Supreme Court, U.S.
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No. 21-1264

In The

Supreme Court of the United States

LARRY KLAYMAN,

Petitioner,

v.

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

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the U.S. Court of Appeals for the District of Columbia Circuit err by failing to apply the "appreciable number of consumers" standard to the "likelihood of confusion" test for a claim brought under the Lanham Act and how this bad and conflicting precedent negatively impacts trademark law in general?

2. Did the U.S. Court of Appeals for the District of Columbia Circuit err by failing to find truth to be an absolute defense to a claim brought under a non-disparagement provision of a severance agreement and how this bad and conflicting precedent negatively impacts business law in general?

STATEMENT OF RELATED CASES

Klayman v. Judicial Watch, Inc. et al., 06-cv-00670, U.S. District Court for the District of Columbia. Judgment entered March 15, 2018.

Klayman v. Judicial Watch, Inc. et al., 19-7105, U.S. Court of Appeals for the District of Columbia Circuit. Judgment entered on September 15, 2021.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Larry Klayman ("Mr. Klayman") respectfully petitions this Court for a writ of certiorari to review the orders of the U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit").

OPINIONS BELOW

On September 15, 2021 the D.C. Circuit issued a *per curiam* order denying Mr. Klayman's Petition for Rehearing En Banc. App. 1–2. On July 30, 2021, the D.C. Circuit issued a *per curiam* judgment affirming in full the jury verdict and judgment from the U.S. District Court for the District of Columbia. App. 2–38.

JURISDICTION

The D.C. Circuit issued a *per curiam* order denying Mr. Klayman's Petition for Rehearing En Banc on September 15, 2021. App. 1–2. On December 6, 2022, this Court granted an extension of time until and including January 7, 2022 for Mr. Klayman to file this Petition. On January 14, 2022, the clerk issued a letter granting Mr. Klayman 60 days, until and including March 15, 2022, to submit a corrected Petition for Writ of Certiorari which does not join any other pleading.

STATUTORY PROVISIONS INVOLVED

Lanham Act—15 U.S.C. § 1125(a)(1):

(a) Civil action

(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,

shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

STATEMENT OF THE CASE

This Petition stems from an appeal to the U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") from a jury verdict and judgment of the

U.S. District Court for the District of Columbia ("District Court") against Larry Klayman ("Mr. Klayman"), the founder and former Chairman and General Counsel of Judicial Watch, Inc. ("JW").

This Petition involves issues of monumental importance not only to Mr. Klayman, but to U.S. and international trade and commerce as a whole.

First, the D.C. Circuit has created a circuit split in terms of interpreting the "likelihood of confusion" standard for claims brought under the Lanham Act. Without a uniform interpretation of what constitutes "likelihood of confusion," individuals and corporations will have no way of knowing what language that they can or cannot include in an advertisement. This is of particular importance, given the fact that many advertisements are now sent over the internet, which therefore reaches every state, and spans every single Circuit. For instance, an advertisement created in the District of Columbia, and thus under the D.C. Circuit, would very likely be viewed in California, under the Ninth Circuit. The harmful precedent created by the D.C. Circuit in this case conflicts with that of the Ninth Circuit, so how is an advertiser supposed to know what he or she can or cannot say to avoid liability under the Lanham Act? Thus, it is untenable for Circuits to have different interpretations of the "likelihood of confusion" standard under the Lanham Act, as what is acceptable in one Circuit may be held improper in another. This would clearly have a strong impact on U.S. and international trade and commerce as a whole.

Second, this case involves a Severance Agreement ("SA") which contains a standard non-disparagement clause. Mr. Klayman raised the argument, supported by established case law, that there can be no disparagement when the statements at issue are true, particularly when the parties contracted the ability to make a fair comment. The D.C. Circuit completely fails to address this point, thereby adopting the harmful precedent set by the District Court in this regard.

This issue is vitally important to U.S. and international trade and commerce as a whole because there are countless contracts being executed every day which contain similar provisions to the SA, and inconsistent interpretations of these provisions would create harmful if not disastrous precedent, as people would simply not know what they are allowed to say and what they are not allowed to say:

> ***Both settlement and severance agreements have traditionally included non-disparagement clauses. Currently, they are becoming more and more prevalent in the initial employment contracts between employees and employers.*** *NOTE: When Telling the Ugly Truth Can Cost Millions: Non-Disparagement Clauses in Employment-Related Contracts*, 37 Quinnipiac L. Rev. 807, 808 (emphasis added).

Furthermore, "[i]t goes without saying that non-disparagement clauses are common in situations where two parties terminate their employment relationship by contract. *See Equal Employment Opportunity Comm'n*

v. Severn Trent Servs., Inc., 358 F.3d 438, 440 (7th Cir. 2004) ("Such private gag orders appear to be fairly common."). They are intended to prevent a disgruntled former employee from disseminating sensitive or false information in revenge for being terminated. *Id.* This action demonstrates the valid legal purpose these clauses serve. *Cooper Tire & Rubber Co. v. Farese, Farese & Farese Prof. Ass'n*, 423 F.3d 446, 457–58 (5th Cir. 2005). Employers as well can disparage a former employee, so these clauses work both ways "Employers frequently include a non-disparagement clause in their separation agreements. Most employers will agree to make the non-disparagement clause mutual if the executive requests a two-way non-disparagement clause." *1 Executive Employment Law: Protecting Executives* § 9.05 (2021).

People entering into agreements containing non-disparagement clauses need to know whether truth is an absolute defense. Furthermore, people need to know that the terms of their agreements will be upheld by the Court by virtue of the contract, or, as a matter of public policy. Otherwise, employers and employees will cease attempting to work out their issues through entering into severance agreement contracts, and instead further burden an already strained legal system with more litigation.

I. FACTS REGARDING THE DISTRICT COURT PROCEEDING

In 2003, Mr. Klayman entered into the SA with JW after he voluntarily left to run for the Senate. App. 310. In his complaint filed in 2006, Klayman alleged that Respondents JW, and JW's officers, Thomas J. Fitton, Paul Orfanedes and Christopher Farrell engaged in a pattern of tortious activity designed to harm Klayman, and that these actions breached the SA. Respondents filed a counterclaim alleging that Klayman owed money for unpaid expenses and falsely advertised and violated their trademark. Importantly, none of the advertisements Klayman ran to protect and alert donors after he voluntarily left JW to run for the U.S. Senate in Florida, were ever found to be untrue, concerning the unethical if not illegal conduct of JW officers and directors. Thus, the jury verdict makes no such findings. App. 39.

During contentious discovery, the District Court overreached and sanctioned Klayman (who appeared *pro se*) for failing to provide what it believed were timely and proper responses and later sanctioned Mr. Klayman for producing an incomplete pre-trial statement. App. 218. The overly broad and draconian sanctions precluded Mr. Klayman from calling witnesses or introducing evidence at trial aside from the SA, which essentially meant that Mr. Klayman's case was decided by the District Court before the trial began. App. 218. To make matters worse, the District Court even refused to provide a jury instruction informing the jury of this sanction, which undoubtedly caused the jury to

reach the incorrect conclusion that Mr. Klayman simply had no witnesses or evidence to present and thus had no defenses. App. 143. Thus, ultimately the trial was then a mere formality, as a litigant who was not allowed any witnesses or evidence has absolutely no chance of victory. Unsurprisingly, the thirteen-day jury trial in 2018 proved to be an exercise in futility for Klayman and resulted in the dismissal of Klayman's claims, an award of $2,300,000 in favor of JW and an award of $500,000 in favor of Fitton. App. 39.

This jury verdict was the direct result of a multitude of errors regrettably committed by the District Court and rubber stamped with little to no review by the appellate court in what had egregiously become a sixteen (16) year old case, without any real bona fide review of a very deep if not contorted sixteen (16) year old record, in addition to the overly broad and draconian sanction order discussed above. These included but are not limited to:

a. the introduction of evidence that contradicted the express language of the SA, namely that Klayman had an inappropriate relationship and sexually harassed a JW employee; App. 214.

b. the introduction of false and highly prejudicial and false testimony from Klayman's former wife about alleged wrongs committed by Klayman during divorce proceedings, including incendiary false allegations that he had beat his wife, and evidence from an unrelated case that were irrelevant; App. 242.

c. erroneous instructions given to the jury, the failure to give the correct jury instructions requested by Klayman, and, most importantly, the failure to docket any written jury instructions delivered to the jury (assuming that any were delivered in the first place); App. 257.

d. the introduction of highly prejudicial evidence that was not properly authenticated on the issue of likelihood of confusion; App. 263.

e. the failure to remit a damage award against Klayman personally from those based on alleged conduct of non-parties to this action; App. 267.

f. the misapplication of the law on confusion as it relates to trademark infringement; App. 271.

g. the entry of judgment on the jury verdict where JW failed to prove that Klayman took and used information regarding its donor list; App. 273.

All of these errors severely harmed and prejudiced Mr. Klayman, but perhaps none more so than section (b), where the District Court allowed highly prejudicial, inflammatory, false, and—perhaps most importantly—completely irrelevant testimony to be presented by Respondents, which undoubtedly poisoned the minds of the jury, as well as the judges of the D.C. Circuit, against Mr. Klayman, which led to the erroneous jury verdict and judgment, App. 242, as well as the decisions on appeal. Ultimately the jurors at the District Court, as well as the judges on the D.C. Circuit, are just

people, and people frequently are unable to entirely separate their emotions from purely factual and logical decision-making. Respondents knew this, and therefore strategically sought to interject highly inflammatory, false, prejudicial, and irrelevant testimony into the trial. The District Court egregiously erred by allowing this to occur. Once the District Court did this, Mr. Klayman no longer stood any chance, either at trial, or on appeal.

These false, inflammatory, prejudicial, and irrelevant statements included (1) an alleged effort to pursue an improper relationship with a JW employee, (2) claiming he effectively sexually harassed her, (3) Mr. Klayman's alleged admission that he was in love with the employee, had purchased gifts for her and had kissed her, and (4) Mr. Klayman's alleged acknowledgment of an incident with his wife that provided the basis for his wife's allegation that he physically assaulted her in front of their children, that is beat his wife. App. 244. This last point was the most harmful, as the entirely false and fabricated allegations and testimony regarding what allegedly occurred in a church parking lot, was Mr. Klayman's estranged wife falsely claimed that he "put his hands around [her] neck, and [] started to shake [her] and bang [her] head against the car window," App. 306–307, in other words, that Mr. Klayman had beat his wife. Notwithstanding Mr. Klayman's vehement denial of these false and outrageous allegations, and the fact that the subsequent divorce decree which was on the record rescinded these blatantly false allegations, the jury should never have

heard such testimony because it was highly inflammatory and grossly prejudicial, even if it was relevant or true, which it clearly was not.

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

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

Even more, the SA contained an integration clause:

> [t]his agreement constitutes the entire agreement and understanding between and among the Parties with respect to the subject matter hereof and supersedes all prior and contemporaneous written or oral agreements and understandings between the Parties with respect to the subject matter of this Agreement. App. 334.

Thus, all of this highly prejudicial and inflammatory testimony, which purportedly went to show that Mr. Klayman was removed from JW, was completely irrelevant, as this "issue" should never have even been at issue or up for debate before the jury, particularly given the parole evidence rule, which Mr. Klayman had invoked but which the District Court denied and the appellate court never addressed. The sole purpose of this testimony was to poison the minds of the jury against Mr. Klayman, and regrettably it worked, causing a highly flawed jury verdict and judgment against Mr. Klayman.

II. FACTS REGARDING THE D.C. CIRCUIT APPEAL

Unfortunately, but unsurprisingly, the D.C. Circuit was not immune to the highly prejudicial, inflammatory, false, and irrelevant testimony that was egregiously allowed into the case by the District Court, as they affirmed the highly flawed jury verdict and judgment in a panel opinion penned by the Hon. Neomi

Rao, App. 3, and subsequently denied en banc review. App. 1–2. It would also appear from the Panel Opinion that the panel did not thoroughly review the voluminous record, as it contained numerous mistakes and false statements, as well as incorrect legal reasoning. This is further shown by the fact that the D.C. Circuit did not even address Mr. Klayman's arguments regarding authentication, truth being an absolute defense to a non-disparagement provision, as well as other important arguments like the parole evidence rule, which barred the introduction of the false information about Mr. Klayman's having left JW to run for the U.S. Senate in Florida. App. 301. The D.C. Circuit appears to have simply glossed over these issues because the underlying District Court proceeding was so lengthy—sixteen (16) years in toto—and the D.C. Circuit likely did not want to reopen this case for whatever reason, perhaps to spare their colleague on the District Court, the Honorable Colleen Kollar-Kotelly having to retry it after all of this time. However, this is not a valid reason to adopt the flawed and erroneous jury verdict and judgment at the District Court level without addressing and correcting errors which create bad and harmful legal precedent.

Chief among the D.C. Circuit's numerous errors concerns the Lanham Act, as the D.C. Circuit ignored precedent in the District Court that stated that there must be an "appreciable number" of confused consumers to meet the standard for "likelihood of confusion." This, at a minimum, creates a circuit split, since other circuits have also adopted this principle. Furthermore,

the D.C. Circuit ignored precedent which showed that there can be no disparagement where the speaker makes a true statement.

The D.C. Circuit's error on these two issues impacts far more than just Mr. Klayman. It is crucial that the Supreme Court address what the appropriate standard is for "likelihood of confusion" under the Lanham Act, as this strongly impacts trade and commerce in the United States as a whole. Furthermore, the disparagement issue also impacts trade and commerce as a whole, as it is common practice for people to sign "non-disparagement" clauses in severance agreements and similar contracts, which should also be encouraged as a matter of public policy. Guidance and clarity from this Court is necessary so that people will understand what conduct is permissible under these widely used clauses by employers and employees and others, and what conduct is not.

REASONS FOR GRANTING THE WRIT

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

The D.C. Circuit fundamentally erred by ignoring conflicting court legal precedent which clearly stated that there needed to be an "appreciable number" of consumers confused to meet the "likelihood of confusion" standard under the Lanham Act. As shown below,

courts in Ninth, Eleventh and Sixth Circuits have adopted this standard, so the D.C. Circuit has created a circuit split.

To make matters worse, the D.C. Circuit then ignored crucial authentication requirements under the Federal Rules of Evidence to find "likelihood of confusion," compounding the prejudice to Mr. Klayman. This too is precedent setting.

A. The D.C. Circuit Erred by Failing to Reverse the Jury Verdict with Regard to Likelihood of Confusion Which Is Necessary for Trademark Infringement.

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

> **Klayman also argues that the district court failed to properly instruct the jury on an element of trademark infringement. Judicial Watch asserted that Klayman infringed on its trademarks "Judicial Watch" and "Because No One is Above the Law." To establish trademark infringement, Judicial Watch needed to prove, among other elements, that Klayman's use of its trademarks created a "likelihood of confusion" among consumers. *See Am. Soc'y for Testing and Materials v. Public.Resource.Org, Inc.*, 896 F.3d 437, 456 (D.C. 2018). Klayman argues that the court erred by failing to instruct the**

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

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

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

this standard, as recognized by the Panel. "While AAAS must show that an "appreciable" number of reasonable buyers is likely to be confused, this does not necessarily mean a majority." *Hearst Corp.*, 498 F. Supp. at 258. Courts all over the country have followed this standard as well. *See Hansen Bev. Co. v. Nat'l Bev. Corp.*, 493 F.3d 1074, 1080 (9th Cir. 2007) (holding that a "handful of declarations" submitted as evidence do not reliably indicate an appreciable number of people.); *see also Pillsbury Co. v. Milky Way Prods.*, 1981 U.S. Dist. LEXIS 17722, at *36–37 (N.D. Ga. Dec. 24, 1981) "More important, evidence of occasional, isolated instances of confusion is insufficient to sustain a finding of a likelihood of confusion when given the similarities between the plaintiff's mark and the alleged infringer's mark, the duration of their concurrent use, and the total volume of sales under both marks, it would be reasonable to expect that if the plaintiff's allegations were true, more instances of confusion would have been reported." *See also Progressive Distribution Servs. v. United Parcel Serv.*, 856 F.3d 416, 434 (6th Cir. 2017) (holding that an isolated instance was insufficient to show likelihood of confusion); *Fla. Int'l Univ. Bd. of Trs. v. Fla. Nat'l Univ. Inc.*, 830 F.3d 1242, 1265 (11th Cir. 2016) (holding that one instance was instance was insufficient to show likelihood of confusion). Importantly, the U.S. District Court for the District of Columbia has made this finding as well. *See Am. Ass'n for the Advancement of Sci. v. Hearst Corp.*, 498 F. Supp. 244 (D.D.C. 1980).

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

Specifically, here, with regard to Respondents' trademark infringement claim, there was simply nothing in the evidentiary record or testimony to support a finding that there was any likelihood of confusion created by Klayman, which is a necessary precursor to any award of damages on this claim.

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

Furthermore, the few letters among the millions that were sent by both Mr. Klayman and Respondents that Respondents entered into evidence that purported

to show that donors were "confused," which were not even authenticated, as set forth below, fall short of the "appreciable" standard to demonstrate likelihood of confusion. App. 84–109. To the contrary, most of the exhibits actually demonstrate that the alleged donors were not confused, and clearly understood that Mr. Klayman was no longer affiliated with JW. For instance:

> Mr. Thomas Fitton, I wish to be removed from your office. I now support Larry Klayman. You are a liar + a cheat. App. 84.
>
> Take my name off your mailing list until Larry Klayman is brought back as president and founder. App. 85.

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

B. The D.C. Circuit Allowed Unauthenticated Hearsay into Evidence to Prove Likelihood of Confusion.

In this same vein, the D.C. Circuit also fundamentally erred by not reversing the fact that the District Court allowed into evidence letters allegedly written by donors proffered by Respondents to show alleged confusion without proper authentication. App. 84–109. Crucially, the D.C. Circuit completely failed to even address this argument, even though it was clearly raised by Mr. Klayman. App. 263.

Courts have routinely held that this type of hearsay "evidence" is inadmissible to show likelihood of confusion. In *Duluth News-Tribune v. Mesabi Publ'g Co.*, 84 F.3d 1093 (8th Cir. 1996), the Eighth Circuit excluded alleged evidence of actual confusion in the form of misdirected phone calls and mail as "hearsay of a particularly unreliable nature given the lack of an opportunity for cross-examination of the caller or sender regarding the reason for the 'confusion.'" *Id.* at 1098. This holding pertained to the summary judgment stage, where some types of hearsay are allowed in the form of affidavits. Here, even worse, impermissible hearsay was allowed at trial. Thus, the facts here are even more egregious, as JW had over a decade to authenticate the letters allegedly written by donors, which they strategically chose not to do. For all we know, these letters could have been fabricated by JW and the other Appellees. They have been known to be untruthful, as just one example, publicly denying that Mr. Klayman was the founder of JW—a cold, hard fact

that is indisputable, as well as the false testimony over his alleged sexual harassment of the office manager. App. 244. Indeed, Mr. Klayman obtained a defamation judgment against JW for making false statements in the past, before in U.S. District Court for the Southern District of Florida for $181,000, where the jury also awarded punitive damages. *See Klayman v. Judicial Watch, Inc.*, 13-cv-20610 (S.D. Fl.). App. 342–343.

Here, JW chose also to not present testimony from these alleged "donors," so therefore Mr. Klayman had no opportunity to cross-examine or inquire as to the reason for the alleged "confusion," identical to the facts of *Duluth*. This is a common issue in the trademark context:

> **Evidence of actual confusion is entitled to weight only if properly proved. . . . The most common evidentiary problem with anecdotal confusion evidence involves testimony or documentary evidence presented in court by a witness about the confusion of a third party who is absent from court.** Richard L. Kirkpatrick, *Likelihood of Confusion in Trademark Law* § 7:6 (2nd).

This is why authentication is so important, and no mere formality. "Authentication and identification are specialized aspects of relevancy that are necessary conditions precedent to admissibility." *United States v. Blackwell*, 694 F.2d 1325, 1330 (D.C. Cir. 1982). It was a glaring and clear error by the District Court to allow this unauthenticated hearsay into evidence and put

forth before the jury. Likely recognizing this deficiency, the District Court strained disingenuously to give a confusing and improper instruction that the letters could not be used to show the truth of the matter asserted, but only to show potential or actual damage to JW. The Court stated, "these documents go to the effect of counter defendant's—Klayman's campaign—not potential donors, insofar as they clearly have not included any donation." App. 302. This was done over Mr. Klayman's strong objection, App. 303, as informing the jury that it could not view the letters for the truth of the matter asserted, yet allowing the jury to consider them with regard to trademark confusion and as a measure of damages was, frankly, talking out of both sides of the District Court's mouth, and a fatal error.

II. THERE CAN BE NO DISPARAGEMENT WHEN THE STATEMENTS AT ISSUE ARE TRUE, PARTICULARLY GIVEN THE ABILITY OF THE PARTIES TO MAKE FAIR COMMENT.

Another critically important matter, which the D.C. Circuit completely failed to address, even though it was clearly raised by Mr. Klayman, App. 259, concerns the fact that there can be no disparagement when the statements at issue are true, particularly when the parties contracted the ability to make a fair comment. This is vitally important to trade and commerce as a whole because there are countless contracts being executed every day which contain similar provisions to the SA, and inconsistent interpretations of

these provisions would create harmful if not disastrous precedent, as people would simply not know what they are allowed to say and what they are not allowed to say:

> Both settlement and severance agreements have traditionally included non-disparagement clauses. Currently, they are becoming more and more prevalent in the initial employment contracts between employees and employers. *NOTE: When Telling the Ugly Truth Can Cost Millions: Non-Disparagement Clauses in Employment-Related Contracts*, 37 Quinnipiac L. Rev. 807, 808.

Specifically, here the SA contained a non-disparagement provision, with the addition of a fair comment clause:

> Klayman expressly agrees that he will not, directly or indirectly, disseminate or publish, or cause or encourage anyone else to disseminate or publish, in any manner, disparaging, defamatory or negative remarks or comments about Judicial Watch or its present or past directors, officers, or employees. Judicial Watch expressly agrees that its present directors and officers namely Paul Orfanedes and Thomas Fitton, will not, directly or indirectly, disseminate or publish; or cause or encourage anyone else to disseminate or publish, in any manner, disparaging, defamatory or negative remarks or comments about Klayman. **Nothing in this paragraph is intended to, nor shall be deemed to, limit either party from making fair commentary on the positions**

> **or activities of the other following the Separation Date.** App. 328 (emphasis added).

First and foremost, as a matter of law, disparagement cannot result if the fair comment is true. *See Armstrong v. Thompson*, 80 A.3d 177, 183 (D.C. 2013). "Substantial truth" also "constitutes a defense to claims of [not just] defamation, [but also] trade libel/**commercial disparagement**, and intentional interference based on allegedly injurious falsehoods." *Aurora World, Inc. v. Ty Inc.*, 2011 U.S. Dist. LEXIS 161683, *22 (C.D. Cal. 2011). Indeed, the U.S. District Court for the Southern District of New York has held that non-disparagements clauses are not allowed unless they expressly include a "carve-out for truthful statements. . . ." *Santi v. Hot In Here, Inc.*, 2019 U.S. Dist. LEXIS 202825, at *7 (S.D.N.Y. Nov. 21, 2019).

The evidence, for example, adduced at trial did not refute Mr. Klayman's fair comments about Respondents having misappropriated about 1.5 million dollars in donor funds and abandoning a client, Peter Paul, who then did ten years in prison, as well as other matters which donors and the public generally had a right to know about as a matter of fair comment. App. 301. Thus, the evidence showed that these statements were true, and/or "substantially true," and therefore could not have served as the basis for an award of damages against Mr. Klayman. Yet, despite this, the jury still issued erroneous liability and damage verdicts on the disparagement claims, awarding $250,000 to JW and $500,000 to Fitton. App. 39. This was compounded by

the jury having been poisoned and turned against Mr. Klayman as a result of the inflammatory, prejudicial, false, and irrelevant testimony allowed by the District Court, but was also the result of the District Court's glaringly erroneous refusal to give a jury instruction on "fair comment." App. 259.

In view of Respondents' counterclaims that alleged disparagement, Mr. Klayman sought a jury instruction on "fair comment" and repeated this request during trial. As just one example, Klayman stated that "fair comment [provision], even under your interpretation, which comes from defamation, was incorporated into the non-disparagement by agreement. So that's why it all has to be read together." App. 303.

The District Court ultimately denied Klayman's request, which was in clear error, given the fact that the parties had expressly contracted for this. Then in denying Mr. Klayman's post-trial motions, in contrived reasoning the District Court doubled down on this error:

> Klayman improperly sought to import a defense from tort law into the specific contractual provision at issue in this breach of contract claim. That provision includes some language about fair comment. CSA ¶ 17 ("Nothing in this paragraph is intended to, nor shall be deemed to, limit either party from making fair commentary on the positions or activities of the other following the Separation Date."). **But the jury, not the Court, was responsible for applying that contractual**

> **provision to the testimony and other evidence of Klayman's statements.** App. 136 (emphasis added).

This is an egregious error. The Court apparently presumed that each member of the jury had at a minimum, gone to law school, and been taught and retained the meaning of the legal principle of "fair comment" as set forth by the Supreme Court under *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). Otherwise, the only other explanation is that the Court believed that a jury of laymen would be able to apply a legal principle that they likely had never heard of to the facts of the case. Either assumption is clearly in gross error, and since this was egregiously not addressed by the D.C. Circuit, it must respectfully be remedied by this Court, as failing to do so would have large-scale implications on contract law and severance agreements, and result in confusion regarding non-disparagement clauses and fair comment provisions in contracts, which are boilerplate in many commercial contracts today. By failing to address this point, the D.C. Circuit has essentially also "doubled down" on and compounded the error of the District Court.

III. MR. KLAYMAN HAS MORE THAN MET THE STANDARD FOR CERTIORARI.

Under Supreme Court Rule 10, a writ of certiorari will be granted for "compelling reasons." There are clearly "compelling" reasons set forth in this Petition, as there are issues that significantly impact not only

Mr. Klayman, but trade and commerce as a whole, as set forth in whole above.

Here, certiorari is warranted because (1) Mr. Klayman clearly has no other adequate remedy at law and (2) it is clear that the D.C. Circuit, regrettably, did not thoroughly review the voluminous record in the underlying case, as their Panel Opinion contained numerous errors, omissions, and misstatements. App. 3–38. It appears that, with the District Court proceeding being sixteen (16) years old, the D.C. Circuit simply did not want to open the case back up, whether to be kind to Honorable Colleen Kollar-Kotelly, who would otherwise have to retry this interminable District Court case, or for whatever other reason. However, this is a not a valid reason for the D.C. Circuit to have given Mr. Klayman's appeal "short shrift" and not thoroughly reviewing the record or even addressing Mr. Klayman's arguments.

Now, Mr. Klayman's last resort is this Court, which means that certiorari review given the circuit split is clearly justified under the extraordinary circumstances. This Court, to prevent a manifest injustice and to reconcile conflicting law among the DC Circuit and other circuits is respectfully requested to remand this case back to the District Court for the new trial before a fair minded jurist with instructions to (1) disallow the highly inflammatory, prejudicial, false, and irrelevant testimony introduced by Respondents, (2) disallow unauthenticated evidence introduced by Respondents, (3) give a jury instruction explaining to the jury that Mr. Klayman had been sanctioned, instead of

creating the false impression that he had no evidence or witnesses on this behalf, and (4) give jury instructions that are in accordance with law on "likelihood of confusion" under the Lanham Act as well as truth being an absolute defense to a claim brought under a non-disparagement clause. Of course, it is of crucial importance that the law, so necessary to further U.S. and international commerce for corporations, labor unions, public interest groups, and other persons, be clarified, far beyond the ramifications to Mr. Klayman, his colleagues and his family of the 2.8 million dollar judgment wrongly entered against him.

CONCLUSION

In the words of John Adams, we are a nation of laws and not men. It was grossly prejudicial for the District Court to allow false, inflammatory, and irrelevant testimony to be heard by the jury, which clearly caused them to react negatively to Mr. Klayman, and render a clearly erroneous jury verdict and judgment. The D.C. Circuit was also clearly influenced in this manner. However, the oath of office for federal judges at provides:

> I do solemnly swear that I will administer justice **without regard to persons**, and do equal right to the poor and to the rich, and that I will impartially discharge and perform all the duties incumbent upon me as judge under the Constitution and laws of the United

States. So help me God. 28 U.S.C. § 453 (emphasis added).

Here, it more than appears that at every step of this case, emotion prevailed over reason and logic, and as such, the correct law was simply not applied to the facts. The Court must respectfully step in and correct these errors to prevent not only manifest injustice to Mr. Klayman with regard to a $2.8 million judgment which will bankrupt him and his family, but also to avoid setting and allowing to stand conflicting harmful and disastrous legal precedent which will govern, if left unaddressed and corrected, U.S. and international trade and commerce as a whole.

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Respectfully submitted,

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