third factor considers whether the amount and importance of the portion taken was reasonable in light of the purpose of the CCD Parties' use and the likelihood that the CCD Parties' use will supersede the use of R.S. Means' copyrighted work.

4. The Effect on the Potential Market or Value of R.S. Means' Copyrighted Work.

Under this factor, you should consider not only actual markets for R.S. Means' copyrighted work, but also markets likely to be developed. And you should consider not only the harm caused by the CCD Parties' use, but also whether widespread uses of the same sort by others would result in a substantial adverse effect on a market, or potential market, for R.S. Means' copyrighted work. Ask yourself: does the CCD Parties' use supersede or impermissibly harm the market or potential market for R.S. Means' copyrighted work? R.S. Means can't preclude some transformative uses – even if the use may result in some harm to its markets. For example, an effective parody may lower demand for the original copyrighted work, but this isn't the type of harm considered under this factor.

Balancing the Four Factors

You should explore all four factors and weigh the results together. You should consider the purposes of copyright: first, to promote public access to knowledge and new ideas, and second, to give authors an incentive to create copyrighted works for the public's benefit.

QUESTION NO. 27

Balancing the factors explained above, do you find that the CCD Parties has proved fair use by a preponderance of the evidence?

Answer "Yes" or "No" _____

5. FINAL INSTRUCTION: DUTY TO DELIBERATE

It is now your duty to deliberate and to consult with one another in an effort to reach a verdict. Each of you must decide the case for yourself, but only after an impartial consideration of the evidence with your fellow jurors. During your deliberations, do not hesitate to re-examine your own opinions and change your mind if you are convinced that you were wrong. But do not give up on your honest beliefs because the other jurors think differently, or just to finish the case.

Remember at all times, you are the judges of the facts. You have been allowed to take notes during this trial. Any notes that you took during this trial are only aids to memory. If your memory differs from your notes, you should rely on your memory and not on the notes. The notes are not evidence. If you did not take notes, rely on your independent recollection of the evidence and do not be unduly influenced by the notes

of other jurors. Notes are not entitled to greater weight than the recollection or impression of each juror about the testimony.

When you go into the jury room to deliberate, you may take with you a copy of this charge, the exhibits that I have admitted into evidence, and your notes. You must select a presiding juror to guide you in your deliberations and to speak for you here in the courtroom.

Your verdict must be unanimous. After you have reached a unanimous verdict, your presiding juror must fill out the answers to the written questions on the verdict form and sign and date it. After you have concluded your service and I have discharged the jury, you are not required to talk with anyone about the case.

If you need to communicate with me during your deliberations, the presiding juror should write the inquiry and give it to the court security officer. After consulting with the attorneys, I will respond either in writing or by meeting with you in the courtroom. Keep in mind, however, that you must never disclose to anyone, not even to me, your numerical division on any question.

January 22, 2019

/s/ Keith P. Ellison
KEITH P. ELLISON
UNITED STATES DISTRICT JUDGE