No. 26A

IN THE SUPREME COURT OF THE UNITED STATES

DMARC ADVISOR BV, f/k/a dmarcian Europe BV,

Applicant,

v.

DMARCIAN, INC.,

Respondent.

On Application for Stay to Chief Justice John G. Roberts, Jr., Circuit Justice for the United States Court of Appeals for the Fourth Circuit

APPLICATION FOR STAY AND REQUEST FOR AN IMMEDIATE ADMINISTRATIVE STAY

Matthew Nis Leerberg
Counsel of Record
FOX ROTHSCHILD LLP
301 Hillsborough Street, Suite 1120
Raleigh, NC 27603
(919) 755-8700
mleerberg@foxrothschild.com

Counsel for Applicant

PARTIES TO THE PROCEEDING

Applicant (Defendant-Appellant below) is DMARC Advisor BV, formerly known as dmarcian Europe BV.

Respondent (Plaintiff-Appellee below) is dmarcian, Inc.

CORPORATE DISCLOSURE STATEMENT

DMARC Advisor BV is a Dutch company. It has no parent company and no publicly held corporation owns 10% or more of its stock or other interest. It has no stock ticker symbol.

dmarcian, Inc. is a United States corporation. It has no parent company and no publicly held corporation owns 10% or more of its stock or other interest. It has no stock ticker symbol.

RELATED PROCEEDINGS

United States District Court (W.D.N.C.):

dmarcian, Inc. v. DMARC Advisor BV, No. 1:21-cv-00067-MR (Dec. 20, 2024) (order vacating prior contempt and sanctions and imposing separate contempt and sanctions)

dmarcian, Inc. v. DMARC Advisor BV, No. 1:21-cv-00067-MR (Dec. 20, 2024) (order modifying preliminary injunction)

dmarcian, Inc. v. DMARC Advisor BV, No. 1:21-cv-00067-MR (March 5, 2025) (order denying motion to stay)

United States Court of Appeals (4th Cir.):

dmarcian, Inc. v. DMARC Advisor BV, Nos. 23-1790, 25-1084 (Apr. 17, 2025) (order administratively staying trial)

dmarcian, Inc. v. DMARC Advisor BV, Nos. 23-1790, 25-1084 (Sept. 18, 2025) (order deferring ruling on motions to dismiss for lack of appellate jurisdiction until the merits stage) *dmarcian, Inc. v. DMARC Advisor BV*, Nos. 23-1790, 25-1084 (July 10, 2026) (opinion affirming preliminary injunction, contempt, and sanctions)

dmarcian, Inc. v. Millen, No. 25-1085 (July 10, 2026) (opinion reversing and vacating attorney's contempt and sanction)

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Pursuant to Rule 23 of the Rules of this Court and 28 U.S.C. § 1651, Defendant-Appellant DMARC Advisor f/k/a dmarcian Europe BV ("DMARC Advisor") seeks (1) a stay pending its forthcoming appeal to this Court and (2) an immediate administrative stay of trial. The district court has signaled its intent to move to trial as soon as it can: "Because at whatever point the Fourth Circuit allows the trial to go forward, you can expect that there will be the final pretrial conference very quickly thereafter." [Transcript of May 2, 2025 at 12].[1] Without a stay, the district court will rush to trial before this Court can even decide whether to take the case, let alone schedule briefing and argument and make a merits decision. [Transcript of May 2, 2025 at 12 (instructing counsel to have all witnesses, experts, etc. ready like "horses . . . in the starting gate. It's just a question of when they ring the bell and open the gate.")].

dmarcian agrees with the district court that nothing should slow the race to trial. dmarcian has already asked for a scheduling conference to hasten trial. [W.D.N.C. ECF 484, 481]. And when DMARC Advisor's trial counsel moved to withdraw last week, dmarcian emphasized its belief that if withdrawal is allowed, DMARC Advisor should not be allowed a full thirty (30) days to obtain substitute counsel and trial should be scheduled for the soonest possible date—despite the fact that substitute counsel will have to catch up on over five years of litigation and parallel proceedings in California and the Netherlands. [W.D.N.C. ECF 491].

[1] Docket entries in the district court proceedings are cited to as "W.D.N.C. ECF." Citations to "Dkt." are to docket entries in Fourth Circuit Appeal No. 25-1084.

This case deserves pretrial review by this Court. DMARC Advisor will soon file a petition for certiorari seeking review of the Fourth Circuit's decision to affirm the Second Amended Preliminary Injunction and its refusal to exercise appellate jurisdiction over another order and a related contempt-and-sanctions order. The injunction, which among other things forbids DMARC Advisor from using the "dmarcian" trademark on websites "accessible in the United States," forbids foreign infringing uses in commerce in violation of *Abitron Austria GmbH v. Hetronic International, Inc.*, 600 U.S. 412 (2023), and conflicts with the decisions of other courts of appeal. It similarly misapplies North Carolina state law governing extraterritoriality, which follows the federal presumption.

Based on these legal errors, the Fourth Circuit affirmed an injunction that forbade DMARC Advisor from using the "dmarcian" trademark anywhere except Europe, Russia, and Africa.[2] [Dkt. 77 at 5]. The injunction also sought to prevent any further alleged tortious interference with contract and prospective contractual relations by forbidding DMARC Advisor from making any public statements about dmarcian or encouraging any of dmarcian's customers to switch to DMARC Advisor. [W.D.N.C. ECF 403]. Meanwhile, dmarcian has been allowed to expand to Europe, which is DMARC Advisor's home territory. [W.D.N.C. ECF 403].

Without a stay of the Second Amended Preliminary Injunction, DMARC Advisor will continue to accrue serious and irreparable harm from this unfair, unbalanced injunction that imposes restrictions well beyond the status quo and relies

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[2] Any use had to be accompanied by a disclaimer.

on unlawful extraterritorial restrictions to do so. DMARC Advisor will also be irreparably harmed without a stay of the district court's order requiring DMARC Advisor to admit it lied to a Dutch court in parallel proceedings in the Netherlands. The order dictates the factual and legal positions DMARC Advisor must take in the Netherlands. That order casts a long shadow over the Dutch proceedings and must be immediately stayed to prevent any further harm. Moreover, the district court's evidentiary and other rulings during trial will be tainted by its incorrect view that DMARC Advisor lied to the Dutch court and, by extension, that it is likely to lie to the district court and the jury. In any event, a trial based on a clearly erroneous interpretation of *Abitron* and a similarly faulty view of state law will have to be redone later at considerable expense that DMARC Advisor cannot later recover. *See Nat'l Inst. of Health v. American Public Health Ass'n*, 145 S. Ct. 2658 (2025) (forced expenditure of funds that cannot be recovered constitutes irreparable harm).

DMARC Advisor's trial counsel has moved to withdraw now that the Fourth Circuit lifted his suspension. [W.D.N.C. ECF 485]. But if the district court denies that motion and orders the parties to proceed to trial immediately, DMARC Advisor will be forced to try the case represented by counsel the district court thinks is a liar.

A stay is the only way to prevent DMARC Advisor from suffering irreparable harm from the injunction and the corrections and contempt orders. At the very least, an administrative stay is the only way to stop the district court and dmarcian's rush to trial from severely and irreparably damaging DMARC Advisor. These harms will only be exacerbated by the unjustified bias the district court has exhibited against DMARC Advisor and by the district court's interference with the Dutch proceedings.

STATEMENT

This is a case of two companies and two court cases. U.S.-based dmarcian and Netherlands-based DMARC Advisor used to have an amicable, profitable business relationship. A dispute over intellectual property ownership of the source code (copyright ownership of the software) caused a breakdown. DMARC Advisor sued dmarcian in the Netherlands in January 2021, and dmarcian sued DMARC Advisor in federal court in North Carolina two months later.

I. Initial Dutch Proceedings

Summary proceedings in the Rotterdam District Court led to a *default*[3] ruling on February 1, 2021 ordering on an emergency basis that dmarcian and its founder, Tim Draegen, must ensure that dmarcian continue cooperating with DMARC Advisor pursuant to their distribution contract—a ruling that was affirmed by the Dutch appellate court on August 4, 2026. [Dutch Court order of 8/4/26 at 8]. dmarcian and Draegen willfully refused to obey that court order and now face coercive penalties (*dwangsommen*) of €500,000 each, plus interest. [Dutch Court order of 8/4/26 at 8-9; [W.D.N.C. ECF 47-2 at 7].

[3] dmarcian has repeatedly mischaracterized this as an *ex parte* ruling, Response Br. at 6, despite having been served with process and given an opportunity to appear. [W.D.N.C. ECF 26-1 at 11; W.D.N.C. ECF 47-2 at 4; W.D.N.C. ECF 189-3 at 5].

II. Injunction and Amended Injunction

In the meantime, pretrial litigation in the Western District of North Carolina led to a preliminary injunction and an amended preliminary injunction. [W.D.N.C. ECF 39, W.D.N.C. ECF 82]. The district court found dmarcian was likely to succeed on its federal claims for copyright infringement, trademark infringement, and misappropriation of trade secrets and on its state claims for tortious interference with contract and with prospective contractual relations. [W.D.N.C. ECF 39 at 29; W.D.N.C. ECF 39 at 48; W.D.N.C. ECF 39 at 56; W.D.N.C. ECF 39 at 62]. Therefore, it issued an injunction forbidding DMARC Advisor from:

> (1) "providing services to any customers located outside of Europe, Africa, or Russia"[4];
>
> (2) "providing access to any of its website to IP addresses from countries outside of Europe, Africa, or Russia";
>
> (3) "making changes to the copyright software";
>
> (4) "using [dmarcian's] trademark in any manner unless such use is accompanied by a [disclaimer]";
>
> (5) "displaying any website with the 'dmarcian' name unless that website includes a [disclaimer]";
>
> (6) "redirecting, encouraging, or allowing any customer to change its payment recipient from [dmarcian] to [DMARC Advisor]"; and
>
> (7) "making any public statement about dmarcian, Inc."

[W.D.N.C. ECF 82 at 3].

[4] Exceptions were made for six specific customers for reasons not relevant here.

III. **First Appeal & *Abitron***

On appeal, the Fourth Circuit affirmed the injunction's extraterritorial scope and a related contempt finding against DMARC Advisor, but vacated the sanction. *dmarcian, Inc. v. dmarcian Europe BV*, 60 F.4th 119, 148 (4th Cir. 2023). Not long after, this Court decided *Abitron Austria GmbH v. Hetronic International, Inc.*, 600 U.S. 412 (2023), holding that the Lanham Act does not apply to conduct that takes place outside of the United States, regardless of whether that conduct causes any customer confusion or financial injury inside the U.S. The district court vacated the contempt and sanctions order in light of *Abitron*. [W.D.N.C. ECF 401 at 26; W.D.N.C. ECF 402 at 15].

IV. **Contempt & Suspension**

Meanwhile, mistaking DMARC Advisor's *good faith legal arguments about Dutch law* in the Dutch proceedings for *factual falsehoods about the status of the case under American law*, the district court issued an order ("Corrections Order") in 2023 requiring DMARC Advisor to "correct misrepresentations" it believed DMARC Advisor made to the Court of Rotterdam. [W.D.N.C. ECF 216 at 7; W.D.N.C. ECF 216 at 19]. Failing to understand that DMARC Advisor and its attorneys acted in good faith and complied with the order, the district court again held DMARC Advisor in contempt ("New Contempt Order"). [W.D.N.C. ECF 401 at 28]. It also imposed new sanctions against DMARC Advisor and even suspended DMARC Advisor's lead attorney, Pressly Millen, from practicing law in the Western District of North Carolina. [W.D.N.C. ECF 401 at 28].

V. Second Amended Preliminary Injunction

The district court simultaneously issued the Second Amended Preliminary Injunction. Paragraph 3, which forbade DMARC Advisor from changing the "copyright" source code, had to change. After all, the district court had dismissed dmarcian's copyright claim at summary judgment after ruling dmarcian or its attorneys undisputably lied or were willfully blind to the truth of material representations in dmarcian's copyright application. [W.D.N.C. ECF 360 at 22]. But instead of deleting paragraph 3 altogether, and without any factual or legal analysis, the district court simply replaced copyright with trade secrets as the justification for prohibiting DMARC Advisor from changing the source code. [W.D.N.C. ECF 402 at 13; W.D.N.C. ECF 403].

Finally, half-heartedly following *Abitron*, the district court left in the prohibitions on trademark use on websites but limited the restriction to websites "which are accessible to IP addresses from the United States." [W.D.N.C. ECF 403]. On its face, this restriction applies to foreign-language websites hosted on foreign soil and that offers service for payment in Euros, merely because a U.S. consumer might stumble across it.

VI. Current Appeal

The Fourth Circuit vacated Mr. Millen's suspension in his parallel appeal. *dmarcian, Inc. v. Millen*, No. 25-1085, slip op. at *6 (4th Cir. 2026). As to DMARC Advisor, the Fourth Circuit refused to exercise jurisdiction over the Corrections Order or New Contempt Order in DMARC Advisor's appeal, despite the fact that the former had the practical effect of granting an injunction and the latter is inextricably bound up in the former and in Mr. Millen's appeal. [Dkt. 77]. Conceding that the Second Amended Preliminary Injunction would be unlawfully extraterritorial if considered in a vacuum, the panel nonetheless invoked personal jurisdiction concepts to hold that it was lawful in this case because of DMARC Advisor's alleged prior activities directed at U.S. companies. [Dkt. 77 at 10-13].

VII. Stay Rulings

During the appeal, the district court denied a stay pending appeal. [JA W.D.N.C. ECF 453]. But the Fourth Circuit administratively stayed trial, recognizing that no trial should proceed until the contempt and suspension issues were resolved and the effect of *Abitron* on the scope of the infringement claims was determined. [Dkt. 23]. Having decided both issues and denied rehearing and *en banc* review, the Fourth Circuit denied a stay pending DMARC Advisor's appeal to this Court. [Dkt. 86].

VIII. Motion to Withdraw & Trial Scheduling

Before the Fourth Circuit's mandate issued on August 26, 2026, a flurry of activity in the district court had already begun. On August 11, dmarcian moved for a scheduling conference so that the parties could "meet the Court's expectations on trial readiness, whether in September or November or some other time as may be set by the Court." [W.D.N.C. ECF 481]. Since the Dutch court is expected to rule on September 9 on DMARC Advisor's request to resume the Dutch proceedings, dmarcian wants to set a trial date quickly so that it can try to convince the Dutch court to delay its trial until after the U.S. trial. [W.D.N.C. ECF 481 at 6]. DMARC Advisor opposed the motion as premature because the Fourth Circuit's mandate had not yet issued. [W.D.N.C. ECF 484].

In the meantime, dmarcian and the district court fired the starting gun and started the race to trial. On August 25, DMARC Advisor's trial counsel moved to withdraw on the basis of a "fundamental disagreement regarding the conduct of this litigation" and asked for DMARC Advisor to have thirty (30) days to hire substitute counsel. [W.D.N.C. ECF 486 at 1, 3]. On August 26, the very next day, dmarcian urged that DMARC Advisor's trial counsel's motion "to withdraw . . . makes a status conference all the more urgent." [W.D.N.C. ECF 488 at 1]. And on August 28, the district court set a scheduling conference for September 8 and ordered DMARC Advisor to have substitute counsel at that hearing "who are prepared to make an appearance in the action and proceed with the litigation of this matter in the event that the Motion to Withdraw is granted." [W.D.N.C. ECF 489]. Notably, the district court's decision to set the conference for September 8 allows it to set a trial date and then have the Dutch court informed of that trial date the day before the Dutch court is expected to rule on whether its own proceedings should resume.

LEGAL STANDARD

In considering a stay request, this Court must consider the following factors: (1) the likelihood that DMARC Advisor will succeed on the merits; (2) whether DMARC Advisor will be "irreparably injured absent a stay"; (3) whether a stay "will substantially injure" dmarcian; and (4) the public interest. *Nken v. Holder*, 556 U.S. 418, 434 (2009).

The first two factors are the "most critical." *Nken v. Holder*, 556 U.S. 418, 434 (2009). But it is necessarily a balancing test that weighs all four factors so as to make the most equitable decision. *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 21-23 (2008); *see also West Virginia v. United States Env't Prot. Agency*, 90 F.4th 323 (4th Cir. 2024) (granting a stay despite the first and fourth factors being neutral and the third weighing slightly against a stay).

This Court also has inherent power to issue administrative stays to "buy[] the court time" for thoughtful merits review of consideration of pending motions. *United States v. Texas*, 144 S. Ct. 797, 798 (2024) (Barrett, J., concurring).

ARGUMENT

DMARC Advisor respectfully requests a stay pending appeal or, at a minimum, an administrative stay of trial. The Second Amended Preliminary Injunction violates *Abitron* and created a circuit split. Thus, this Court is likely to grant review on that and other questions in this case, including the issue of appellate jurisdiction over the Corrections Order and the New Contempt Order. All three orders are seriously harming DMARC Advisor and will inflict even more harm if the district court proceeds to trial.

I. This Court should stay the Second Amended Preliminary Injunction.

A. The Fourth Circuit's extraterritoriality analysis conflicts with the decisions of the other courts of appeal and is likely to be reviewed.

The Fourth Circuit held that DMARC Advisor's alleged past domestic conduct—including allegedly directing customers in "the Americas" away from dmarcian and allegedly using email contact with an Israeli employee to convince a

California-based company to "switch from [dmarcian's] software product to" DMARC Advisor's,[5] [Dkt. 77 at 4]—justified a prospective injunction that admittedly regulates foreign "use in commerce." [Dkt. 77 at 12-13]. This Court is likely to grant review because the panel's opinion created a circuit split with the First, Ninth, Tenth, Eleventh, and D.C. Circuits.

The panel's opinion conflicts with several Ninth Circuit decisions, primarily *LegalForce RAPC Worldwide, PC v. LegalForce, Inc.*, 124 F.4th 1122 (9th Cir. 2024). In *LegalForce*, an American company and a Japanese company both operated under the name "LegalForce" in their respective countries, where each owned the trademark rights to that name. *Id.* at 1124. The Japanese company registered "LF" in America, "bought two website domains in the United States" including the "LegalForce" name, and created an American subsidiary to handle its U.S. business. *Id.* at 1124-25. It also used "LegalForce" in meetings in California to win over investors who otherwise would have invested in the American company, although this activity was not "use in commerce." *Id.* at 1125.

Notwithstanding all of the Japanese company's activities on U.S. soil, the Ninth Circuit held the Lanham Act could not reach the Japanese company's activities in Japan because the physical location of the "infringing use in commerce" was dispositive—notwithstanding the fact that a U.S. consumer could access the Japanese

[5] DMARC Advisor's financials, produced to the district court and verified by declaration, show that DMARC Advisor never received a penny (or a Euro) from Clarizen or any other U.S. entity. dmarcian's argument hinges on Clarizen's own decision to change its own DNS to DMARC Advisor's platform—a decision DMARC Advisor could not effectuate and over which it had no control.

website and that the company was starting to target U.S. consumers. *Id.* at 1126-27; *see also Daramola v. Oracle America, Inc.*, 92 F.4th 833, 839-43 (9th Cir. 2024) (applying *Abitron* to hold that the anti-retaliation provisions of the Sarbanes-Oxley Act and Dodd-Frank Act did not apply to a remote Canadian employee even though he "accessed [his employer's] web servers located in California"); *Doctor's Best, Inc. v. Nature's Way Prods., LLC*, 143 F.4th 1101, 1104-05, 1107-10 (9th Cir. 2025) (holding that manufacturing and shipping goods with infringing labels in the United States is domestic "use in commerce" under the Lanham Act, but shipping and selling those goods abroad is extraterritorial).

It also conflicts with *Hetronic International, Inc. v. Hetronic Germany GmbH*, 99 F.4th 1150 (10th Cir. 2024). On remand from this Court's *Abitron* decision, the Tenth Circuit held that the Lanham Act forbade a foreign company's U.S. sale of products with the infringing mark, but foreign sales to foreign customers were outside its scope even where the products ended up in the United States and *were intended for resale into the United States*. *Id.* at 1166-69. Otherwise, "almost any claim involving exclusively foreign conduct" could be "repackaged as a 'domestic application.'" *Id.* at 1169 (quoting *Abitron Austria GmbH v. Hetronic International, Inc.*, 600 U.S. 412, 425 (2023)).

The Eleventh Circuit has, in a binding part of its rationale in a personal-jurisdiction case, applied *Abitron* by holding that that "U.S. trademarks not only receive no legal protections outside of the United States—they do not legally *exist* outside of the United States." *Jekyll Island-State Park Authority v. Polygroup Macau*

Ltd., 140 F.4th 1304, 1320 (11th Cir. 2025) (citing *Abitron*, 600 U.S. at 426-27). By extension, if dmarcian's trademarks do not even exist in the Netherlands, how can a Dutch website maintained on a server in the Netherlands possibly violate dmarcian's trademark rights? It cannot. Yet the panel held that it could.[6]

Pre-*Abitron*, the First Circuit held that hosting a foreign-language website in foreign country is foreign conduct is only governed by the Lanham Act to the extent the Act has extraterritorial application. *McBee v. Delica Co., Ltd.*, 417 F.3d 107, 123-24 (1st Cir. 2005). And in the adjacent copyright context, the D.C. Circuit held even before *Abitron* that operating a website in a foreign country does not constitute infringing conduct in the U.S. merely because U.S. customers access it and even download the infringing content to their U.S. devices. *IMAPizza, LLC v. At Pizza Ltd.*, 965 F.3d 871, 878-79 (D.C. Cir. 2020).

The Fourth Circuit's opinion here also conflicts with the holdings of district courts in the Third, Fifth, Eighth, and Eleventh Circuits. *Rockwell Automation, Inc. v. Parcops S.R.L.*, No. 21-1238-GBW-JLH, 2023 WL 4585952, at *2-3 (D. Del. July 18, 2023); *Total90, LLC v. Nike, Inc.*, No. 25-2325, 2026 WL 1782015, at *6 & n.77 (E.D. La. June 22, 2026); *Hazeldon Betty Ford Foundation v. My Way Betty Ford Klinik GmbH*, No. 20-409, 2023 WL 6318164, at *8 (D. Minn. Sept. 28, 2023); *Commodores Entertainment Corp. v. McClary*, No. 6:14-cv-1335-RBD-EJK, 2024 WL 4349623, at *2 (M.D. Fla. May 14, 2024).

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[6] dmarcian has registered its trademark in the European Union. Its sole remedy for alleged trademark infringement in Europe is European trademark law.

Next, the Fourth Circuit concluded that North Carolina's tortious interference law applies extraterritorially. But North Carolina follows the federal presumption against extraterritoriality, *Sawyer v. Market American, Inc.*, 661 S.E.2d 750, 754 (N.C. Ct. App. 2008), which the Fourth Circuit misconstrued. Moreover, it conflicts with actual North Carolina decisions applying the law of other jurisdictions where the interference itself occurs outside of North Carolina. *E.g. Soma Technology, Inc. v. Dalamagas*, No. 16 CVS 11100, 2017 WL 2056904, at *9 (N.C. Business Ct. May 11, 2017). And it also conflicts with the decisions of the federal courts of appeal. *Grupo Televisa, S.A. v. Telemundo Communications Group, Inc.*, 485 F.3d 1233, 1242-44 (11th Cir. 2007); *Abogados v. AT&T, Inc.*, 223 F.3d 932, 935 (9th Cir. 2000); *White Plains Coat & Apron Co., Inc. v. Cintas Corp.*, 460 F.3d 281, 284 (2d Cir. 2006); *Integral Resources (PVT) Ltd. v. Istil Group, Inc.*, 155 F. App'x 69, 73-75 (3d Cir. 2005); *Barnes Group, Inc. v. C & C Prods., Inc.*, 716 F.2d 1023 (4th Cir. 1983); *Brinkley & West, Inc. v. Foremost Ins. Co.*, 499 F.2d 928, 924-25 (5th Cir. 1974). Since at least one circuit agrees with the panel, there is a circuit split this Court is likely to review. *See SCO Group, Inc. v. Int'l Business Machines Corp.*, 879 F.3d 1062, 1081 (10th Cir. 2018).

B. The panel's opinion conflicts with *Abitron* and is likely to be reversed.

For the same reasons that *LegalForce*, *Doctor's Best*, and *Hetronic Germany* came out the other way, the panel's opinion contradicts *Abitron*. Admitting that "a rule that hinged on web access alone would" be impermissible under *Abitron*, the panel reasoned that the extraterritorial reach of the injunction was permitted because of DMARC Advisor's alleged past actions targeting dmarcian's United States customers. [Dkt. 77 at 12-13].

But *Abitron* expressly held that the Lanham Act only applies where "the claimed infringing use in commerce is domestic." *Abitron*, 600 U.S. at 415. *Abitron* left no room for introducing personal-jurisdiction concepts into the extraterritoriality analysis. [Dkt. 77 at 10]. Foreign infringing uses connected to past or present domestic infringing uses are simply beyond the scope of the Act. *LegalForce*, 124 F.4th 1122; *Hetronic Germany GmbH*, 99 F.4th 1150; *Doctor's Best*, 143 F.4th at 1104-05, 1107-10. The Fourth Circuit's unsupported assertion that "marketing, advertising, and distribution . . . occur in the United States if the intended recipients are in the United States" is wrong, at least for purposes of the Lanham Act. *See, e.g.*, *McBee*, 417 F.3d at 123-24; *LegalForce*, 124 F.4th 1122.

Similarly, North Carolina's extraterritoriality jurisprudence, which follows the federal presumption, *Sawyer v. Market American, Inc.*, 661 S.E.2d 750, 754 (N.C. Ct. App. 2008), and choice-of-law rules forbid the application of North Carolina tortious interference law to foreign or out-of-state acts of tortious interference, except to the extent that the contractual breach—and not just the resulting injury to the plaintiff—occurred in North Carolina. *Worley Claims Servs., LLC v. Jefferies*, 429 F. Supp. 3d 146, 158 (W.D.N.C. 2019) (citing *Harco Nat'l Ins. Co v. Grant Thornton, LLP*, 698 S.E.2d 719, 726 (N.C. Ct. App. 2010)); *Soma Technology, Inc. v. Dalamagas*, No. 16 CVS 11100, 2017 WL 2056904, at *9 (N.C. Business Ct. May 11, 2017).

C. The Second Amended Preliminary Injunction is inflicting irreparable harm on DMARC Advisor.

The Second Amended Preliminary Injunction, which is likely to be reversed on federal and state law grounds as argued above, imposes two irreparable harms on DMARC Advisor. First, it forbids DMARC Advisor from "making changes to the trade secret source code." [W.D.N.C. ECF 403 at 2].

Second, it also prohibits DMARC Advisor from expanding into lucrative markets (*e.g.* Asia) pursuant to the old contract's sales-territory restrictions, while simultaneously allowing dmarcian to compete with DMARC Advisor in Europe. [W.D.N.C. ECF 403]. When combined with the restriction forbidding DMARC Advisor from making any public statements about dmarcian while nonetheless permitting dmarcian to disparage DMARC Advisor online,[7] these restrictions have a chilling effect on speech as a prior restraint, put DMARC Advisor in an impossible situation, and inflict irreparable harm upon it. *Celsis In Vitro, Inc. v. CellzDirect, Inc.*, 664 F.3d 922, 930 (Fed. Cir. 2012) ("Price erosion, loss of goodwill, damage to reputation, and loss of business opportunities are all valid grounds for finding irreparable harm."); *accord Commodity Futures Trading Comm'n v. British American Commodity Options Corp.*, 434 U.S. 1316, 1320-21 (1977) (Marshall, J., in chambers); *Labrador v. Poe ex rel. Poe*, 144 S. Ct. 921, 929 (2024) (Kavanaugh, J., concurring); *Johnson & Johnson v. Samsung Bioepis Co. Ltd.*, 173 F.4th 454, 461-63 (3d Cir. 2026) (noting that loss of market share can be irreparable harm).

[7] *See* https://dmarcian.com/eu-brand-abuse/

D. dmarcian will not be harmed by a stay of the Second Amended Preliminary Injunction.

While DMARC Advisor will continue to be irreparably harmed by ongoing enforcement of the Second Amended Preliminary Injunction, dmarcian argues that the mere fact that it is entangled in parallel Dutch proceedings is inexcusable and substantially, if not irreparably, harmful. dmarcian further insists that a stay of the U.S. trial will cause the Dutch court to proceed to trial immediately. This is the same argument dmarcian made in opposition to the original stay motion. [W.D.N.C. ECF 440; Dkt. 18-1 at 19-21]. It was unavailing then, and it should not affect this Court's ruling now.

Both parties prefer the forum they perceive as more favorable to their respective positions.[8] Hence, this consideration is a wash; it favors neither side.

dmarcian's complaints are also simply wrong. DMARC Advisor has long believed there is insufficient overlap between the two proceedings to justify delaying the Dutch proceedings until the U.S. trial is held. That became indisputable when the district court dismissed dmarcian's copyright claim. [W.D.N.C. ECF 360 at 22]. dmarcian will face a trial in the Netherlands on Dutch and European copyright law issues and damages based on (already established) liability for the unlawful blockades regardless of when the U.S. trial is held and how it comes out. [W.D.N.C.

[8] DMARC Advisor has made no secret of its belief that the district court is unjustifiably prejudiced against DMARC Advisor. [Dkt. 46 at 79-81 (requesting reassignment on remand)].

ECF 294-1 at 12]. Hence, it is entirely proper for DMARC Advisor to seek a resumption of those proceedings.

Besides, dmarcian's argument also fails on its own terms. dmarcian says that it will be harmed by a stay because that will delay the U.S. proceedings, which will lead the Dutch Court to resume its proceedings. [Dkt. 81 at 6-7]. Other than vague protestations that it is spending money to fight the Dutch lawsuit, dmarcian has never really explained the supposed harm it incurs if the Dutch trial goes first. dmarcian will face a trial in the Netherlands on Dutch and European copyright law issues regardless of when the U.S. trial is held and how it comes out. [W.D.N.C. ECF 294-1 at 12].

Besides, litigating in the Netherlands is much less expensive than litigating in the U.S., and the Dutch legal system is rated as the fourth best in the world.[9] Hence, DMARC Advisor is harmed much more by being dragged into court in the U.S. than dmarcian is for being subject to Dutch proceedings that will have to be resumed regardless of whether the U.S. case goes first and regardless of the outcome of the U.S. case. There is also no harm to dmarcian because, among other things, its market share in Europe has increased from 0% to 8% during the course of this lawsuit.[10] dmarcian also has a 100%-owned subsidiary in Ireland.[11]

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[9] https://worldjusticeproject.org/rule-of-law-index/global/2025/Civil%20Justice/

[10] https://www.linkedin.com/posts/larssandbergen_dmarc-emailsecurity-dmarcvendors-activity-7368566871371059200-vjiy/

[11] https://dmarcian.com/contact/

What dmarcian's motion reveals—when considered alongside its own briefing in the district court and the Fourth Circuit—is that its actual interest lies in having the U.S. district court's factual and legal findings finalized first, so that those findings can be the basis of additional orders that require DMARC Advisor to take disadvantageous legal or factual positions in the Dutch litigation. dmarcian's own filing confirms this objective, complaining that DMARC Advisor "continued to argue, contrary to the Corrections Order, that the Dutch case was the first case on the merits, thereby undercutting the District Court's order." [Dkt. 81 at 7 n.2]. Hence, it wants to try the U.S. case first so that the district court can write the "song sheet" it believes both courts ought to be singing from. [W.D.N.C. ECF 218 at 35 (district court: "And I don't want to interfere with them any more than I hope that they don't want to interfere with me. But we need to be reading off of the same song sheet in order to do that and right now we're not doing that because I believe they have been misdirected.")].

This overriding desire for haste led dmarcian to argue that DMARC Advisor's trial counsel's recent motion to withdraw makes a scheduling conference *all the more urgent*. [W.D.N.C. ECF 485]. That makes no sense, as trial cannot possibly be scheduled until the motion to withdraw is resolved. dmarcian's reply betrays its true motive: it's worried that the Dutch court will dissolve its own stay and resume its proceedings, and dmarcian desperately wants the district court to beat the Dutch court to the punch. [W.D.N.C. ECF 485].

dmarcian's professed desire to avoid conflicting rulings between the Dutch court and the U.S. proceedings are insincere. dmarcian has consistently argued that the U.S. case needs to go first so as to avoid conflicting rulings issuing from the Dutch and U.S. courts. [*e.g.* Dkt. 53 at 7, 15, 46 (reciting the district court's belief that there was a risk that the U.S. and Dutch courts would issue conflicting rulings and that risk must be mitigated)]. But after failing to appear in Dutch court in January 2021 and being subjected to a default injunction requiring it to continue cooperating with DMARC Advisor, dmarcian ran to the Western District of North Carolina to obtain a competing and conflicting injunction against DMARC Advisor. In other words, when subjected to a ruling it did not like, it sought a competing and conflicting ruling from the U.S. court. Against that backdrop, its current arguments are disingenuous attempts to get the U.S. court to rule first and then seek to tie the Dutch court's hands based on the U.S. court's findings.

The desire to leverage one court's findings to gain advantage in a foreign proceeding is not a legally cognizable harm.

E. A stay is in the public interest.

Granting a stay will not only protect DMARC Advisor from irreparable harm and avoid irreparable harm to dmarcian, it will also promote the efficient and accurate administration of justice more effectively than an immediate trial. "[T]he expedient administration" of justice "does not outweigh the public interest in judicial accuracy." *In re Alrich Pump, LLC*, 3:23-CV-00099, 2023 WL 3108509, at *3 (W.D.N.C. April 26, 2023). The public interest in judicial efficiency can militate either in favor or against a stay. *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1112 (9th Cir.

2005); *Utah ex rel. Cox v. Environmental Protection Agency*, No. No. 23-1157, 2025 WL 1354371, at *2 (D.C. Cir. May 2, 2025). Here, where reversal if this Court takes the case is near-certain, judicial economy would be best served by a stay. *See Commodity Future Trading Comm'n v. Chilcott Portfolio Management, Inc.*, 713 F.2d 1477, 1483 (10th Cir. 1983). Given the likelihood that this Court will grant review and reverse, trying this case during this appeal creates an unnecessary and substantial risk that a trial will have to be repeated—and therefore a stay is in the public interest.

That risk is increased here because the district court has been wrong before. When a district court's previous rulings have been modified or reversed on appeal, the risk of a retrial typically justifies a stay. *Scott v. Family Dollar Stores, Inc.*, 3:08-CV-00540, 2016 WL 4267954, at *1-2, (W.D.N.C. Aug. 11, 2016). Here, the district court's earlier preliminary injunction was vacated in light of *Abitron* and its sanction was vacated and remanded by the Fourth Circuit in a prior appeal. Moreover, the district court's decision to suspend DMARC Advisor's counsel was just reversed by the Fourth Circuit. These developments suggest that the wisest course is to stay trial pending the outcome of this appeal.

dmarcian argued in the district court and the Fourth Circuit that the public interest is served by protecting the intellectual property of North Carolina companies and preventing consumers from being misled. [W.D.N.C. ECF 440 at 19]. In so arguing, Plaintiff-Appellee once again assumed the very thing that still needs to be tried—who is at fault here. Besides, the public interest is not served by applying

United States law extraterritorially in violation of *Abitron*. Nor is it served by holding trials that are likely to have to be repeated after an appeal, or by unfairly assuming that American companies' claims are more likely to be correct than foreign companies' claims.

II. <u>This Court should administratively stay trial.</u>

DMARC Advisor anticipates including in its certiorari petition a request for review of the appellate jurisdictional issues, especially whether the Corrections Order qualifies as an injunction and the court's pendent jurisdiction over the New Contempt Order. Proceeding to trial before those orders are reviewed on the merits would inflict irreparable harm on DMARC Advisor by forcing it to trial in a district court that believes it and its lawyers lied to the Dutch court.

A. DMARC Advisor's challenge to the Corrections Order and New Contempt and Sanctions Order is likely to succeed.

Federal courts of appeal have jurisdiction of appeals from orders "granting, continuing, *modifying*, refusing or dissolving injunctions." 28 U.S.C. § 1292(a)(1) (emphasis added). The panel incorrectly decided the Corrections Order was not an appealable injunction, in part because it was not "styled" as one. [Dkt. 77 at 21].

But an order of any name is still an injunction if it has "the practical effect" of denying an injunction. *Carson v. American Brands, Inc.*, 450 U.S. 79, 83 (1981). Rejecting a "magic-words test," this Court has said all that matters is what the order actually does. *Abbott v. Perez*, 585 U.S. 579, 596 (2018). If the order grants or denies a request to prohibit or require a party to take certain action, it is an injunction. *Carson*, 450 U.S. at 88. Even the Fourth Circuit, albeit in a different case, agrees: an order is an injunction if it "describe[s] the specific conduct required" or prohibited "in detail," "provide[s] a deadline to act," and "requires the enjoined party to 'perform enumerated steps under a threat of . . . contempt." *Wudi Indus. (Shanghai) Co., Ltd. v. Wong*, 70 F.4th 183, 190-91 (4th Cir. 2023) (last alteration in original) (citations omitted).

The Corrections Order possesses all these hallmarks. It ordered action that went beyond merely regulating its own proceedings, gave a specific deadline, threatened sanctions for noncompliance, and relied upon 26 pages of factual findings and legal conclusions. [W.D.N.C. ECF 216]. Hence, this Court will likely conclude that appellate jurisdiction exists over the Corrections Order, which justifies the exercise of pendent appellate jurisdiction over the New Contempt and Sanctions Order. [Dkt. 21 at 22-24].

The Fourth Circuit's conclusion that the Corrections Order is nonetheless not an appealable injunction rested on the absence of irreparable, irremediable harm. [Dkt. 77 at 21-22]. But the Fourth Circuit mistakenly assumed that the harm, if any, is to principles of international comity and can be corrected, if at all, after final judgment. [Dkt. 77 at22-23]. In fact, the primary harm consists in DMARC Advisor and its counsel being coerced to submit filings to a foreign court that reflect how the district court believes the foreign litigation should be conducted, not how DMARC Advisor or its counsel believes it should be litigated. DMARC Advisor has effectively been forced to shoot itself in the foot in the Netherlands: after its Dutch counsel submitted copies of the district court's order and verbatim statement, the Dutch

Court ultimately stayed the Dutch litigation. [W.D.N.C. ECF 401 at 18]. And the toothpaste cannot be put back in the tube—the Dutch Court has been infected with the idea that an American judge says that DMARC Advisor's lawyers lied about American law and the status of the American case. Only immediate vindication on appeal can rectify that harm.

The Hobson's choice that DMARC Advisor faced when initially confronted with the Corrections Order now confronts it again on appeal. With a short deadline, DMARC Advisor faced contempt sanctions including striking of its answer versus irreparable harm to its position in the Dutch litigation.[12] Now, the Fourth Circuit says that the fact that the harm has been done means it cannot be fixed, or at least that it can be corrected after final judgment as well as it can be corrected now. [Dkt. 77 at 21-23].

Contrary to the panel's belief, an appellate ruling that the district court's Corrections Order was issued in error would of course have an immediate effect on the Dutch proceedings. DMARC Advisor would provide such a ruling to the Dutch court as promptly as possible. And since the Dutch court's stay was issued based upon the Corrections Order, a reversal of that order would necessarily put the issue of the Dutch court's stay back in play.

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[12] And now, the district court has given DMARC Advisor as a foreign defendant only five business days to obtain substitute counsel who is prepared to enter an appearance and proceed promptly to trial on an extensively litigated case that has been going on for over five years and has nearly five hundred docket entries, and that is also related to parallel litigation in California and the Netherlands. [W.D.N.C. ECF 481 at 3-5].

Regardless, upon reversal of the Corrections Order, DMARC Advisor could once again take the legal and factual positions it believes correct in the Dutch proceedings without fear of being held in contempt for that. The "chain of causation" from reversal or vacatur by this Court to real-world effects in the Dutch court is concrete, not speculative. The panel expressly admitted there is a live issue when it said that "trying to unwind past interference in the Dutch proceedings would require further interference."[13] [Dkt. 77 at 22]. Most importantly, the chilling effect that is created by the Corrections Order is an irreparable harm requiring immediate review.

Once jurisdiction is accepted, both the Corrections Order and the New Contempt and Sanctions Order should be reversed. For all of the reasons set forth more fully in DMARC Advisor's filings in the Fourth Circuit, [Dkt. 14 at 17-20; Dkt. 46 at 59-60], accepting jurisdiction will naturally lead to reversal on the merits of both.

B. This Court will likely accept review of the issue of appellate jurisdiction over the Corrections Order.

The Fourth Circuit's opinion created circuit splits on jurisdictional questions as well. For instance, other circuits have not required a showing of irreparable harm for immediate appeal from orders that effectively *grant* an injunction. *La Belle Dairy, LLC v. Sharpe Holdings, Inc.*, __ F.4th __, __ (8th Cir. 2026); *Salazar ex rel. Salazar v. District of Columbia*, 671 F.3d 1258, 1261-62 (D.D.C. 2012) (citing D.C. Circuit

[13] Unwinding the interference would not constitute further interference. It would, in fact, partly rectify the past interference by vacating and undoing the district court's prior interference that still casts a shadow over the Dutch proceedings.

precedents). Additionally, this Court should decide the important federal issue of whether, to qualify as an order *granting* an injunction, the order must cause irreparable harm that can only be rectified by an immediate appeal—an issue it has previously decided only in the context of immediate appeals to the Supreme Court pursuant to 28 U.S.C. 1253. *Abbott*, 585 U.S. at 597.

Other aspects of the Fourth Circuit's opinion on appellate jurisdiction conflict with decisions of other circuits. For instance, adverse effects in proceedings in another tribunal can constitute irreparable harm, *Government Employees Ins. Co. v. Patel*, 166 F.4th 280, 291-93 (2d Cir. 2026), which in turn supports immediate appealability. *Defense Distributed v. Attorney General of New Jersey*, 972 F.3d 193, 202 (3d Cir. 2020) (concluding that an order that did not hinder a party seeking relief in another tribunal could not inflict irreparable, irremediable harm).

C. DMARC Advisor will be irreparably harmed if the Corrections Order and the New Contempt and Sanctions Order are allowed to stand.

DMARC Advisor's irreparable harm primarily consists of the coercion of its litigation choices in the Dutch proceedings. But there is more. For one, the district court's conclusion that Mr. Millen made "disingenuous statements" stands uncorrected to this day. [W.D.N.C. ECF 453 at 7]. Proceeding to trial with counsel the district court has (mistakenly) branded as dishonest, before that error is corrected, risks severely prejudicing DMARC Advisor's presentation of its case. Of course, unless his firm's motion to withdraw is granted, Mr. Millen has to be brought up to speed now that he can once again represent DMARC Advisor, and will need to discuss trial and overall strategy with DMARC Advisor so that he can start contributing to filings and appearing at proceedings. And if the motion is granted and DMARC Advisor has to proceed with new trial counsel, it will take a lot longer than either dmarcian or the district court is willing to give for new trial counsel to become familiar with five years of litigation, two appeals, numerous depositions, and parallel litigation in California and the Netherlands.

Two other harms identified in DMARC Advisor's stay briefing will be irreparable if not corrected until after an expensive trial has already been held and a retrial has to be financed.

First, DMARC Advisor is still prohibited from modifying the software's source code. [W.D.N.C. ECF 404 at 2]. A prohibition on innovation is deadly to technology companies.

Second, enforcing the district court's $400,000 sanctions award will also cause irreparable harm because the "expenditure of valuable resources" that "will be irrevocably lost" is one kind of injury that weighs heavily in favor of a stay. *West Virginia v. United States Env't Prot. Agency*, 90 F.4th 323, 331 (4th Cir. 2024). When circumstances render funds vital, the loss of those funds is irreparable harm. *Id.; see also City of Alexandria v. Helms*, 719 F.2d 699, 700-01 (4th Cir. 1983); *Doran v. Salem Inn., Inc.*, 422 U.S. 922, 932 (1975). This is especially true where the appellate ruling could require the parties to finance an unnecessary retrial. *See Nat'l Inst. of Health v. American Public Health Ass'n*, 145 S. Ct. 2658 (2025); *Underwood v. Harkleroad*, 5:04-CV-00193 MU-02, 2010 WL 324416, at *1 (W.D.N.C. Jan. 19, 2010).

D. A stay is in the public interest.

The district court ruled that "the public has an interest . . . in ensuring that disingenuous statements made by those involved in litigation are addressed appropriately." [W.D.N.C. ECF 453 at 7]. This assumes both the correctness of the very rulings DMARC Advisor is challenging and that appellate review would undermine the interest. But Mr. Millen did nothing more than act in good faith to assist DMARC Advisor's Dutch counsel make an argument to a Dutch court about the interpretation and application of Dutch procedural law. [Dkt. 46 at 17-21, 46-51]. That the alleged misrepresentation was made in Dutch court weakens the argument that a stay would harm the public interest in America judicial proceedings. Tellingly, Plaintiff-Appellee fled to the United States court with poor translations of Dutch proceedings rather than file an ethics complaint against DMARC Advisor's Dutch counsel with the appropriate Dutch authorities[14] or seek to show the Dutch Court how it had allegedly been duped.

CONCLUSION

For the reasons set forth above, DMARC Advisor respectfully asks this Court to stay the Second Amended Preliminary Injunction, stay the mandate or extend the administrative stay of trial, and administratively stay the mandate until it rules on this motion.

Respectfully submitted,

/s/ Matthew Nis Leerberg
Matthew Nis Leerberg

[14] *See* https://www.advocatenorde.nl/de-advocaat/klacht-over-een-advocaat.

Counsel of Record
FOX ROTHSCHILD LLP
301 Hillsborough Street, Suite 1120
Raleigh, NC 27603
(919) 755-8700
mleerberg@foxrothschild.com

Dated: August 31, 2026

APPENDIX

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-1790

DMARCIAN, INC.,

Plaintiff – Appellee,

v.

DMARC ADVISOR BV, f/k/a dmarcian Europe BV,

Defendant – Appellant.

No. 25-1084

DMARCIAN, INC.,

Plaintiff – Appellee,

v.

DMARC ADVISOR BV, f/k/a dmarcian Europe BV,

Defendant – Appellant.

Appeals from the United States District Court for the Western District of North Carolina at Asheville. Martin K. Reidinger, District Judge. (1:21−cv−00067−MR)

Argued: May 7, 2026 Decided: July 10, 2026

Before WILKINSON and WYNN, Circuit Judges, and KEENAN, Senior Circuit Judge.

Affirmed in part and dismissed in part by published opinion. Judge Wilkinson wrote the opinion, in which Judge Wynn and Senior Judge Keenan joined.

ARGUED: Matthew Aaron Hughes, FOX ROTHSCHILD LLP, Greenville, South Carolina, for Appellant. Pamela Suzanne Duffy, ELLIS & WINTERS, LLP, Greensboro, North Carolina, for Appellee. **ON BRIEF:** Gregory G. Holland, Greensboro, North Carolina, Matthew Nis Leerberg, FOX ROTHSCHILD LLP, Raleigh, North Carolina; Samuel B. Hartzell, WOMBLE BOND DICKINSON (US) LLP, Raleigh, North Carolina, for Appellant. Tyler C. Jameson, ELLIS & WINTERS, LLP, Greensboro, North Carolina; David A. Dorey, BLANK ROME LLP, Wilmington, Delaware, for Appellee.

WILKINSON, Circuit Judge:

This appeal involves a cross-border intellectual property dispute between two software companies. dmarcian, Inc. (dInc), an American company with headquarters in North Carolina, alleges that DMARC Advisor BV (dBV), a Dutch company, stole its brand name, software code, and customers. The case was last before us in 2023. *See dmarcian, Inc. v. dmarcian Eur. BV*, 60 F.4th 119 (4th Cir. 2023).

dBV argued last time that it was not subject to United States law. As it saw things, the alleged theft took place in the Netherlands, not the United States. We rejected that argument. Wherever the alleged theft took place, we held that it had effects in the United States that brought it within the reach of United States law.

dBV now makes the argument again, contending that the Supreme Court's intervening decision in *Abitron Austria GmbH v. Hetronic International, Inc.*, 600 U.S. 412 (2023) should change our answer. We reject dBV's argument again. *Abitron* shifts our focus from effects to conduct, but dBV's alleged theft involved significant conduct in the United States too. The new rules in *Abitron* do not allow dBV to escape liability.

In the modern world, intellectual property theft often cannot be confined to a single sovereign. An actor in the Netherlands may traffic in American trademarks and trade secrets as if there were no national borders or ocean between them. Whether the effects of its conduct are under scrutiny, as before *Abitron*, or the conduct itself is under scrutiny, as now, the fundamental question remains whether the actor has sufficient interrelationships with the United States to make it an appropriate subject of our law.

The district court's second amended preliminary injunction, which is justified by dBV's conduct in the United States, comports with *Abitron*. We affirm the injunction and dismiss the remainder of dBV's appeal.

I.

The underlying facts of this case were set out in our 2023 opinion. It remains now, as it was then, a case about "a broken business relationship" between dInc and dBV. *dmarcian*, 60 F.4th at 128. This appeal, however, involves two new sets of issues.

A.

When dInc filed suit in North Carolina, it brought a litany of claims. dBV, it said, had breached the parties' contract and committed more than a dozen business torts and intellectual property violations. The district court found that dInc was likely to prevail on its copyright infringement, trademark infringement, trade secret misappropriation, and tortious interference claims. It thus issued a preliminary injunction against dBV.

On appeal, dBV argued that the preliminary injunction impermissibly sought to apply United States and North Carolina law to its activities abroad. We disagreed, explaining that the injunction was justified largely by the domestic effects of dBV's conduct. dBV had created a website that featured dInc's name and logo, the likenesses of dInc employees, and the identities of dInc customers. It had used this website to sell the same software product as dInc. The website had not merely reached American customers by accident. To the contrary, dBV placed a button on the website directed to customers in "the Americas," it sent messages to American customers, and it convinced at least one American company, Clarizen, to switch from dInc's software product to dBV's. We affirmed the preliminary injunction because these effects in the United States were sufficient under then-binding precedent to bring dBV within the reach of United States law. *See dmarcian*, 60 F.4th at 138–43.

Only a few months later, in *Abitron*, the Supreme Court announced a new set of rules governing the territorial reach of intellectual property law. *See* 600 U.S. at 417–23. For unrelated reasons, the district court dismissed dInc's copyright claim. In response to both developments, the district court modified its preliminary injunction. The new injunction, labeled the second amended preliminary injunction, was intended to conform with *Abitron* and reflect that dInc no longer had a likelihood of success (or any chance of success) on its copyright claim. *See dmarcian, Inc. v. DMARC Advisor BV*, No. 1:21-cv-67, 2024 WL 5188766, at *3–6 (W.D.N.C. Dec. 20, 2024).

Under the terms of the second amended preliminary injunction, which remains in effect, dBV was prohibited from doing the following:

> (1) providing services to any customers located outside of Europe, Africa, or Russia . . .;
> (2) providing access to any of its websites to IP addresses from countries outside of Europe, Africa, or Russia. . . .;
> (3) making changes to the trade secret source code . . .;
> (4) using [dInc's] trademark in any manner in the United States or on any websites which are accessible to IP addresses from the United States, unless such use is accompanied by a [disclaimer]. . . .;
> (5) displaying any website with the "dmarcian" name which is accessible to IP addresses from the United States, unless that website includes a [disclaimer]. . . .;
> (6) redirecting, encouraging, or allowing any customer to change its payment recipient from [dInc] to [dBV]. . . .;
> (7) making any public statement about [dInc] except as expressly allowed or directed herein.

J.A. 2069–72.

dBV now appeals the second amended preliminary injunction.

B.

dInc is not the only party to this troubled relationship that believes it has been wronged. In the Netherlands, a reciprocal lawsuit brought by dBV charges dInc with misconduct.

After dBV filed its Dutch lawsuit, dInc asked the Dutch court to impose a stay pending the outcome of the American lawsuit. dInc pointed to a provision of Dutch law intended to prevent dueling suits over the same subject matter across national borders. In response, dBV told the Dutch court that no stay was warranted because the two suits addressed sufficiently distinct subject matter. dBV also said that, even if the subject matter of the two suits overlapped, the Dutch suit should take priority because it was filed first. The Dutch court agreed and declined to enter a stay.

Back in North Carolina, the district court took issue with what had transpired in the Netherlands. It concluded that dBV's arguments to the Dutch court had misrepresented the subject matter and start date of the American litigation. As a remedial measure, it ordered dBV to file a document with the Dutch court providing a corrected account ("the correction order"). *See dmarcian, Inc. v. DMARC Advisor BV*, No. 1:21-cv-67, 2023 WL 4223536, at *9–10 (W.D.N.C. June 27, 2023).

dBV filed the document. As a result, the Dutch court reversed its prior decision and stayed its proceedings. The district court in North Carolina nevertheless concluded that dBV had not filed the document in the manner directed by the correction order, so it held dBV in civil contempt and ordered dBV to pay dInc $400,000 ("the contempt order"). *See* *dmarcian, Inc. v. DMARC Advisor BV*, No. 1:21-cv-67, 2024 WL 5193519, at *11 (W.D.N.C. Dec. 20, 2024).

dBV now appeals both the correction order and the contempt order.[1]

II.

We begin with dBV's appeal of the second amended preliminary injunction. We have appellate jurisdiction over the injunction pursuant to 28 U.S.C. § 1292(a)(1). We review it for abuse of discretion, examining factual findings for clear error and legal conclusions de novo. *Centro Tepeyac v. Montgomery Cnty.*, 722 F.3d 184, 188 (4th Cir. 2013).

dBV's primary contention is that the injunction runs afoul of the new extraterritoriality rules announced in *Abitron*. According to dBV, it did not engage in sufficient conduct in the United States to justify the application of United States law. dBV's secondary contention is that the injunction violates the specificity requirements in Federal Rule of Civil Procedure 65(d)(1). We address each contention in turn.

A.

The extraterritoriality rules in *Abitron* are new in several ways.

The old rules came from *Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952). Under *Steele*, the Lanham Act's prohibitions on trademark infringement and unfair competition usually applied if a defendant's conduct had "effects" in the United States, even if that

[1] The district court also held dBV's attorney in contempt and suspended him from practicing law in the Western District of North Carolina. The attorney's appeal of the contempt order is addressed in a separate opinion. *See dmarcian, Inc. v. Pressly McAuley Millen*, No. 25-1085, --- F.4th --- (4th Cir. 2026).

conduct occurred abroad. *Id.* at 286; *see also, e.g.*, *Nintendo of Am., Inc. v. Aeropower Co., Ltd.*, 34 F.3d 246, 250 (4th Cir. 1994) (applying *Steele* with a three-part test focused on "effects on commerce within the United States").

In the decades after *Steele*, the Supreme Court developed a more comprehensive two-step extraterritoriality inquiry. The inquiry is grounded in the presumption against extraterritoriality, a canon of statutory construction which counsels that "federal laws will be construed to have only domestic application" "[a]bsent clearly expressed congressional intent to the contrary." *RJR Nabisco, Inc. v. European Cmty.*, 579 U.S. 325, 335 (2016).

At step one of the inquiry, the Court asks whether the statutory provision at issue "gives a clear, affirmative indication that it applies extraterritorially." *Id.* at 337. If so, the provision may apply extraterritorially. If not, the provision may only apply domestically. In the latter scenario, the Court proceeds to step two to determine whether the case at hand "involves a permissible domestic application" of the provision or "an impermissible extraterritorial application." *Id.* The case involves a permissible domestic application "[i]f the conduct relevant to the statute's focus occurred in the United States." *Id.*

The Court proceeded to apply this two-step inquiry to several statutory provisions. *See, e.g.*, *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 265–67 (2010) (Securities Exchange Act of 1934); *RJR Nabisco*, 579 U.S. at 337–38 (Racketeer Influenced and Corrupt Organizations Act (RICO)); *WesternGeco LLC v. ION Geophysical Corp.*, 585 U.S. 407, 412–13 (2018) (Patent Act); *Nestlé USA, Inc. v. Doe*, 593 U.S. 628, 632–33 (2021) (Alien Tort Statute). Then, in *Abitron*, the Court "put aside" *Steele* and applied the two-step inquiry to the Lanham Act too. *Abitron*, 600 U.S. at 422.

Pursuant to *Abitron*, two provisions of the Lanham Act—15 U.S.C. § 1114(1)(a) and § 1125(a)(1)—no longer apply extraterritorially. The conduct relevant to the focus of these provisions, which must occur domestically before the Act may apply, is "infringing use in commerce" of a trademark. *Abitron*, 600 U.S. at 422. Finally, *Steele*'s effects-focused test is no longer good law.

B.

Although *Abitron* is new, the tensions it reconciles are longstanding.

Congress, if it wishes, may legislate "beyond the territorial boundaries of the United States." *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991). When it does so, however, it risks causing "international discord." *RJR Nabisco*, 579 U.S. at 335. Other nations may see the application of United States law in their territory as a violation of their sovereignty, and businesses may find it challenging to comply with overlapping or even conflicting legal regimes.

These risks are especially acute in the context of intellectual property law, which is generally territorial. A trademark has "a separate existence in each sovereign territory in which it is registered or legally recognized as a mark." *Abitron*, 600 U.S. at 426 (quoting 5 J. Thomas McCarthy, Trademarks and Unfair Competition § 29:1, at 29–4 to 29–5 (5th ed. 2023)). Patents and copyrights depend on national borders too, and "[f]oreign law may embody different policy judgments" than American law about the strength of protection they should be accorded. *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 455 (2007) (internal quotation marks omitted). If United States intellectual property law sought to rule the world, it would quickly bump up against other regimes.

At the same time, businesses today operate seamlessly across national borders. There are few more attractive markets than the United States, which promises a large consumer base and a judicial system that affords stability to commercial transactions. If foreign companies could operate in the United States and escape the reach of American intellectual property law by virtue of their national origin—or by virtue of their intermingled domestic and foreign operations—American companies would be left defenseless against even the most blatant acts of theft. This vulnerability would violate the fundamental promise of our laws "that the courthouse door is open to [American companies] when their intellectual property is misused." *dmarcian*, 60 F.4th at 147.

Abitron carefully balances these competing interests. While purely foreign conduct is now shielded from the Lanham Act, foreign actors who enter American markets and steal American intellectual property are not. "[D]ue regard" is given "both to international duty and convenience, and to the rights of [our] own citizens." *Hilton v. Guyot*, 159 U.S. 113, 164 (1895).

The balance struck by *Abitron* echoes that struck by the law of personal jurisdiction. When a defendant has "minimum contacts" with a forum, he may be haled into its courts. *Fuld v. Pal. Liberation Org.*, 606 U.S. 1, 12 (2025) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980)). A corporate defendant establishes such minimum contacts by "purposefully avail[ing] itself of the privilege of conducting" business there. *Id.* at 13 (citing *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 592 U.S. 351, 359 (2021)). In a similar way, a business based abroad that purposefully avails itself of American markets opens itself up to liability under American intellectual property law.

C.

When this case is considered in light of *Abitron*, dInc continues to have a likelihood of success on the merits of its trademark, trade secret, and tortious interference claims.

1.

dInc's trademark infringement claim was brought under 15 U.S.C. § 1114(1)(a), one of the same provisions of the Lanham Act at issue in *Abitron*. *Abitron* made clear that this provision only reaches a defendant if he has committed an "infringing use in commerce, as the Act defines it," in the United States. 600 U.S. at 422.

The Act defines an infringing use as a "use in commerce . . . in connection with the sale, offering for sale, distribution, or advertising of any goods or services" in a manner "likely to cause confusion." 15 U.S.C. § 1114(1)(a). This definition contains three components. The first, "use in commerce," means that "the mark is being used in commerce in the constitutional sense." *Radiance Found., Inc. v. NAACP*, 786 F.3d 316, 323 (4th Cir. 2015).[2] The second and third, "in connection with . . ." and "likely to cause confusion," are well established by our case law. *See, e.g.*, *id.* at 322–25; *People for the Ethical Treatment of Animals v. Doughney*, 263 F.3d 359, 365–67 (4th Cir. 2001).

[2] In the context of trademark registration under 15 U.S.C. § 1051, "use in commerce" carries the somewhat stricter definition found in 15 U.S.C. § 1127. *See, e.g.*, *VersaTop Support Sys., LLC v. Ga. Expo, Inc.*, 921 F.3d 1364, 1368–70 (Fed. Cir. 2019). Since *Abitron* refers to an "infringing use in commerce," the § 1114(1)(a) definition rather than the § 1127 definition applies here. 600 U.S. at 422–23; *accord Hetronic Int'l, Inc. v. Hetronic Ger. GmbH*, 99 F.4th 1150, 1162, 1167 (10th Cir. 2024).

This definition plainly encompasses not just "direct sales," but also "marketing, advertising, and distributing activities." *Hetronic Int'l, Inc. v. Hetronic Ger. GmbH*, 99 F.4th 1150, 1163, 1167 (10th Cir. 2024). When direct sales are at issue, they occur in the United States if the customers are in the United States. *Id.* at 1163. When marketing, advertising, and distribution are at issue, they occur in the United States if the intended recipients are in the United States.

We readily conclude that dBV's conduct meets this standard. As we noted in our prior opinion, dBV maintained a website that used dInc's trademark as its domain name and was "virtually identical" to dInc's website, all in an effort to sell "essentially the same" services as dInc. *dmarcian*, 60 F.4th at 140 (quoting *dmarcian, Inc. v. dmarcian Eur. BV*, No. 1:21-cv-67, 2021 WL 2144915, at *18 (W.D.N.C. May 26, 2021)). The website was accessible in the United States and featured a button for customers in "the Americas," and dBV affirmatively sent a message to customers in the United States highlighting its software product. *Id.* at 129, 140. These facts are sufficient to demonstrate marketing or advertising in the United States. dBV also succeeded in luring at least one company based in the United States, Clarizen, to switch providers, which is sufficient to demonstrate a direct sale in the United States. Although our prior opinion applied *Steele*'s effects-focused test, the bottom line remains the same under *Abitron*'s conduct-focused test.

If dBV had passively operated a website that was accessible in the United States, and there was no additional evidence that it had targeted or interacted with customers in the United States, the Lanham Act might well not reach it. Since most businesses around the world have websites that are accessible in the United States, a rule that hinged on web access alone would turn the presumption against extraterritoriality into "a craven watchdog." *Morrison*, 561 U.S. at 266. But on the facts here, which go beyond mere web access, it is likely that dBV used dInc's trademark or its imitation "in commerce . . . in connection with the sale, offering for sale, distribution, or advertising of . . . services" in the United States. 15 U.S.C. § 1114(1)(a). We need not rehash the "likely to cause confusion" analysis, which remains the same in the wake of *Abitron*.

2.

dInc's trade secret claim was brought under the Defend Trade Secrets Act (DTSA), which provides a private civil cause of action to owners of trade secrets that have been misappropriated. 18 U.S.C. § 1836(b)(1). Since *Abitron* concerned the Lanham Act rather than the DTSA, the decision's holding does not directly affect this claim. Nevertheless, *Abitron*'s two-step framework reinforces that dInc is likely to succeed in its DTSA arguments.

The DTSA's private civil action provision quite explicitly "applies to conduct occurring outside the United States," so long as the offender committed "an act in furtherance of the offense . . . in the United States." *Id.* § 1837. This language provides the "unmistakable instruction" from Congress that is needed to rebut the presumption against extraterritoriality at step one of *Abitron*'s framework. 600 U.S. at 418; *see also RJR Nabisco*, 579 U.S. at 338–39 (coming to the same conclusion about a RICO provision that prohibits certain conduct "tak[ing] place outside the United States" (quoting 8 U.S.C. § 1957(d)(2))). That means the DTSA's reach is global.

Once the presumption has been rebutted, the only remaining question is whether the facts of the case satisfy "the limits Congress has . . . imposed on the statute's foreign application." *Abitron*, 600 U.S. at 418 (quoting *RJR Nabisco*, 579 U.S. at 337–38). The relevant limit in this DTSA provision is the presence of a domestic "act in furtherance of the offense." 18 U.S.C. § 1837(2).

Although the DTSA applies extraterritorially and the Lanham Act does not, the two statutes are in a certain respect alike. When a foreign company steals an American company's trade secrets and commits some act in furtherance of its theft inside the United States, the DTSA applies. And when a foreign company steals an American company's trademarks and commits an act of infringement inside the United States, the Lanham Act applies. Both laws require culpable domestic conduct for justification. The difference lies only in the nature of the conduct required.

It would be a mistake, then, to conclude that the DTSA's global reach facilitates careless intervention in the affairs of other nations. The DTSA, like the Lanham Act as interpreted in *Abitron*, protects American property interests without running roughshod over international comity interests. While "[f]oreign conduct is [generally] the domain of foreign law," *Microsoft Corp.*, 550 U.S. at 455 (second alteration in original), foreign conduct becomes the domain of the DTSA once the offender has chosen to operate here.

Since dBV has so chosen, the DTSA may reach it. As we noted in our prior opinion, dBV "'originally gained access' to dInc's trade secrets through 'data stored on servers within the United States.'" *dmarcian*, 60 F.4th at 141 (quoting *dmarcian*, 2021 WL 2144915, at *22). An agreement between the parties permitted dBV to use dInc's trade secrets for limited purposes, but dBV went "beyond the scope of the parties' agreement" by using those trade secrets in its own software product—a product that not only replicated dInc's product but directly competed with it. *dmarcian*, 2021 WL 2144915, at *21. dBV then marketed its product in the United States by messaging American customers and featuring an "Americas" button on its website, and it successfully convinced at least one American company, Clarizen, to switch to its product. *Id.* at *22. These efforts involved "using [dInc's] trade secrets to conduct business with customers in the United States." *Id.*

In light of these actions, there is no merit to dBV's contention that it is beyond the reach of the DTSA. If dBV had not gained access to dInc's trade secrets in the United States, and it had not used those trade secrets to seek out customers in the United States, this would be a different lawsuit. But if dBV had not taken those steps, it is possible that this would not be a lawsuit at all. For now, a lawsuit it is, and one in which dInc is likely to succeed on its DTSA claim.

3.

The last of dInc's claims on which the district court found a likelihood of success are North Carolina common law claims: tortious interference with contract and tortious interference with prospective economic advantage.

These are not directly affected by *Abitron*'s holding or its two-step framework. The presumption against extraterritoriality is a federal canon of statutory construction, so it is inapplicable where there is no federal statute at issue. *Wudi Indus. (Shanghai) Co., Ltd. v. Wong*, 143 F.4th 250, 259 (4th Cir. 2025).

Nevertheless, state common law and federal statutory law share an essential feature: neither "rule[s] the world." *Microsoft Corp.*, 550 U.S. at 454 (referring to the latter). A state may not simply apply its common law beyond its borders where it has no relationship to a dispute. The federal Constitution, for example, prohibits a state from applying its law to cases in which it does not have "a significant contact or significant aggregation of contacts, creating state interests." *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 313 (1981). Suffice it to say that state common law must abide by a similar balance to the one struck by *Abitron* between the rights of citizens and regard for other sovereigns.

As we articulated in our prior opinion, dInc's tortious interference claims are consistent with this balance. *dmarcian*, 60 F.4th at 142–43. dInc, a North Carolina entity, had contracts with its existing customers and used its website to solicit new customers, with whom it hoped to execute contracts. *dmarcian*, 2021 WL 2144915, at *23–24. dBV sought to interfere with these existing and prospective contractual relationships by cloning dInc's website and marketing its own services to some of the same customers. It did succeed in winning over at least one customer, Clarizen, that had previously been a customer of dInc. The harm from its conduct befell dInc. This chain of events touched North Carolina sufficiently closely to justify the application of North Carolina tort law.

D.

Given dInc's continued likelihood of success on the merits of its trademark, trade secret, and tortious interference claims, the second amended preliminary injunction is a permissible restraint on dBV.

"The purpose of a preliminary injunction is . . . to preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). When a defendant is likely violating the rights of a plaintiff, a district court may issue a preliminary injunction that provides the plaintiff "complete relief" from the ongoing violation. *Trump v. CASA, Inc.*, 606 U.S. 831, 851 (2025). The court may not, however, provide more relief than that. *Id.* The scope of the remedy afforded by the injunction should match the scope of the violation it seeks to prevent.

Since neither the scope of the ongoing violation nor the remedy that would best prevent it are always clear, especially at the preliminary stage, district courts have some leeway when crafting an injunction. It is "an exercise of discretion and judgment," *Trump v. Int'l Refugee Assistance Project*, 582 U.S. 571, 579 (2017), characterized by "[f]lexibility rather than rigidity," *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944). The match between violation and remedy must be approximate, but it need not be perfect.

Since the scope of the second amended preliminary injunction approximately matches the scope of dBV's likely violations, the injunction is permissible.

The fourth and fifth decretal paragraphs are supported by dInc's Lanham Act claims. Although the Lanham Act prohibits only domestic trademark infringement, the decretal paragraphs respect this limitation by enjoining use of dInc's name and trademarks only on websites "accessible to IP addresses from the United States." J.A. 2070–71. The injunction need not be so tailored that it prohibits the precise manner in which dBV likely violated the Lanham Act—by, for example, featuring a button for American customers and executing a direct sale in the United States. "The more specific the order, the more opportunities for evasion," and an injunction that can be evaded is not one that provides complete relief. *Minn. Mining & Mfg. Co. v. Pribyl*, 259 F.3d 587, 598 (7th Cir. 2001) (quoting *Scandia Down Corp. v. Euroquilt, Inc.*, 772 F.2d 1423, 1431 (7th Cir. 1985)).

The other decretal paragraphs of the injunction are supported by dInc's DTSA and tortious interference claims. The first and second paragraphs apply to North and South America, Oceania, and part of Asia, and the third, sixth, and seventh paragraphs apply worldwide. Given the express extraterritorial scope of the DTSA and the long arm of North Carolina tort law, we see no errors in the territorial reach of these paragraphs.

E.

Finally, dBV challenges the injunction's third decretal paragraph on additional grounds. dBV says the paragraph violates Federal Rule of Civil Procedure 65(d)(1), which requires that an order granting an injunction "state its terms specifically" and "describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required."

The rule is "no mere technical requirement[]" that can be lightly brushed off. *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974) (per curiam). It embodies the serious substantive goals of "prevent[ing] uncertainty and confusion on the part of those faced with injunctive orders" and enabling "intelligent appellate review." *Id.* at 476–77.

At the same time, the rule does not require that every injunction read like an instruction manual. There are good reasons why a district court might choose to craft an injunction in general terms, including that, as the preceding discussion noted, a more specific order can be more easily evaded. In a trade secrets case, the district court may also wish to avoid inadvertently disclosing the plaintiff's trade secrets by describing them with too much particularity. *Minn. Mining & Mfg. Co.*, 259 F.3d at 597–98.

For these reasons, our cases have taken a practical approach to the Rule 65(d)(1) inquiry. We consider "the language of an injunction . . . in the light of the circumstances surrounding its entry." *United States v. Fuller*, 919 F.2d 139 (Tbl.), 1990 WL 190495, at *3 (4th Cir. Dec. 4, 1990) (per curiam). When evaluating whether an injunction provides a defendant fair notice about what is proscribed, we will not "strip[] it of its context." *Kadel v. Folwell*, 100 F.4th 122, 160 (4th Cir. 2024) (en banc), *vacated on other grounds by Folwell v. Kadel*, 145 S. Ct. 2838 (Mem.) (2025).

The third decretal paragraph prohibits dBV from "making changes to the trade secret source code." J.A. 2070. In context, this is sufficiently clear to pass Rule 65(d)(1) muster. The district court found in 2021 that dBV likely misappropriated the trade secrets dInc had in its source code, and we affirmed that finding on appeal in 2023. *dmarcian*, 60 F.4th at 141–42. The district court repeated the finding when it issued the second amended preliminary injunction in 2024. The "trade secret source code" referenced in the injunction is the same trade secret source code that has been the subject of the likelihood of success finding all along. *See Ciena Corp. v. Jarrard*, 203 F.3d 312, 321–22 (4th Cir. 2000) (affirming a similar injunction). If dBV's real objection is to the trade secret definition underlying the likelihood of success finding, the time to bring it has long passed.

* * *

In affirming the injunction, we remain cognizant of the fact that this case and the litigation in the Netherlands have a degree of overlap. We wish to express our sincere appreciation for the conscientious manner in which our colleagues in the Dutch judiciary have approached their end of the case.

We have no desire to indiscriminately sweep activities in the Netherlands into the net of American law. As the facts of this case reveal, however, intellectual property disputes often involve interrelationships that cannot be confined to a single sovereign. If we were to vacate the preliminary injunction, we would be authorizing a foreign company to steal the intellectual property of an American company, use the stolen property to target American customers, and then claim its foreign status as a shield against American law. This American company and others in its shoes would be left defenseless. Respect for other sovereigns does not require us to countenance such behavior.

III.

Having addressed dBV's appeal of the second amended preliminary injunction, we turn to dBV's appeals of the correction order and the contempt order. We dismiss both for lack of appellate jurisdiction.

A.

Recall that the district court issued the correction order in response to proceedings in the Netherlands. dBV, in the course of opposing a stay, told the Dutch court that the American lawsuit involved different subject matter and was filed later than the Dutch lawsuit. These arguments initially succeeded in convincing the Dutch court not to enter a stay. The district court, however, held that dBV's comments were misrepresentations and ordered dBV to submit a document to the Dutch court correcting them. When dBV submitted the document, the Dutch court reversed itself and entered a stay.

Generally, a court of appeals has jurisdiction to review a district court order only if the order is "final." 28 U.S.C. § 1291. An order is final when "nothing remains for the district court to do" in the case "except execute the judgment." *United States ex rel. Lutz v. United States*, 853 F.3d 131, 136 (4th Cir. 2017). dBV does not argue, nor could it, that the correction order is final. Instead, it argues that the correction order fits into three narrow exceptions to the finality rule.

1.

First, dBV says we have jurisdiction over the correction order pursuant to 28 U.S.C. § 1292(a)(1). This provision permits a court of appeals to consider an interlocutory appeal of an injunction or an order that has the "practical effect" of an injunction. *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 83 (1981). If the order has the "practical effect" of an injunction but is not styled as one, § 1292(a)(1) only permits interlocutory review when declining review would cause "serious, perhaps irreparable, consequence" and prevent the order from ever being "effectually challenged." *Carson*, 450 U.S. at 84.

The correction order does not satisfy these requirements. It is not styled as an injunction and, even if we assume it has the practical effect of an injunction, we see no irreparable harm from declining to review it now. To put a finer point on it, there are no harms caused by the correction order that we could remedy now but could not remedy in an appeal from a final judgment.

The primary harm to which dBV points is harm to international comity principles. The correction order, dBV says, improperly "interfered with the Dutch proceedings." Supp. Opening Br. at 52. Even if we assume this allegation is correct, however, it is retrospective.

Because the document at the center of the correction order has been filed with the Dutch court, the Dutch proceedings have already been interfered with. "[W]e cannot unring that bell," either now or after a final judgment. *United States v. Under Seal*, 853 F.3d 706, 724 (4th Cir. 2017).

This appeal is not like ones addressing the wrongful disclosure of documents. In those appeals, we have consistently held "that a party's 'continued possession' of information wrongfully disclosed constitute[s] an ongoing injury" capable of at least partial remediation by an order telling the party to return or dispose of the documents. *Stanko v. Stirling*, 109 F.4th 681, 698–99 (4th Cir. 2024) (quoting *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 13 (1992)). In this case, by contrast, there is no ongoing injury to international comity principles. The Dutch proceedings are currently being left alone. In fact, trying to unwind past interference in the Dutch proceedings would require further interference. The harm to international comity, real or imagined, is simply irremediable.

The second alleged harm dBV identifies is ongoing rather than retrospective. Because the Dutch proceedings are currently stayed as a result of the correction order, dBV says it is losing the opportunity to press its Dutch claims. Even if we assume that dBV is right, however, we possess no means of remedying this harm.

"It is a federal court's judgment, not its opinion, that remedies an injury." *Haaland v. Brackeen*, 599 U.S. 255, 294 (2023). A court must "be able to afford relief *through the exercise of its power*, not through the persuasiveness or even awe-inspiring effect of the opinion *explaining* the exercise of its power." *Id.* (quoting *Franklin v. Massachusetts*, 505 U.S. 788, 825 (1992) (Scalia, J., concurring in part and concurring in the judgment)). We have no power to order the Dutch court to lift its stay. Instead, we can only explain whether or not, in our view, dBV accurately told the Dutch court about the subject matter and start date of the American litigation. However persuasive our thoughts on that matter may be, it would be a quintessential advisory opinion.

Consider the long chain of events that would need to occur in order for any views of ours to have an impact in the real world. If we were to vacate the correction order, the Dutch court would need to somehow be informed of the vacatur; the Dutch court, once informed, would need to be sufficiently moved by our analysis of the issues that it would choose to revisit its prior decision to enter a stay; and the Dutch court, once it revisited its prior decision, would need to come to a different conclusion about the subject matter and start date of the American litigation, leading it to lift the stay. Without deeper knowledge of the Dutch legal system, we are poorly positioned to determine whether any of these events, let alone all of them, are likely. The chain of causation is simply too speculative and attenuated to sustain a plausible claim that dBV's injury is remediable.

That leaves one final harm: the $400,000 fine the district court imposed on dBV for what, in its view, was contumacious failure to follow the correction order. The tools needed to remedy this harm, unlike the tools needed for the other harms, are within our toolbox. If we were to vacate the correction order, the compensatory fine imposed for violating it would necessarily be invalid. *United States v. United Mine Workers of Am.*, 330 U.S. 258, 295 (1947) (noting, with respect to compensatory civil fines, that "[t]he right to remedial relief falls with an [order] which events prove was erroneously issued"). Monetary harms, however, are by definition reparable. If dBV has paid a fine that should not have been paid, then it can be refunded appropriately after a final judgment. Given the strong "congressional policy against piecemeal review," there is no need for us to consider the question now. *Carson*, 450 U.S. at 84.

2.

Second, dBV says we have jurisdiction over the correction order pursuant to the collateral order doctrine. This doctrine permits a court of appeals to review orders "that are conclusive, that resolve important questions separate from the merits, and that are effectively unreviewable on appeal from the final judgment." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009) (quoting *Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 42 (1995)).

The correction order would not be effectively unreviewable later for the same reasons that declining review now would not cause irreparable harm. The only remediable harm the correction order has caused is the fine imposed on dBV for failing to follow it, and that can be straightforwardly refunded—if a refund is merited—at any time. Since the correction order is not effectively unreviewable, we need not consider whether it is conclusive or resolves important questions separate from the merits.

3.

Third, dBV says we have pendent appellate jurisdiction over the correction order. This doctrine permits us to review an order "not otherwise subject to immediate appeal when [the] issues [it raises] are so interconnected with immediately appealable issues that they warrant concurrent review." *Rux v. Republic of Sudan*, 461 F.3d 461, 475 (4th Cir. 2006). This standard is met "only (1) when an issue is 'inextricably intertwined' with a question that is the proper subject of an immediate appeal; or (2) when review of a jurisdictionally insufficient issue is 'necessary to ensure meaningful review' of an immediately appealable issue." *Id.* (quoting *Swint*, 514 U.S. at 50–51).

The only order that is the proper subject of immediate appeal is the second amended preliminary injunction, and the correction order is too far removed from it to justify pendent jurisdiction. Although both orders superficially raise international comity issues, they are neither intertwined nor interdependent. The issues implicated by the correction order involve intervention in foreign judicial proceedings, whereas the issues implicated by the injunction involve the extraterritorial application of United States law.

dBV argues that deciding whether the correction order was justified would require deciding whether dBV misrepresented the subject matter of the American litigation in its arguments to the Dutch court, which would in turn require deciding the territorial scope of the laws at issue in the American litigation. Territorial scope is, of course, the primary issue raised by the second amended preliminary injunction. But once again, defining the issue at this superficial level is misleading. The scope questions presented by the correction order concern the reach of United States law at the time dBV described it to the Dutch court—in other words, before *Abitron*—while the scope questions presented by the injunction concern the reach of United States law after *Abitron*. These questions are not inextricably intertwined, and deciding the former is not necessary to decide the latter. Assuming pendent jurisdiction here would disregard the cardinal rule that the doctrine be one of "limited and narrow application driven by considerations of need." *Rux*, 461 F.3d at 475.

Although declining to exercise jurisdiction over the correction order means the order will remain in place, it does not mean that we give the order our stamp of approval. To the contrary, we recognize that the order raises weighty issues. On the one hand, a district court has the power to issue foreign directives "to protect the integrity" of its proceedings. *BAE Sys. Tech. Sol. & Servs., Inc. v. Republic of Korea's Def. Acquisition Program Admin.*, 884 F.3d 463, 480 (4th Cir. 2018). On the other hand, "the court should use that power 'sparingly'" given the serious risks posed by its exercise. *Id.* at 479 (quoting *Microsoft Corp. v. Motorola, Inc.*, 696 F.3d 872, 881 (9th Cir. 2012)). These considerations will need to be carefully weighed if the correction order is appealed after a final judgment.

B.

We now turn to the contempt order. Recall that the correction order directed dBV to submit a document to the Dutch court. dBV did submit the document. But the district court concluded the document was not submitted in the manner directed by the correction order, so it held dBV in civil contempt and ordered dBV to pay dInc $400,000.

dBV argues the contempt order is either an appealable final order, an appealable injunction, or an appealable collateral order. None of these arguments, however, overcomes the "settled" rule that a party may not bring an interlocutory appeal of a civil contempt order that imposes a fine. *Fox v. Capital Co.*, 299 U.S. 105, 107 (1936). Instead, the party must seek review of the order "in connection with an appeal from a final judgment." *Id.* This rule applies "[i]n normal civil litigation," *In re Bestwall, LLC*, 99 F.4th 679, 684 (4th Cir. 2024), so it applies here.

dBV protests that this case is different because the contempt order did more than impose a fine. The order also suspended dBV's attorney from practicing law in the forum in which this case is being litigated, which had the effect of disqualifying the attorney from the case. But "orders disqualifying counsel in a civil case are not collateral orders subject to immediate appeal" by the party whose counsel is disqualified. *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 426 (1985). Nor can they be characterized as appealable final orders under 28 U.S.C. § 1291 or appealable injunctions under § 1292(a)(1), which would render the *Richardson-Merrell* rule a nullity. *Id.* at 430. Two types of contempt orders that are each unappealable on their own—an attorney disqualification and a compensatory monetary sanction—do not become appealable because they are issued together.

dBV's theory of pendent appellate jurisdiction might present a more challenging question, except that it relies upon jurisdiction over the correction order to justify jurisdiction over the contempt order. Since we lack the former, there is no question that we lack the latter.

As with the correction order, our inability to review the contempt order does not mean we give it our stamp of approval. In our contemporaneous decision in a related appeal, we vacate the contempt order as applied to dBV's attorney. *See dmarcian, Inc. v. Pressly McAuley Millen*, No. 25-1085, --- F.4th --- (4th Cir. 2026). If dBV appeals the contempt order after a final judgment, the court will have the opportunity to consider whether to vacate it as applied to dBV.

IV.

dBV requests one more item: reassignment to a new district judge on remand. We deny its request.

A court of appeals may order reassignment pursuant to its authority to "require such further proceedings . . . as may be just." *Liteky v. United States*, 510 U.S. 540, 554 (1994) (quoting 28 U.S.C. § 2106). But reassignment is not a costless step. When it occurs after substantive proceedings have already taken place in the district court, it imposes "burdens" on the new judge, on the litigants, and on the judicial system itself. *United States v. McCall*, 934 F.3d 380, 384 (4th Cir. 2019). As a result, it is an unusual remedy that is "only warranted in 'unusual circumstances.'" *United States v. Galecki*, 932 F.3d 176, 195 (4th Cir. 2019) (quoting *United States v. North Carolina*, 180 F.3d 574, 582–83 (4th Cir. 1999)).

In deciding whether the circumstances are unusual enough to merit reassignment, "we may consider (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously expressed views or findings determined to be erroneous or based on evidence that must be rejected'; '(2) whether reassignment is advisable to preserve the appearance of justice'; and '(3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness.'" *McCall*, 934 F.3d at 384 (quoting *United States v. Nicholson*, 611 F.3d 191, 217 (4th Cir. 2010)).

Reassignment is not warranted here. The district judge in this case has presided over it for more than five years, becoming intimately familiar with a complex set of facts and claims. The last time we were asked to review his work in this case, we largely affirmed it.

It is true that the correction order and the contempt order were strict sanctions against dBV, but it is also true that the judge has ruled in dBV's favor, including by dismissing dInc's copyright claim. This is a challenging case, and the district court has displayed a conscientious approach to it. The fact that a litigant is displeased with a judge's rulings is hardly sufficient grounds to direct reassignment to a new judge upon remand. Ultimately, we see no reason why this judge cannot be a fair and impartial adjudicator moving forward.

V.

The last time this case was before us, we noted that "[c]ases like the current one will involve a balance." *dmarcian*, 60 F.4th at 147. That caution is even truer now.

When interpreting statutes, *Abitron* instructs that a balance must be struck between respect for the interests of other sovereigns and protection for the rights of Americans. The second amended preliminary injunction gets this right by enjoining dBV on the basis of its domestic conduct.

In the district court, the regrettable series of events that culminated in the correction order and the contempt order offers an instruction about a different sort of balance—balance between the district court's prerogative to protect the integrity of its proceedings on the one side, and the care it must take before intervening beyond its proceedings on the other. Since we lack jurisdiction over these orders, we save for another day the tasks of defining the balance with greater precision and assessing whether the orders got it right.

The second amended preliminary injunction is hereby affirmed and the remainder of dBV's appeal is dismissed. The motion to stay the injunction pending appeal is denied.

Now that the application of United States law to dBV is settled, the parties may proceed to the main events in this litigation. The administrative stay of trial is hereby lifted.

SO ORDERED

FILED: August 19, 2026

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-1790 (L)
(1:21-cv-00067-MR)

DMARCIAN, INC.

Plaintiff - Appellee

v.

DMARC ADVISOR BV, f/k/a dmarcian Europe BV

Defendant - Appellant

No. 25-1084
(1:21-cv-00067-MR)

DMARCIAN, INC.

Plaintiff - Appellee

v.

DMARC ADVISOR BV, f/k/a dmarcian Europe BV

Defendant - Appellant

O R D E R

Upon consideration of appellant's motion to stay the mandate, the court denies the motion.

Entered at the direction of Judge Wilkinson with the concurrence of Judge Wynn and Senior Judge Keenan.

For the Court

/s/ Nwamaka Anowi, Clerk

THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION
CIVIL CASE NO. 1:21-cv-00067-MR

DMARCIAN, INC., **Plaintiff,** **vs.** **DMARC ADVISOR BV, formerly known as dmarcian Europe BV,** **Defendant.**	)	**ORDER**

THIS MATTER is before the Court on the Defendant's Motion to Stay. [Doc. 432].

I. BACKGROUND

This case arises from a dispute between the Plaintiff dmarcian, Inc., an American company, and the Defendant DMARC Advisor BV, formerly known as dmarcian Europe BV, a Dutch company, over the ownership, licensing, and distribution of certain computer code (the "Software"), which was the subject of a January 2016 oral agreement between the parties. [Doc. 26-1 ¶¶ 16-18; Doc. 26-6 at ¶ 2.18].

The Court has recounted the factual and procedural background of this case in several prior Orders, and such will not be repeated here. Of relevance to the present motion, this case was finally scheduled for trial, after several continuances, during the March 10, 2025, trial term, with a final pretrial conference scheduled for February 7, 2025.

The present motion relates to the Court's December 20, 2024 rulings which (1) held the Defendant in civil contempt for failing to comply with the Court's June 27, 2023 Order and ordered the Defendant to pay the Plaintiff $400,000 for fees and expenses incurred as a result of the Defendant's contemptuous conduct [Doc. 401]; (2) held the Defendant's lead counsel, Pressly Millen, in civil contempt for failing to comply with the Court's June 27, 2023 Order and suspended his admission to the bar of this Court for the pendency of the present action or until purged by compliance with that prior Order [Doc. 401]; and (3) amended the Preliminary Injunction [Doc. 403]. The Defendant filed a Notice of Appeal of these Orders on January 17, 2025. [Doc. 405].[1] On January 31, 2025, fourteen days after the Notice of Appeal was filed and one week prior to the final pretrial conference, the Defendant filed the present motion, seeking to stay all further litigation pending resolution of its latest appeal. [Doc. 432]. The Court heard oral argument from the parties on this motion at the final pretrial conference on February 7,

[1] Mr. Millen filed a separate Notice of Appeal challenging the Court's Order holding him in civil contempt. [Doc. 407].

2025. In light of certain issues that remained regarding the scheduling the examinations of certain Dutch witnesses,[2] as well as some other discovery issues that have arisen between the parties, the Court continued the trial to May 13, 2025, and took the present motion under advisement. This Order now follows.

II. DISCUSSION

The standard for consideration of a motion to stay litigation pending an interlocutory appeal is substantially similar to the standard governing a request for preliminary injunction. Nken v. Holder, 556 U.S. 418, 434 (2009). The Court considers "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." Hilton v. Braunskill, 481 U.S. 770, 776 (1987). The first two factors are the most critical to the inquiry. Nken, 556 U.S. at 434.

[2] The Court notes that the Defendant's Dutch counsel, Mr. Meijboom, urged the Dutch Court to continue the examination of these witnesses from the original setting of February 11, 2025, stating that it was "plausible that the trial will be postponed as a result of the appeal and the request for adjournment, thus significantly reducing the urgency with which the present witness examination[s] should take place…" [Doc. 442-11 at 1: Meijboom Email dated Feb. 4, 2025].

In seeking a stay of all further litigation, the Defendant argues that the "disqualification" of its chosen counsel just weeks before trial has caused the Defendant extreme prejudice. The Court, however, did not disqualify Mr. Millen; rather, he was held in civil contempt for material misrepresentations that he made in a parallel proceeding regarding what has transpired in this case. The Court provided Mr. Millen an opportunity to purge that contempt in a simple manner—by submitting an additional affidavit correcting his misrepresentations—which would thereby allow him to continue his representation of the Defendant. As such, the prejudice that the Defendant claims is one that could easily be cured. Having considered the posture of the cases being so close to trial as it was, the Court treated Mr. Millen very leniently in order to give the Defendant the opportunity to avoid any prejudice. For whatever reason, Mr. Millen has chosen not to remedy his error and instead filed the present appeal. The prejudice claimed by the Defendant is entirely of counsel's own making.

The Defendant further contends that the appeal of the Second Amended Preliminary Injunction necessitates a stay of the trial. The Court notes, however, that regardless of the trial's outcome, any preliminary injunctive relief that has been awarded will end as of the entry of judgment. The trial is currently scheduled for May 12, 2025, which the Court anticipates will be well in advance of the conclusion of the Defendant's appeal. Thus, any prejudice suffered by the Defendant arising from the enforcement of the Second Amended Preliminary Injunction would only be ***extended*** by the granting of the requested stay, which is potential prejudice that the Court endeavors to avoid.

Turning now to the Nken factors, the Court finds that the Defendant has failed to make a strong showing of a likelihood of prevailing on its appeal. With respect to the appeal of the contempt order, the Court notes that such appeal is of very questionable appellate jurisdiction. As the Supreme Court has held, "orders disqualifying counsel in civil cases. . .are not collateral orders subject to appeal as 'final judgments' within the meaning of 28 U.S.C. § 1291." Richardson-Merrell, Inc. v. Koller, 472 U.S. 424 (1985). Here, as is discussed supra, the Order holding Mr. Millen in civil contempt did not even rise to the level of disqualification. Even if the Court of Appeals were to entertain the Defendant's appeal of this order, the Defendant has failed to demonstrate that it is likely to prevail on its argument that this Court erred in suspending Mr. Millen during the pendency of this action and providing him a path reinstatement through the purging of his contempt. The Court acted well within its scope of its inherent power to address the refusal of the Defendant and its counsel to fully comply with the Court's prior order directing that counsel rectify the misrepresentations made to the Dutch Court about this Court's proceedings.

As for the Defendant's appeal of the Second Amended Preliminary Injunction, any likelihood of success that the Defendant may be able to show is rendered moot by the fact that the preliminary injunctive relief that has been awarded will terminate upon the entry of a final judgment in this case.

Turning now to the issue of irreparable harm, the Court finds that the risk of irreparable harm would only be increased by implementing a stay of this litigation pending the resolution of the Defendant's appeal. As for the potential injury to the Plaintiff, the Court finds that issuing the requested stay would substantially harm the Plaintiff, as it would only delay the resolution of this litigation even further. A delay also would have potential adverse consequences to the Dutch proceedings. After the Plaintiff was forced to defend the Dutch litigation on the merits for many months due to the Defendant's misrepresentations about the status of this case, the Dutch Court ultimately stayed the Dutch case pending a ruling in this case. It seems likely that if this case is stayed on appeal that the Defendant will again attempt to resume proceedings in the Netherlands on the argument that the case on the merits here is delayed, requiring the Plaintiff to incur even more expense and effort in the Dutch case.

Finally, the Court finds that the public has an interest not only in the expeditious conclusion of litigation, but also an interest in ensuring that disingenuous statements made by those involved in litigation are addressed appropriately.

For all of these reasons, the Court in the exercise of its discretion denies the Defendant's Motion.

IT IS, THEREFORE, ORDERED that the Defendant's Motion to Stay [Doc. 432] is **DENIED**.

IT IS SO ORDERED.

Signed: March 5, 2025

Martin Reidinger
Chief United States District Judge

THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION
CIVIL CASE NO. 1:21-cv-00067-MR

DMARCIAN, INC.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**SECOND AMENDED**
	)	**PRELIMINARY INJUNCTION**
DMARCIAN EUROPE BV,	)	
	)	
Defendant.	)	
	)	

THIS MATTER is before the Court *sua sponte*.

The Court has entered an Order contemporaneously herewith which grants the Defendant's request to modify the Amended Preliminary Injunction Order entered in this matter on August 11, 2021. Consistent with that Order, the Court hereby enters the following Second Amended Preliminary Injunction Order.

IT IS, THEREFORE, ORDERED that the Defendant, its officers, agents, servants, employees, attorneys, affiliates, and those persons in active concert or participation with the Defendant are **HEREBY ENJOINED** from:

(1) providing services to any customers located outside of Europe, Africa, or Russia, except for the six customers detailed in the

Defendant's Brief on Proposed Voluntary Commitments [Doc. 32 at 4 n.3];

(2) providing access to any of its websites to IP addresses from countries outside of Europe, Africa, or Russia. The Defendant shall inform website visitors from outside of those areas that it does not create new accounts in that region and shall direct those customers to contact dmarcian, Inc. for services through the Plaintiff's website https://dmarcian.com;

(3) making changes to the trade secret source code except as specifically and expressly allowed or directed by this Order;

(4) using the Plaintiff's trademark in any manner in the United States or on any websites which are accessible to IP addresses from the United States, unless such use is accompanied by a statement which reads: "This trademark is the trademark of dmarcian, Inc. This website is produced and generated and posted by dmarcian Europe BV, which is a different entity from dmarcian, Inc. This trademark is being used at this location without the permission of dmarcian, Inc. and only pursuant to the terms of a court order allowing its temporary use during litigation between dmarcian, Inc. and dmarcian Europe BV." That statement must be at least the size of the trademark itself, as

presented, or 12-point type when displayed on a 24” computer screen, whichever is larger. Such statement must appear immediately adjacent to the location where the trademark appears, and must be shown at each location where the trademark appears, whether that be on the Defendant’s website, in printed material, an electronic display, or otherwise;

(5) displaying any website with the “dmarcian” name which is accessible to IP addresses from the United States, unless that website includes a statement that “The dmarcian software was originally developed by dmarcian, Inc. This is not the website of dmarcian, Inc. The website of dmarcian, Inc. can be found at https://dmarcian.com.” That statement must be displayed as a banner at the top of each page of the website on which the dmarcian name appears and must be of a size that is at least 12-point type when displayed on a 24” computer screen, and the reference to the website of the Plaintiff must be a link to that website;

(6) redirecting, encouraging, or allowing any customer to change its payment recipient from the Plaintiff to the Defendant. To the extent that the current service provider for any customer is different from the payment recipient for that customer, the party providing services to that

customer is prohibited from unilaterally terminating or otherwise altering those services without the express permission from the Court; (7) making any public statement about dmarcian, Inc. except as expressly allowed or directed herein; and

IT IS FURTHER ORDERED that the Defendant shall provide to the Court (under seal) copies of all documents sufficient to show all income received by the Defendant and the sources thereof, all expenditures made by the Defendant and the payors thereof, and all net income generated by the Defendant's business efforts from the date of this Order until the conclusion of this action.

IT IS FURTHER ORDERED that no further bond is required in conjunction with the entry of this Amended Preliminary Injunction, the Plaintiff already having posted a bond in the amount of $25,000.

IT IS SO ORDERED.

Martin Reidinger
Chief United States District Judge

THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION
CIVIL CASE NO. 1:21-cv-00067-MR

DMARCIAN, INC.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**ORDER**
	)	
DMARC ADVISOR BV, formerly known as dmarcian Europe BV,	)	
	)	
Defendant.	)	

THIS MATTER is before the Court following a hearing on August 23, 2024, at which time the Defendant and its counsel were required to show cause why this Court should not hold them in contempt and impose sanctions for their failure to comply with the Court's June 27, 2023 Order.

I. BACKGROUND

This case arises from a dispute between dmarcian, Inc. ("dmarcian"), an American company, and the Defendant DMARC Advisor BV, formerly known as dmarcian Europe BV ("DMARC Advisor"), a Dutch company, over the ownership, licensing, and distribution of certain computer code (the "Software"), which was the subject of a January 2016 oral agreement between the parties. [Doc. 26-1 ¶¶ 16-18; Doc. 26-6 at ¶ 2.18].

In December 2019, dmarcian's principal, Tim Draegen ("Draegen"), temporarily suspended DMARC Advisor's access to the Software. [Doc. 26-2 at ¶ 2.19]. Two days later, dmarcian restored DMARC Advisor's access to the Software [Doc. 26-6 at ¶ 2.20], and the parties resumed negotiating a potential license agreement or other solution to their dispute over ownership of the Software. [Doc. 26-1 at ¶ 19]. When negotiations again stalled, Draegen (then a DMARC Advisor shareholder) sought to remove DMARC Advisor's minority shareholder, TDX, as DMARC Advisor's director. [Id. at ¶ 20]. In July 2020, Draegen requested a Dutch shareholder meeting for that purpose. [Id.]. TDX responded by submitting an application (akin to a motion for injunctive relief) to the Enterprise Court of the Amsterdam Appellate Court, seeking to block Draegen from removing TDX.[1] [Id. at ¶ 22].

In August 2020, both Draegen and TDX asked the Enterprise Court in the Netherlands to order an investigation into DMARC Advisor's policies and course of affairs. [Doc. 26-2 at ¶¶ 1.3, 1.4]. On September 7, 2020, the Enterprise Court ordered such investigation and appointed an independent director with a decisive vote "to try to obtain clarity as to the question of where the intellectual property rights to the software and software applications

[1] dmarcian was not a party to these interim proceedings in the Enterprise Court.

developed by [DMARC Advisor] (and [DMARC Advisor's Bulgarian subsidiary]) lie." [Doc. 10-1 at ¶ 3.5].

While that investigation was ongoing, on January 22, 2021, dmarcian told DMARC Advisor that it intended once again to terminate access to the parties' shared computer systems where the parties made the Software available to their respective customers. [Doc. 26-1 at ¶ 30; Doc. 26-5 at ¶ 4]. DMARC Advisor objected to this termination as inconsistent with the parties' agreement and the pending investigation, and it asked the District Court of Rotterdam ("the Rotterdam Court") to enjoin the termination. [Doc. 26-5 at ¶ 4].

On January 29, 2021, DMARC Advisor summoned dmarcian and Draegen to appear at a hearing on February 1, 2021, before the Rotterdam Court. [Doc. 26-5 at ¶ 11]. Draegen and dmarcian did not appear that day. [Id. at ¶ 12]. In an order entered February 1, 2021, the Rotterdam Court entered a default against dmarcian and Draegen and directed them to grant DMARC Advisor access to the computer systems necessary to service its customers. [Doc. 26-3 at ¶ 3.3]. The court also fixed the coercive penalty for non-compliance at €20,000 per day, up to €500,000, for both dmarcian and Draegen. [Id. at ¶ 3.4].

On March 12, 2021, dmarcian filed its Complaint in this Court, asserting claims for copyright and trademark infringement and misappropriation of trade secrets, as well as related state claims for breach of contract, defamation, computer trespass, tortious interference with contract, tortious interference with prospective economic advantage, and unfair or deceptive trade practices. [Doc. 1]. On March 25, 2021, dmarcian submitted a motion for a temporary restraining order and preliminary injunction. [Doc. 6]. The Complaint was later amended, with the most recent amendment made on June 22, 2021. [Doc. 51].

On April 19, 2021, DMARC Advisor filed a motion to dismiss based on a lack of personal jurisdiction and forum non conveniens. [Doc. 22]. On May 26, 2021, this Court issued an Order enjoining DMARC Advisor and its agents and attorneys and denying DMARC Advisor's motion to dismiss. [Doc. 39]. On June 25, 2021, DMARC Advisor appealed the Preliminary Injunction and the Order denying its motion to dismiss. [Doc. 52]. On June 28, 2021, the Court issued a Show Cause Order based on allegations of DMARC Advisor heaving violated the Preliminary Injunction Order. [Doc. 54]. Following a July 28, 2021 hearing, the Court issued Orders on August 11, 2021, holding DMARC Advisor in civil contempt of the Preliminary

Injunction and amending the Preliminary Injunction to clarify certain provisions. [Docs. 76, 80, 82].

On May 13, 2022, the Court issued an Order allowing discovery to proceed despite the pendency of the appeal. [Doc. 123].

On February 14, 2023, the Fourth Circuit issued its opinion affirming the entry of the Preliminary Injunction and the denial of DMARC Advisor's motion to dismiss. [Doc. 168].

While the U.S. litigation was getting underway, on May 31, 2021, the Rotterdam Court issued a judgment rejecting dmarcian's and Draegen's objections to the February 1, 2021, injunction requiring them to restore DMARC Advisor's access to the shared computer systems. [Doc. 47-2]. The Rotterdam Court also upheld the previous €500,000 coercive penalty for non-compliance and imposed a new coercive penalty of €20,000 per day for further disobedience, with a maximum aggregate penalty of €1 million for both dmarcian and Draegen. [Id. at ¶¶ 5.4, 5.6].

On September 3, 2021, the year-long investigation of DMARC Advisor by the Dutch Enterprise Court concluded. [See Doc. 93-6]. The court-appointed investigator submitted a report, which described the history of the parties' relationship and found that, under applicable Dutch law, dmarcian had no justification for terminating the January 2016 agreement with immediate effect. [Doc. 93-2 at ¶¶ 7.11–7.13]. The investigator further stated that it "is plausible that [dmarcian] and [DMARC Advisor] jointly have copyrights to (the majority of) the source code of version 2.0," [id. at ¶ 7.20], and that if "the parties continue to use the software without mutual consent, they are mutually infringing each other's copyright to the source code," [id. at ¶ 7.22].

Following the conclusion of the Enterprise Court proceedings, on October 11, 2021, DMARC Advisor filed a Writ of Summons (the Dutch equivalent of a civil complaint) in the Rotterdam District Court (the "Rotterdam Complaint"). In the Rotterdam Complaint, DMARC Advisor asserts ownership of the copyright in the Software "by operation of law under Article 7 of the Dutch Copyright Act" [Doc. 106-5 at ¶ 6.22]; asserts the creation of an original work of copyright under E.U. law [see id. at ¶ 6.28]; contends that use of the Software by dmarcian "would . . . infringe [DMARC Advisor's] copyright under Article 26 of the Dutch Copyright Act and the copyright equivalents of other countries where [dmarcian] does business [id. at ¶ 6.39]; and requests that the Rotterdam Court "partition the community of [dmarcian] and [DMARC Advisor] in respect of computer programs to which they jointly hold the copyright pursuant to Article 3:178 of the Dutch Civil Code" [id. at ¶ 6.40].

Pursuant to Article 12 of the Dutch Civil Law, dmarcian sought to stay the Rotterdam proceedings in favor of the U.S. case. [See Doc. 174-2 at ¶¶ 1.1, 5.1]. DMARC Advisor opposed dmarcian's request for a stay. [Id. at ¶¶ 5.6, 5.7]. In support of its opposition, DMARC Advisor relied on a May 2, 2022 affidavit from Pressly Millen, who is counsel of record along with Samuel Hartzell in the action pending in this Court. [Id. at ¶ 5.8]. In his Affidavit, Mr. Millen asserted, in pertinent part, as follows:

> 16. As a general matter, U.S. courts recognize that "[i]ntellectual property" involves "separate and independent rights arising from the unique laws of each nation." Black & Decker Corp. v. Sanyei America Corp., 650 F. Supp. 406, 409 (N.D.Ill.1986) (discussing copyright and trademark laws). Neither U.S. copyright law nor U.S. trademark law applies extraterritorially. See GB Mktg. USA Inc. v. Gerolsteiner Brunnen, 782 F. Supp. 763, 772 (W.D.N.Y. 1991) ("Where copyright infringement occurs both inside and outside the United States, the [U.S.] district court has jurisdiction, but only over the U.S. infringement."). For that reason, **the North Carolina litigation, which pleads only violations of U.S. copyright and trademark law**, is "incapable of resolving infringement under foreign law," e.g., Dutch law. Zynga, Inc. v. Vostu USA, Inc., 816 F. Supp. 2d 824, 829 (N.D. Cal. 2011) (U.S. court refusing to enjoin Brazilian copyright action).
>
> 17. For these reasons (and notwithstanding the fact that the North Carolina Litigation is currently on appeal challenging both jurisdiction and failure of the court to apply the doctrine of forum non conveniens in order to dismiss the case), **determinations to be**

> **made by the U.S. court in the North Carolina Litigation do not concern the same subject matter as the subject matter before the Dutch court.** In other words, **the primary subject matter of the North Carolina Litigation is alleged infringement of the intellectual property within the U.S.** while the subject matter of the Dutch proceedings is related to the relationship between the parties with respect to their distribution agreement, co-ownership of the software code, and the determination of the penalties previously imposed.

[Doc. 186-1: Millen Aff. at ¶¶ 16-17] (emphasis added).

On September 13, 2022, DMARC Advisor's Dutch counsel, Alfred Meijboom, filed pleading notes (essentially a brief) in the Rotterdam proceedings, describing the U.S. proceedings to the Dutch court as follows:

> 4.1 A month and a half after [DMARC Advisor] filed for summary judgment against [dmarcian] and Draegen in Rotterdam on January 28, 2021, and received default judgment on February 1, 2021, [dmarcian] addressed the U.S. reehter [sic] in North Carolina on March 12, 2021 .... Unlike in Dutch procedural law, a plaintiff in the United States can start a case and gradually adjust his claims and basis. **Therefore, it cannot be said that**, translated to Dutch proportions, [dmarcian] in the United States on March 12, 2021, **a case on the merits has begun.**
>
> 4.2 [dmarcian], in fact, first sought a Temporary Restraining Order . . . .
>
> 4.3 Also, [dmarcian] (still in the same case) sought injunctive relief (i.e., a preliminary injunction)—for [DMARC Advisor's] alleged infringement of U.S.

copyright, the Lanham Act (trademark law), local know-how and for “tortuous [sic] interference” with [dmarcian’s] agreements with its U.S. customers because [DMARC Advisor] allegedly persuaded a customer to use its European instance [sic], based on an amended claim dated April 7, 2021—for which the court did assert jurisdiction, and on May 26, 2021, granted the claims to some extent. [DMARC Advisor] appealed the May 26, 2021 preliminary injunction (both jurisdiction and sentencing) on June 25, 2021, and the Court of Appeals 4th Circuit is expected to enter judgment by the end of the year.

4.4 The May 26, 2021 Order is a contempt order . . . and not a judgment on the merits . . . .

4.5 . . . [O]n May 22, 2022, the U.S. court commenced proceedings on the merits and ultimately issued a pretrial order on July 11, 2022, setting forth a roadmap for the continuation of the proceedings . . . to the effect that the parties first conduct a discovery (in the American system, this is essentially gathering evidence for the purpose of presenting evidence at oral argument—the *trial*), to be completed by the end of February 2023. The final claim is filed through motions, and not later than March 31, 2023. The substantive, oral hearing (the *trial*) will take place on or after September 5, 2023.

4.6 In the meantime, the parties are still required to try a mediation, which must be completed by March 15, 2023 ....

4.7 **There is therefore no question of the North Carolina judge being the first adjudicated judge on the merits** in the spirit of Article 12 Rv. **The U.S. court has only granted injunctive relief**, and it will take until March 2023 for Oberhaupt[2] to determine the final bases and claims of [dmarcian] in the U.S. proceedings on the merits (if the North Carolina court's finding of jurisdiction has not been overturned by the Court of Appeals by then, or the appeal does not result in further delay).

4.8 **In the present case, the summons was served on [dmarcian] and Draegen on October 11, 2021, making the Rotterdam District Court the court first asked to rule on the parties' disputes on the merits.**

4.9 For this reason alone, therefore, the Rotterdam District Court should hear the case expeditiously and not adjourn until the U.S. court has issued a judgment on the merits.

[Doc. 173-1: Meijboom Aff. at ¶¶ 4.1-4.9] (footnotes omitted) (bold emphasis added).

On May 20, 2022, while dmarcian's motion to stay the Dutch proceedings was pending, DMARC Advisor filed a separate preliminary relief proceeding in the Rotterdam Court. [Doc. 174-1]. In that filing, DMARC Advisor asserted that it is a co-copyright holder of the Software and contended that it "also has an interest in [dmarcian] being enjoined from

[2] While it is unclear whether "Oberhaupt" has a particular meaning in the Dutch language, the Court is aware that "Oberhaupt" in German means "chief." The Court therefore assumes that this is a reference to the undersigned, who is currently serving as the Chief Judge of the Western District of North Carolina.

changing the Software – except for repairing errors." [Id. at ¶ 6.16]. DMARC Advisor explicitly asked the Rotterdam Court for a "mirror image" of this Court's Preliminary Injunction, seeking to enjoin dmarcian from "altering the Software, except for modifications which are necessary to comply with the other orders based on the judgment to be rendered in this matter or to correct demonstrable errors." [Id. at 50].

On July 18, 2022, the Rotterdam Court granted DMARC Advisor's request for preliminary relief and entered an order which, among other things, "[p]rohibits [d]marcian . . . from altering the Software without [DMARC] Advisor's consent, except for the modifications that are necessary to comply with other orders based on this judgment and correction of demonstrable errors." [Doc. 141-2 at ¶ 7.3].

On December 14, 2022, the Rotterdam Court denied dmarcian's request to stay (referred to as a "lis pendens appeal") the Rotterdam action that had been initiated on October 11, 2021. [Doc. 173-2]. In denying the stay, the Rotterdam Court accepted DMARC Advisor's representation that the U.S. case did not "commence" until May 22, 2022:

> 5.35. The question remains whether the American proceedings that dmarcian Inc. bases its lis pendens appeal on were instituted earlier than the present case . . .

5.36. Since in the present case the day of summons is October 11, 2021, cleze case is pending pursuant to a11icle 125 paragraph I Rv from that day.

5.37. **During the oral hearing of I September 4, 2022, [DMARC Advisor] explained very concretely and further substantiated with documents that in the U.S. proceedings that dmarcian Inc. underlies its lis pendens appeal to date only decisions of a provisional nature (injunctive relief) have been rendered and that the court in those proceedings did not commence proceedings on the merits until May 22, 2022.** dmarcian Inc. has left this exposition of [DMARC Advisor] undisputed and the court assumes that the decisions rendered before May 22, 2022 should be considered as preliminary injunctive relief under the applicable procedural law.

5.38. A procedure for obtaining provisional relief is not a procedure that is relevant in the present context. **Article 12 of the Dutch Code of Civil Procedure requires that in the foreign proceedings a judgment can be given that is capable of recognition and, if applicable, enforcement in the Netherlands.** With regard to that requirement, the Court considers that it is implicit in that requirement that the foreign decision must have or be able to acquire res judicata in the Netherlands. Under Dutch civil procedural law, a summary judgment is not subject to res judicata .... The court considers that this applies equally, and on the same grounds, to a decision of a foreign court that should be considered as an interim injunction ....

5.39. The fact that, in the American proceedings, it is not a separate legal proceeding but a preliminary phase of the proceedings does not alter the fact that the ratio of the lis pendens rule precludes taking this first phase into account. After all, that ratio is that **if**

> **proceedings have been commenced simultaneously in two jurisdictions that can lead to a decision that can become res judicata, the older proceedings take precedence.** The assessment of the lis pendens appeal of dmarcian Inc. is therefore limited to the bidder dispute initiated by the American court on May 22, 2022.

[Id. at 17 §§ 5.35-5.39] (errors uncorrected)[3] (emphasis added). The Rotterdam Court set a July 5, 2023 trial date to determine the parties' rights in the very software at issue in the present case.

The Plaintiff then moved this Court to enter an antisuit injunction to preliminarily enjoin DMARC Advisor from proceeding on its Dutch claims as to copyright ownership and the terms of the parties' contract and breach thereof until the U.S. litigation was tried on its merits. [Doc. 185]. Additionally, dmarcian asked this Court to require DMARC Advisor to correct certain misrepresentations made to the Dutch Court regarding the status of the U.S. case. [Id.].

This Court denied dmarcian's request for an antisuit injunction, concluding that principles of international comity weighed against enjoining DMARC Advisor from proceeding with the Rotterdam Court litigation. [Doc.

[3] This Judgment was translated into English by an unknown entity and contains a number of typographical errors. The Court presents the language of the translated Judgment without corrections.

216 at 16-17]. However, the Court granted dmarcian's request to require the Defendant to correct certain misrepresentations made to the Dutch court by its American counsel, Mr. Millen, in his affidavit and by its Dutch counsel, Mr. Meijboom, in his pleading notes. Specifically, the Court held as follows:

> In opposing dmarcian's request, DMARC Advisor submitted the affidavit of American counsel, Pressly Millen, who represented to the Dutch Court that the U.S. litigation involves only violations of U.S. copyright and trademark law only within the U.S. and therefore does not concern the same subject matter as the litigation before the Dutch Court. [Doc. 186-1: Millen Aff. ¶¶ 16-17]. Mr. Millen conceded at the hearing on this matter, however, that there is a degree of overlap of claims asserted in the U.S. and Dutch litigation. This representation is also clearly contrary to this Court's determination, just months earlier, that the Copyright Act can be applied extraterritorially based on the facts presented in this case.[4] [Doc. 39 at 48-49].
>
> Mr. Millen's Affidavit also wrongly implies that issues of copyright ownership and the terms of the parties' agreement are not at issue in the U.S. case. However, dmarcian's original Complaint makes numerous allegations placing the ownership of the copyright in the source code directly at issue. [Doc. 1 at ¶¶ 2, 8, 9, 33(g), 70, 71(c), 126]. Moreover, dmarcian also pled breach of contract claims, which will require the Court to determine the nature of the parties' relationship and the terms of their agreement. [Id. at ¶¶ 114-24]. These allegations and

[4] The Fourth Circuit later affirmed this determination. See dmarcian, Inc. v. dmarcian Eur. BV, 60 F.4th 119, 139-40 (4th Cir. 2023).

claims were carried forward to dmarcian's Second Amended Complaint. [Doc. 51].

Several months later, DMARC Advisor's Dutch counsel, Alfred Meijboom, filed pleadings notes in opposition to dmarcian's request for a stay, arguing that the Rotterdam proceedings (which commenced in October 2021) preceded the commencement of proceedings on the merits in the U.S. Specifically, Mr. Meijboom asserted that the filing of the U.S. Complaint in March 2021 sought only interim injunctive relief and therefore did not begin "a case on the merits," and that this Court did not commence "proceedings on the merits" until May 22, 2022. [Doc. 173-1 at ¶¶ 4.1-4.5]. These statements are false and misleading. Unlike Dutch law, wherein proceedings on the merits are conducted separately from proceedings for preliminary or summary relief, under U.S. law, a civil action is commenced with the filing of a complaint. Fed. R. Civ. P. 3. There is no separation of the preliminary proceedings and the proceedings on the merits. The complaint sets forth a statement of the claims upon which the plaintiff seeks relief on the merits. Fed. R. Civ. P. 8(a)(2). When a civil action is filed, a plaintiff may seek preliminary relief as part of that action. In order to receive preliminary or interim relief under U.S. law, the party seeking relief must demonstrate a likelihood of prevailing on the merits. A preliminary relief hearing can even be consolidated with a trial on the merits. See Fed. R. Civ. P. 65(a)(2). Thus, regardless of whether preliminary injunctive relief is sought, what matters for the purpose of determining under U.S. law whether an action on the merits was first to be filed is the filing of the complaint. The complaint sets forth the claims upon which the Court may issue a final judgment, and therefore it is the filing of the complaint that commences the proceedings on the merits in a U.S. action.

> Mr. Meijboom's false and misleading statements caused the Dutch Court to conclude that dmarcian's Complaint sought only provisional relief and therefore did not constitute a commencement of proceedings on the merits, thereby making DMARC Advisor's commencement of proceedings in the Rotterdam Court in October 2021 the "earlier filed" action. [See Doc. 173-2 at § 5.39 (finding that the U.S. proceedings "commenced" on May 22, 2022 and therefore concluding that the October 2021 Dutch proceedings "take precedence" as the older proceeding)]. The Rotterdam Court, therefore, denied dmarcian's request to stay its proceedings in favor of the U.S. proceedings based on counsel's misrepresentations of U.S. and the application of that law to the facts of this case.

[Doc. 216 at 19-22]. Finding that the above-referenced statements made by DMARC Advisor's counsel to the Rotterdam Court were "significant and material misrepresentations," which "create[d] a risk of inconsistent, conflicting, and erroneous judgments which will neutralize or negate this Court's rulings," this Court ordered DMARC Advisor to promptly correct its misstatements to the Rotterdam Court prior to the commencement of the trial on July 5, 2023. [Id. at 23]. To that end, the Court specifically required DMARC Advisor to provide a copy of the Order to the Rotterdam Court, as well as a statement from DMARC Advisor's counsel that would include the following:

> (1) Counsel is submitting this statement to the Rotterdam Court in order to correct false and misleading representations previously made to the Court in both the Affidavit of Pressly Millen and the pleading notes of Alfred Meijboom;
>
> (2) The proceedings on the merits in the U.S. case began with the filing of the Complaint on March 12, 2021, and DMARC Advisor's representations to the contrary to the Rotterdam Court are entirely untrue;
>
> (3) The U.S. case filed on March 12, 2021 presented claims which put copyright ownership and the terms of the parties' contracts squarely at issue. As such, there appears to be some overlap of issues between the U.S. case and that pending before the Rotterdam Court. DMARC Advisor's representation to the Rotterdam Court that the U.S. case pleads only violations of U.S. copyright and trademark law, and not any infringing actions outside the U.S., is entirely untrue; and
>
> (4) The Preliminary Injunction issued by the U.S. Court did not limit application of the Copyright Act to only acts of infringement within the United States and gave extraterritorial application to reach acts of DMARC Advisor in Europe and elsewhere, and DMARC Advisor's representations to the contrary to the Rotterdam Court are entirely untrue.

[Id. at 23-24]. The Court specifically warned DMARC Advisor "that failure to comply with the directives of this Order will result in the imposition of sanctions, up to and including the striking of DMARC Advisor's Answer and the entry of default against it." [Id. at 24-25].

The Defendant complied with the directive to submit the June 27, 2023 Order to the Dutch Court. However, the Defendant failed to submit the required statement from its counsel. At the hearing before the Dutch Court on July 5th, Mr. Meijboom continued to maintain the Defendant's position that the U.S. did not commence on the merits until after the Dutch case was commenced in October 2021 and that the claims in the cases do not overlap. [See Doc. 254-1 at 6].

On September 14, 2023, the Plaintiff filed a motion to show cause for the Defendant's failure to comply with the Court's June 27, 2023 Order. [Doc. 253]. On May 1, 2024, the Court ordered the Defendant and its counsel to show cause why a finding of civil contempt and imposition of sanctions, including reasonable attorneys' fees, was not warranted. [Doc. 358]. The show cause hearing was initially scheduled for May 15, 2024; however, scheduling conflicts required continuance of that hearing until August 23, 2024.

In the meantime, on December 20, 2023, the Dutch Court reversed its prior ruling and concluded that the U.S. proceedings were commenced earlier than the Dutch action; that the cases had substantial overlap of issues; and that the Dutch proceedings should be stayed pending the entry of a final judgment in the U.S. action. [Doc. 294-1 at 11-12].

At the August 23, 2024 hearing, the Plaintiff presented argument from both its American counsel and its Dutch counsel on the issues of contempt and the appropriate sanctions therefor. Counsel appeared on behalf of Mr. Millen and Mr. Hartzell to argue that a finding of contempt was not warranted because defense counsel had substantially complied with the Court's Order. The Defendant's Dutch counsel, Mr. Meijboom, also appeared on behalf of himself and argued against a finding of contempt on numerous grounds. At the conclusion of the hearing, the Court gave both sides the opportunity to submit further documentation in support of their arguments, and the parties complied. [See Docs. 385, 387].

II. STANDARD OF REVIEW

District courts have "inherent power to enforce compliance with their lawful orders through civil contempt." Sullivan v. United States, 384 U.S. 364, 370 (1966). "That power includes the ability to award damages and attorney's fees to an aggrieved party." Rainbow Sch., Inc. v. Rainbow Early Educ. Holding LLC, 887 F.3d 610, 617 (4th Cir. 2018) (citing Hutto v. Finney, 437 U.S. 678, 691 (1978)). To establish civil contempt, there must be clear and convincing evidence of four elements:

> (1) the existence of a valid decree of which the alleged contemnor had actual or constructive knowledge; (2) that the decree was in the movant's

> “favor”; (3) that the alleged contemnor by its conduct violated the terms of the decree, and had knowledge (at least constructive knowledge) of such violations; and (4) that the movant suffered harm as a result.

United States v. Ali, 874 F.3d 825, 831 (4th Cir. 2017).

III. DISCUSSION

The Court begins by addressing the issue of whether Mr. Meijboom should be held in contempt. On this issue, there are two threshold questions. As a preliminary matter, Mr. Meijboom questions whether this Court has jurisdiction over him, as he is not counsel of record for the Defendant in this case, even though he is counsel of record of that Defendant in the Dutch litigation. The Court has already rejected this argument [Doc. 358 at 3-4] and readily concludes that it may properly exercise over Meijboom for the purpose of these contempt proceedings.

Next, Mr. Meijboom asserts that he cannot be held in contempt for failing to correct his misrepresentations to the Dutch Court by an affirmative statement by him, or for having re-affirmed his representations at the July 5th hearing. On this point, Mr. Meijboom makes two arguments. First, citing Article 10a of the Lawyers Act and the Dutch Rules of Professional Conduct, he argues that he is *dominus litis* (“the master of the suit”) and is ethically required to act independently of a third party's instructions. As such, he contends, that he was not required to abide by the instructions of this Court.

Mr. Meijboom's argument in this regard overlooks Rules 6 and 8 of the Dutch Rules of Professional Conduct and Article 21 of the Dutch Code of Civil Procedure, which require a Dutch lawyer to accurately present the facts while advocating for his client; to avoid causing unnecessary expense by the opposing party; and to refrain from providing factual information that knows, or at least should know, to be incorrect. [See Doc. 385: 3rd Hoeba Decl. at ¶¶ 4, 5; Exs. 385-1 at 10-11, 12; Exhibit 385-2 at 1]. In asserting his misrepresentations regarding the status of the U.S. proceedings and by failing to correct the same, Mr. Meijboom failed to comply with these ethical requirements.

Second, citing a decision from the European Court of Human Rights,[5] Mr. Meijboom argues that he has a cognizable freedom of speech under the European Convention on Human Rights, and that this freedom gives him the right to criticize and even contradict the opinion of any judge (European or American). As such, he argues that statements and his failure to comply with

[5] Lutgen v. Luxembourg, Case 36681/23 Eur. Ct. H.R. (2024).

the June 27, 2023 order are protected, even though they were in the nature of a factual misrepresentation.

The Court is reluctant to interpret, much less apply, European law in this instance.[6] The Court finds, however, it is not necessary to do so. When Mr. Meijboom failed to comply with this Court's Order and spoke in direct contravention thereof, he was acting as an advocate of DMARC Advisor. His actions and words were DMARC Advisor's actions and words. There is no question that DMARC Advisor is before this Court and that this Court has jurisdiction over it. As such, the Court finds that Mr. Meijboom's actions, inaction, and words were contemptuous of this Court; that Mr. Meijboom committed such contemptuous acts with the full knowledge and approval of DMARC Advisor; and that such supports a finding and holding that the Defendant DMARC Advisor is in civil contempt of this Court.

The Court next addresses the actions and failure to comply of Mr. Millen. The facts and circumstances surrounding Mr. Millen's conduct are materially different from those concerning Mr. Meijboom. As previously found

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[6] Even though Mr. Meijboom's argument in this regard would seem to be beyond the pale, and would also appear to vitiate any requirement of candor that Mr. Meijboom may have to the Dutch Court where he is admitted to practice, this may be more of a question for the authorities in the Netherlands who govern the licensing of attorneys in that court, than for this Court to address herein. Moreover, there is the practical limitation of whether any contempt sanction levied against Mr. Meijboom could be enforceable, given there is no requirement or certainty that he will ever return to the United States.

by this Court, Mr. Millen's affidavit of May 2, 2022 was materially false. Therein, he stated that the case in this Court addressed only copyright and trademark issues, ignoring the other twelve claims that were pending, and asserted that there was no overlap of claims or issues between this case and that pending in the Dutch Court. In addition, Mr. Millen's affidavit was silent on the crucial issue of when the merits of this case commenced, even though Mr. Meijboom had represented to the Dutch Court that this did not occur until May 22, 2002 (i.e., after Mr. Millen's affidavit, presumably the date of the taking of the first deposition in the case). Mr. Millen was ordered to correct his misrepresentation by the filing of this Court's June 27, 2023, Order with the Dutch Court and also by the filing of a statement of correction. Just as Mr. Meijboom, he did the first but not the second. Unlike Mr. Meijboom, however, he did not re-affirm his misrepresentation to the Dutch Court, but merely remained silent.

Mr. Millen, through counsel, presents several arguments as to why his failure should be excused. First, he argues that his efforts at compliance were thwarted by Mr. Meijboom. Since Mr. Meijboom was the counsel of record for the Dutch Court, and Mr. Millen was not, Mr. Millen was entirely dependent on Mr. Meijboom for Mr. Millen to comply. Mr. Millen, however, has presented nothing to this Court to demonstrate what efforts, if any, he personally made to undertake compliance through Mr. Meijboom. He has not shown any corrective affidavit that he attempted to present to the Dutch Court either with or without Mr. Meijboom's cooperation. He also did nothing to apprise this Court that he was being thwarted in any attempt to comply. In all respects, Mr. Millen simply remained silent. Mr. Millen's counsel argued that the filing of this Court's June 27, 2023 order without the corrective statement constituted "substantial compliance" with the Court's directive. This argument, however, was belied by the fact that Mr. Meijboom appeared before the Dutch Court on July 5, 2023, and reaffirmed the misrepresentations previously made. This, of course, made the corrective statements (and particularly Mr. Millen's corrective statement) all the more crucial to achieving substantial compliance with this Court's Order.

Mr. Millen's third argument can best be summarized as "no harm, no foul." After the July 5, 2023 hearing the Dutch Court ultimately found in accord with this Court's order and rejected Mr. Millen's and Mr. Meijboom's misrepresentations. The sequence of events, however, was not so simple. The Dutch Court's initial ruling was in accord with Mr. Millen's and Mr. Meijboom's misrepresentations. Only after a protracted procedural struggle was the error corrected by a subsequent order of the Dutch Court on

December 20, 2023. Even then, Mr. Meijboom has persisted in seeking the reversal thereof—continuing to be persistent in his wrongful conduct.

It is obvious that Mr. Millen's conduct was not as blatant as that of Mr. Meijboom, and compliance with the Court's order would have been much more difficult for Mr. Millen. But the fact remains that he materially failed to comply, and that his efforts to comply were no more than half measures. Not only did this cause the Plaintiff to incur substantial expense, but these misrepresentations and the failure to correct them have delayed this case and the Dutch proceedings by many months, if not years. For these reasons, the Court find that Mr. Millen's material failure to comply with this Court's June 27, 2023 Order was contemptuous of this Court and that such conduct supports a finding and a holding that Mr. Millen is in civil contempt of this Court.

Regarding Mr. Hartzell, the Court finds that Mr. Hartzell made no material misrepresentations to the Dutch Court and thus had no individual obligation to correct any misstatements of his own. The Order did, however, direct "counsel for the Defendant" to correct the misrepresentations that were made. The Court finds that Mr. Hartzell undertook a number of communications seeking to prod Mr. Meijboom into full compliance with this

Order. Therefore, the Court declines to find any of Mr. Hartzell's conduct to be contemptuous of this Court.

In assessing an appropriate sanction for DMARC Advisor and Mr. Millen, the Court finds that substantially different sanctions for each would be appropriate because the nature of their respective contemptuous acts and omissions were materially different.

With regard to DMARC Advisor, the particular acts of contempt set out herein are merely another chapter in a series of obstructionist and obstreperous litigation tactics by the Defendant that have drawn this case out and caused the Plaintiff great expense. The Court entered a Preliminary Injunction in this matter, which the Defendant promptly disregarded, necessitating a finding of contempt.[7]

Were it not for the Defendant's machinations in the Dutch Court, as well as its misrepresentations thereto, this case would probably have been concluded in 2023. In fact, even the show cause hearing at issue here was delayed several times at the Defendant's request such that it had to be

[7] That order of contempt was affirmed by the Fourth Circuit. Since that time, the Supreme Court has come to the Defendant's rescue in that the Supreme Court's subsequent decision in Abitron Austria GmbH v. Hetronic International, Inc., 600 U.S. 412 (2023), undercut the basis for this Court's and the Fourth Circuit's rulings, and thus necessitated the vacating of the sanctions entered thereon. That, however, does not excuse or even diminish the overt disregard for the orders of this Court demonstrated by the Defendant.

scheduled on August 23, 2024, the date that had been reserved for the final pretrial conference. Now, however, the trial of this matter will not commence until March 2025.

As the Fourth Circuit noted in the prior appeal of this matter, "[a] civil contempt sanction must serve either to (1) coerce obedience to a court order, or (2) compensate the complainant for losses sustained as a result of the contumacy." dmarcian, Inc. v. dmarcian Eur. BV, 60 F.4th 119, 146 (4th Cir. 2023) (quoting in part Cromer v. Kraft Foods N. Am., Inc., 390 F.3d 812, 821 (4th Cir. 2004)) (internal quotation marks omitted). Here, the Plaintiff has represented to the Court that the Defendant's delay tactics and misrepresentations have cost the Plaintiff some €250,000 (approximately 262,000 USD) in attorney's fees in the Dutch action alone. [Doc. 386: Tr. at 142]. The Court can reasonably estimate that the attendant cost to the Plaintiff relative to this action can amount to an additional $150,000. Based thereon, the Court imposes on the Defendant as a compensatory sanction for this contempt a fine in the amount of $400,000.

On the other hand, Mr. Millen's improper actions constitute one small slice of the overall obstruction of the Defendant. Therefore, making him jointly and severally liable for that monetary sanction would not be warranted. In lieu of imposing any monetary penalty on him, the Court instead will suspend Mr. Millen's admission to the Bar of this District for the pendency of the present action. This sanction, however, is imposed not as a punitive sanction but as a coercive one. Mr. Millen can purge his contempt by certifying under oath and demonstrating to the satisfaction of the Court that he has had filed with the Dutch Court an affidavit, under oath, correcting the misstatements and omissions of his prior affidavit, as well as the misstatements and omissions made by Mr. Meijboom, and apologizing to the Dutch Court for such failures. Upon the completion of such, Mr. Millen's suspension will be lifted fourteen (14) days thereafter.

IT IS, THEREFORE, ORDERED that the Defendant DMARC Advisor BV is hereby held in civil contempt of the Court's June 27, 2023 Order. The Defendant shall pay to the Plaintiff Four Hundred Thousand Dollars ($400,000.00), representing the attorney's fees and expenses incurred by the Plaintiff as a result of the Defendant's contemptuous conduct.

IT IS FURTHER ORDERED that the Defendant's counsel, Pressly Millen, is hereby found in civil contempt and his admission to the Bar of this District is hereby suspended for the pendency of the present action. Mr. Millen may purge his contempt by filing a certification under oath that he has had filed with the Dutch Court an affidavit correcting the misstatements and omissions of his prior affidavit, as well as the misstatements and omissions made by Mr. Meijboom, and apologizing to the Dutch Court for such failures.

IT IS SO ORDERED.

Signed: December 19, 2024

Martin Reidinger
Chief United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION
CIVIL CASE NO. 1:21-cv-00067-MR

DMARCIAN, INC.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**O R D E R**
	)	
DMARC ADVISOR BV,	)	
f/k/a dmarcian Europe BV,	)	
	)	
Defendant.	)	
	)	

THIS MATTER is before the Court on the Plaintiff's Motion for Antisuit Injunction and/or to Require Correction of Misrepresentations Made to the Dutch Court [Doc. 185]. The Court held a hearing on this motion on June 27, 2023.

I. BACKGROUND

A. The Dutch Interim Proceedings

In late 2019, a dispute arose between dmarcian, Inc. ("dmarcian") and the Defendant DMARC Advisor BV, formerly known as dmarcian Europe BV ("DMARC Advisor"), and their principals over the ownership, licensing, and distribution of certain computer code (the "Software"), which was the subject of a January 2016 agreement between dmarcian and DMARC Advisor. [Doc.

26-1 ¶¶ 16-18; Doc. 26-6 at ¶ 2.18]. Although the parties attempted to negotiate a resolution to their dispute, these negotiations ultimately broke down, and on December 6, 2019, dmarcian's principal, Tim Draegen ("Draegen"), temporarily suspended DMARC Advisor's access to the Software. [Doc. 26-2 at ¶ 2.19].

Two days later, dmarcian restored DMARC Advisor's access to the Software [Doc. 26-6 at ¶ 2.20], and the parties resumed negotiating a potential license agreement or other solution to their dispute over ownership of the Software. [Doc. 26-1 at ¶ 19]. When negotiations again stalled, Draegen (then a DMARC Advisor shareholder) sought to remove DMARC Advisor's minority shareholder, TDX, as DMARC Advisor's director. [Id. at ¶ 20]. In July 2020, Draegen requested a Dutch shareholder meeting for that purpose. [Id.]. TDX responded by submitting an application (akin to a motion for injunctive relief) to the Enterprise Court of the Amsterdam Appellate Court, seeking to block Draegen from removing TDX.[1] [Id. at ¶ 22].

In August 2020, both Draegen and TDX asked the Enterprise Court in the Netherlands to order an investigation into DMARC Advisor's policies and course of affairs. [Doc.. 26-2 at ¶¶ 1.3, 1.4]. On September 7, 2020, the

[1] dmarcian was not a party to these interim proceedings in the Enterprise Court.

Enterprise Court ordered such investigation and appointed an independent director with a decisive vote "to try to obtain clarity as to the question of where the intellectual property rights to the software and software applications developed by [DMARC Advisor] (and [DMARC Advisor's Bulgarian subsidiary]) lie." [Doc. 10-1 at ¶ 3.5].

While that investigation was ongoing, on January 22, 2021, dmarcian told DMARC Advisor that it intended once again to terminate access to the parties' shared computer systems where the parties made the Software available to their respective customers. [Doc. 26-1 at ¶ 30; Doc. 26-5 at ¶ 4]. DMARC Advisor objected to this termination as inconsistent with the parties' agreement and the pending investigation, and it asked the District Court of Rotterdam ("the Rotterdam Court") to enjoin the termination. [Doc. 26-5 at ¶ 4].

On January 29, 2021, DMARC Advisor summoned dmarcian and Draegen to appear at a hearing on February 1, 2021, before the Rotterdam Court. [Doc. 26-5 at ¶ 11]. Draegen and dmarcian did not appear that day. [Id. at ¶ 12]. In an order entered February 1, 2021, the Rotterdam Court entered a default against dmarcian and Draegen and directed them to grant DMARC Advisor access to the computer systems necessary to service its customers. [Doc. 26-3 at ¶ 3.3]. The court also fixed the coercive penalty for non-compliance at €20,000 per day, up to €500,000, for both dmarcian and Draegen. [Id. at ¶ 3.4].

B. The Commencement of the U.S. Litigation

On March 12, 2021, dmarcian filed its Complaint in this Court, asserting claims for copyright and trademark infringement as well as related state claims. [Doc. 1]. On March 25, 2021, dmarcian submitted a motion for a temporary restraining order and preliminary injunction. [Doc. 6]. The Complaint was later amended, with the most recent amendment made on June 22, 2021. (Doc. 51].

On April 19, 2021, DMARC Advisor filed a motion to dismiss based on a lack of personal jurisdiction and forum non conveniens. [Doc. 22]. On May 26, 2021, this Court issued an Order enjoining DMARC Advisor and its agents and attorneys and denying DMARC Advisor's motion to dismiss. [Doc. 39]. On June 25, 2021, DMARC Advisor appealed the Preliminary Injunction and the Order denying its motion to dismiss. [Doc. 52]. On June 28, 2021, the Court issued a Show Cause Order based on allegations of DMARC Advisor heaving violated the Preliminary Injunction Order. [Doc. 54]. Following a July 28, 2021 hearing, the Court issued Orders on August 11, 2021 holding DMARC Advisor in civil contempt of the Preliminary

Injunction and amending the Preliminary Injunction to clarify certain provisions. [Docs. 76, 80, 82].

On May 13, 2022, the Court issued an Order allowing discovery to proceed despite the pendency of the appeal. [Doc. 123].

On February 14, 2023, the Fourth Circuit issued its opinion affirming the entry of the Preliminary Injunction and the denial of DMARC Advisor's motion to dismiss. [Doc. 168].

C. The Dutch Interim Proceedings Continue

While the U.S. litigation was getting underway, on May 31, 2021, the Rotterdam Court issued a judgment rejecting dmarcian's and Draegen's objections to the February 1, 2021, injunction requiring them to restore DMARC Advisor's access to the shared computer systems. [Doc. 47-2]. The Rotterdam Court also upheld the previous €500,000 coercive penalty for non-compliance and imposed a new coercive penalty of €20,000 per day for further disobedience, with a maximum aggregate penalty of €1 million for both dmarcian and Draegen. [Id. at ¶¶ 5.4, 5.6].

On September 3, 2021, the year-long investigation of DMARC Advisor by the Dutch Enterprise Court concluded. [See Doc. 93-6]. The court-appointed investigator submitted a report, which described the history of the parties' relationship and found that, under applicable Dutch law, dmarcian had no justification for terminating the January 2016 agreement with immediate effect. [Doc. 93-2 at ¶¶ 7.11–7.13]. The investigator further stated that it "is plausible that [dmarcian] and [DMARC Advisor] jointly have copyrights to (the majority of) the source code of version 2.0," [id. at ¶ 7.20], and that if "the parties continue to use the software without mutual consent, they are mutually infringing each other's copyright to the source code," [id. at ¶ 7.22].

D. The Commencement of Proceedings on the Merits in the Netherlands

Following the conclusion of the Enterprise Court proceedings, on October 11, 2021, DMARC Advisor filed a writ of summons (the Dutch equivalent of a civil complaint) in the Rotterdam District Court (the "Rotterdam Complaint"). In the Rotterdam Complaint, DMARC Advisor asserts ownership of the copyright in the Software "by operation of law under Article 7 of the Dutch Copyright Act" [Doc. 106-5 at ¶ 6.22]; asserts the creation of an original work of copyright under E.U. law [see id. at ¶ 6.28]; contends that use of the Software by dmarcian "would . . . infringe [DMARC Advisor's] copyright under Article 26 of the Dutch Copyright Act and the copyright equivalents of other countries where [dmarcian] does business [id. at ¶ 6.39]; and requests that the Rotterdam Court "partition the community of [dmarcian] and [DMARC Advisor] in respect of computer programs to which they jointly hold the copyright pursuant to Article 3:178 of the Dutch Civil Code" [id. at ¶ 6.40].

Pursuant to Article 12 of the Dutch Civil Law, dmarcian sought to stay the Rotterdam proceedings in favor of the U.S. case. [See Doc. 174-2 at ¶¶ 1.1, 5.1]. DMARC Advisor opposed dmarcian's request for a stay. [Id. at ¶¶ 5.6, 5.7]. In support of its opposition, DMARC Advisor relied on a May 2, 2022 affidavit from one of its U.S. counsel, Pressly Millen. [Id. at ¶ 5.8]. In his Affidavit, Mr. Millen asserted, in pertinent part, as follows:

> 16. As a general matter, U.S. courts recognize that "[i]ntellectual property" involves "separate and independent rights arising from the unique laws of each nation." *Black & Decker Corp. v. Sanyei America Corp.,* 650 F. Supp. 406, 409 (N.D.Ill.1986) (discussing copyright and trademark laws). Neither U.S. copyright law nor U.S. trademark law applies extraterritorially. *See GB Mktg. USA Inc. v. Gerolsteiner Brunnen,* 782 F. Supp. 763, 772 (W.D.N.Y. 1991) ("Where copyright infringement occurs both inside and outside the United States, the [U.S.] district court has jurisdiction, but only over the U.S. infringement."). For that reason, **the North Carolina litigation, which pleads only violations of *U.S.* copyright and trademark law**, is "incapable of resolving infringement under foreign law," *e.g.*, Dutch law. *Zynga, Inc. v. Vostu USA, Inc.,* 816 F. Supp. 2d 824, 829 (N.D. Cal. 2011) (U.S. court refusing to enjoin Brazilian copyright action).
>
> 17. For these reasons (and notwithstanding the fact that the North Carolina Litigation is currently on appeal challenging both jurisdiction and failure of the court to apply the doctrine of *forum non conveniens* in order to dismiss the case), **determinations**

> **to be made by the U.S. court in the North Carolina Litigation do not concern the same subject matter as the subject matter before the Dutch court**. In other words, **the primary subject matter of the North Carolina Litigation is alleged infringement of the intellectual property within the U.S.** while the subject matter of the Dutch proceedings is related to the relationship between the parties with respect to their distribution agreement, co-ownership of the software code, and the determination of the penalties previously imposed.

[Doc. 186-1: Millen Aff. at ¶¶ 16-17] (emphasis added).

On September 13, 2022, DMARC Advisor's Dutch counsel, A.P. Meijboom, filed pleading notes (essentially a brief) in the Rotterdam proceedings, describing the U.S. proceedings to the Dutch court as follows:

> 4.1 A month and a half after [DMARC Advisor] filed for summary judgment against [dmarcian] and Draegen in Rotterdam on January 28, 2021, and received default judgment on February 1, 2021, [dmarcian] addressed the U.S. reehter [sic] in North Carolina on March 12, 2021 .... Unlike in Dutch procedural law, a plaintiff in the United States can start a case and gradually adjust his claims and basis. **Therefore, it cannot be said that,** translated to Dutch proportions, [dmarcian] in the United States on March 12, 2021, **a case on the merits has begun.**
>
> 4.2 [dmarcian], in fact, first sought a Temporary Restraining Order . . . .
>
> 4.3 Also, [dmarcian] (still in the same case) sought *injunctive relief* (i.e., a preliminary injunction)—for [DMARC Advisor's] alleged infringement of U.S. copyright, the Lanham Act (trademark law), local know-how and for "tortuous [sic] interference" with [dmarcian's] agreements with its U.S. customers because [DMARC Advisor] allegedly persuaded a customer to use its European

instance [sic], based on an amended claim dated April 7, 2021—for which the court did assert jurisdiction, and on May 26, 2021, granted the claims to some extent. [DMARC Advisor] appealed the May 26, 2021 preliminary injunction (both jurisdiction and sentencing) on June 25, 2021, and the Court of Appeals 4th Circuit is expected to enter judgment by the end of the year.

4.4 The May 26, 2021 Order is a contempt order . . . and not a judgment on the merits . . . .

4.5 . . . [O]n May 22, 2022, the U.S. court commenced proceedings on the merits and ultimately issued a pretrial order on July 11, 2022, setting forth a roadmap for the continuation of the proceedings . . . to the effect that the parties first conduct a discovery (in the American system, this is essentially gathering evidence for the purpose of presenting evidence at oral argument—the *trial*), to be completed by the end of February 2023. The final claim is filed through motions, and not later than March 31, 2023. The substantive, oral hearing (the *trial*) will take place on or after September 5, 2023.

4.6 In the meantime, the parties are still required to try a mediation, which must be completed by March 15, 2023 ....

4.7 **There is therefore no question of the North Carolina judge being the first adjudicated judge on the merits** in the spirit of Article 12 Rv. **The U.S. court has only granted injunctive relief**, and it will take until March 2023 for Oberhaupt[2] to determine the final bases and claims of [dmarcian] in the U.S. proceedings on the merits (if the North Carolina court's finding of jurisdiction has not been overturned by the Court of Appeals by then, or the appeal does not result in further delay).

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[2] While it is unclear whether "Oberhaupt" has a particular meaning in the Dutch language, the Court is aware that "Oberhaupt" in German means "chief." The Court therefore assumes that this is a reference to the undersigned, who is currently serving as the Chief Judge of the Western District of North Carolina.

4.8 In the present case, **the summons was served on [dmarcian] and Draegen on October 11, 2021, making the Rotterdam District Court the court first asked to rule on the parties' disputes on the merits.**

4.9 For this reason alone, therefore, the Rotterdam District Court should hear the case expeditiously and not adjourn until the U.S. court has issued a judgment on the merits.

[Doc. 173-1: Meijboom Aff. at ¶¶ 4.1-4.9] (footnotes omitted) (bold emphasis added).

On May 20, 2022, while dmarcian's motion to stay the Dutch proceedings was pending, DMARC Advisor filed a separate preliminary relief proceeding in the Rotterdam Court. [Doc. 174-1]. In that filing, DMARC Advisor asserted that it is a co-copyright holder of the Software and contended that it "also has an interest in [dmarcian] being enjoined from changing the Software – except for repairing errors." [Id. at ¶ 6.16]. DMARC Advisor explicitly asked the Rotterdam Court for a "mirror image" of this Court's Preliminary Injunction, seeking to enjoin dmarcian from "altering the Software, except for modifications which are necessary to comply with the other orders based on the judgment to be rendered in this matter or to correct demonstrable errors." [Id. at 50].

On July 18, 2022, the Rotterdam Court granted DMARC Advisor's request for preliminary relief and entered an order which, among other things, "[p]rohibits [d]marcian . . . from altering the Software without [DMARC] Advisor's consent, except for the modifications that are necessary to comply with other orders based on this judgment and correction of demonstrable errors." [Doc. 141-2 at ¶ 7.3].

On December 14, 2022, the Rotterdam Court denied dmarcian's request to stay (referred to as a "lis pendens appeal") the Rotterdam action that had been initiated on October 11, 2021. [Doc. 173-2]. In denying the stay, the Rotterdam Court accepted DMARC Advisor's representation that the U.S. case did not "commence" until May 22, 2022:

> 5.35. The question remains whether the American proceedings that dmarcian Inc. bases its lis pendens appeal on were instituted earlier than the present case . . .
>
> 5.36. Since in the present case the day of summons is October 11, 2021, cleze case is pending pursuant to a11icle 125 paragraph I Rv from that day.
>
> 5.37. **During the oral hearing of I September 4, 2022, [DMARC Advisor] explained very concretely and further substantiated with documents that in the U.S. proceedings that dmarcian Inc. underlies its lis pendens appeal to date only decisions of a provisional nature (injunctive relief) have been rendered and that the court in those proceedings did not commence proceedings on the merits until May 22, 2022.** dmarcian Inc. has left this exposition of [DMARC Advisor] undisputed and the court assumes that the decisions rendered before May 22, 2022 should be considered as preliminary injunctive relief under the applicable procedural law.

5.38. A procedure for obtaining provisional relief is not a procedure that is relevant in the present context. **Article 12 of the Dutch Code of Civil Procedure requires that in the foreign proceedings a judgment can be given that is capable of recognition and, if applicable, enforcement in the Netherlands.** With regard to that requirement, the Court considers that it is implicit in that requirement that the foreign decision must have or be able to acquire res judicata in the Netherlands. Under Dutch civil procedural law, a summary judgment is not subject to res judicata . . . . The court considers that this applies equally, and on the same grounds, to a decision of a foreign court that should be considered as an interim injunction . . . .

5.39. The fact that, in the American proceedings, it is not a separate legal proceeding but a preliminary phase of the proceedings does not alter the fact that the ratio of the lis pendens rule precludes taking this first phase into account. After all, that ratio is that **if proceedings have been commenced simultaneously in two jurisdictions that can lead to a decision that can become res judicata, the older proceedings take precedence.** The assessment of the lis pendens appeal of dmarcian Inc. is therefore limited to the bidder dispute initiated by the American court on May 22, 2022.

[Id.at 17 §§ 5.35-5.39] (errors uncorrected)[3] (emphasis added). The Rotterdam Court has set a July 5, 2023 trial date to determine the parties' rights in the very Software at issue in the present case.

[3] This Judgment was translated into English by an unknown entity and contains a number of typographical errors. The Court presents the language of the translated Judgment without corrections.

E. The Hague Appellate Court Judgment Reversing the Rotterdam Court's Interim Relief Judgments

Meanwhile, on May 23, 2023, the Hague Appellate Court reversed the Rotterdam Court judgments dated February 1, 2021 and May 31, 2021 that afforded interim relief to DMARC Advisor. Specifically, the Hague Appellate Court ruled that DMARC Advisor's "claims cannot be allowed at this point, nor [were] they allowed at the time of the judgment amending the default judgment." [Doc. 202-1 at ¶ 4.7]. The Hague Appellate Court set aside/reversed the portions of the February 1 and May 31, 2021 decisions that had favored DMARC Advisor, including the award of sanctions against dmarcian and Draegen and the requirement that dmarcian provide DMARC Advisor access to the shared computer system. [Id. at 7]. As the unsuccessful party, DMARC Advisor was ordered to pay the costs of the proceedings. [Id. at 7-8].

II. DISCUSSION

A. Antisuit Injunction

By the present motion, dmarcian moves the Court to enter an antisuit injunction to preliminarily enjoin DMARC Advisor from proceeding on its Dutch claims as to copyright ownership and the terms of the parties' contract and breach thereof until the present litigation (hereinafter referred to as "the U.S. action") is tried on its merits. [Doc. 185].

In the seminal case of Laker Airways Ltd. v. Sabena, Belgian World Airlines, the D.C. Circuit recognized the well-settled principle that "American courts have power to control the conduct of persons subject to their jurisdiction to the extent of forbidding them from suing in foreign jurisdictions." 731 F.2d 909, 926 (D.C. Cir. 1984). It is also generally recognized, however, that "parallel proceedings on the same *in personam* claim should ordinarily be allowed to proceed simultaneously, at least until a judgment is reached in one jurisdiction which can be pled as res judicata in the other." Gau Shan Co. v. Bankers Trust Co., 956 F.2d 1349, 1352 (6th Cir. 1992) (quoting in part Laker Airways, 731 F.2d at 926-27). Accordingly, "injunctions 'restraining litigants from proceeding in courts of independent countries are rarely issued.'" Gau Shan, 956 F.2d at 1352 (quoting in part Laker Airways, 731 F.2d at 927).

In determining whether to issue an antisuit injunction, the Court must first determine as a threshold inquiry whether the parties and the issues in the two disputes are the same. See BAE Sys. Tech. Solution & Servs., Inc. v. Republic of Korea's Defense Acquisition Program Admin., 884 F.3d 463, 479 n.15 (4th Cir. 2018). Here, although there is a significant overlap of parties and issues in both the U.S. and Dutch actions, they are not identical. In the Dutch proceeding, DMARC Advisor asserts a number of claims against Tim Draegen; however, Draegen is not a party to the U.S. action. Thus, enjoining DMARC Advisor from proceeding in the Dutch litigation would effectively prohibit it from pursuing any relief at all from Draegen.

Moreover, while there is substantial similarity between the claims asserted in each of these actions, the claims asserted in the Dutch action are markedly different from the U.S. action. In the U.S. action, dmarcian is asserting intellectual property claims under U.S. laws, including claims for copyright infringement, trademark infringement, and for false designation. [See Doc. 51]. In the Rotterdam Court proceeding, DMARC Advisor is asserting claims under Dutch, Bulgarian and E.U. copyright laws and Dutch contract and tort law, and also seeking "to determine the amount of penalties forfeited by [dmarcian] and Draegen." [Doc. 189-1 at ¶ 1.4]. The assertion of the Dutch contract and intellectual property claims as well as the separate claim for the penalty payments render the Dutch proceeding significantly different from the U.S. action.

Even if the Plaintiff could satisfy these basic threshold requirements, consideration of the relevant factors would still weigh against the entry of an antisuit injunction here. The circuits are split regarding the proper standards to apply in determining whether a foreign antisuit injunction should issue. The First, Second, Third, Sixth, and District of Columbia Circuits have adopted the so-called "conservative approach," by which a foreign antisuit injunction will issue "only if the movant demonstrates (1) an action in a foreign jurisdiction would prevent United States jurisdiction or threaten a vital United States policy, and (2) the domestic interests outweigh concerns of international comity." Goss Int'l Corp. v. Man Roland Druckmaschinen Aktiengesellschaft, 491 F.3d 355, 359 (8th Cir. 2007) (collecting cases). The Fifth and Ninth Circuits, on the other hand, utilize the "liberal approach," "which places only modest emphasis on international comity and approves the issuance of an antisuit injunction when necessary to prevent duplicative and vexatious foreign litigation and to avoid inconsistent judgments." Id. at 360. While the Fourth Circuit has not expressly adopted either of these standards, it has recognized that under either approach, "international comity remains a significant consideration." BAE Sys., 884 F.3d at 479.

Here, consideration of principles of international comity weigh against enjoining DMARC Advisor from proceeding with the Rotterdam Court litigation. Although the issuance of an antisuit injunction does not directly interfere with the jurisdiction of the foreign court, it would "effectively restrict the foreign court's ability to exercise its jurisdiction." Laker Airways, 731 F.2d at 927. Such action "conveys the message, intended or not, that the issuing court has so little confidence in the foreign court's ability to adjudicate a given dispute fairly and efficiently that it is unwilling even to allow the possibility." Goss Int'l, 491 F.3d at 360 (citation omitted).

Moreover, should this Court employ an anti-suit injunction, it is entirely possible that the Rotterdam Court could do the same. "If both the foreign court and the United States court issue injunctions preventing their respective nationals from prosecuting a suit in the foreign forum, both actions will be paralyzed and neither party will be able to obtain any relief." Gau Shan, 956 F.2d at 1354-55. "The more readily courts resort to this extraordinary device, the more frequently this sort of undesirable stalemate will occur." Id. at 1355.

In arguing for an antisuit injunction, dmarcian cites to the factors considered in the "liberal approach," include the need to avoid duplicative (and therefore vexatious) foreign litigation and to avoid inconsistent judgments. Such factors, however, are always "likely to be present whenever parallel actions are proceeding concurrently." Id. at 1355 (quoting China Trade and Dev. Corp. v. M.V. Choong Yong, 837 F.2d 33, 36 (2d Cir. 1987)). As such, reliance on these factors "is *prima facie* inconsistent with the rule permitting parallel proceedings in concurrent *in personam* actions."

Laker Airways, 731 F.2d at 928; see also Gau Shan, 956 F.2d at 1355 ("An antisuit injunction based upon these factors would tend to debilitate the policy that permit parallel actions to continue and that disfavors antisuit injunctions."). Accordingly, courts have held that such factors are more properly considered in a motion for dismissal for forum *non conveniens* than a motion for antisuit injunction. See Laker Airways, 731 F.2d at 928. Moreover, these factors "do not outweigh the important principles of comity that compel deference and mutual respect for concurrent foreign proceedings." Id. at 928-29.

Here, dmarcian contends that the Dutch proceedings pose a threat to this Court's jurisdiction, in that DMARC Advisor is seeking in the Dutch proceeding "an earlier adjudication of copyright ownership and infringement," which it characterizes as "an effort to undermine the jurisdiction of this Court to adjudicate the parties' rights in relation to the source code." [Doc. 187 at 20]. As dmarcian concedes, however, "the Dutch Court cannot determine issues arising under US copyright law." Id. Further, while dmarcian argues that "[DMARC Advisor] will likely attempt to bind dmarcian to rulings on the underlying contractual relationship" in the Dutch litigation [id.], it is *this Court* that will decide whether any forthcoming Dutch rulings are, in fact, binding on the parties in the U.S. litigation. In short, nothing that the Dutch Court does or has done poses a threat to this Court's jurisdiction.

For all of these reasons, the Court in the exercise of its discretion declines to issue an antisuit injunction in this case.

B. Correction of Misrepresentations

Either in addition to or as an alternative to an antisuit injunction, dmarcian asks the Court to require DMARC Advisor to correct certain misrepresentations made to the Dutch Court regarding the status of the U.S. case.

As noted *supra*, dmarcian previously sought a stay of the Dutch proceedings in favor of the U.S. case. In opposing dmarcian's request, DMARC Advisor submitted the affidavit of American counsel, Pressly Millen, who represented to the Dutch Court that the U.S. litigation involves only violations of U.S. copyright and trademark law only *within the U.S.* and therefore does not concern the same subject matter as the litigation before the Dutch Court. [Doc. 186-1: Millen Aff. ¶¶ 16-17]. Mr. Millen conceded at the hearing on this matter, however, that there is a degree of overlap of claims asserted in the U.S. and Dutch litigation. This representation is also clearly contrary to this Court's determination, just months earlier, that both the Copyright Act can be applied extraterritorially based on the facts presented in this case.[4] [Doc. 39 at 48-49].

Mr. Millen's Affidavit also wrongly implies that issues of copyright ownership and the terms of the parties' agreement are not at issue in the U.S. case. However, dmarcian's original Complaint makes numerous allegations placing the ownership of the copyright in the source code directly at issue. [Doc. 1 at ¶¶ 2, 8, 9, 33(g), 70, 71(c), 126]. Moreover, dmarcian also pled breach of contract claims, which will require the Court to determine the nature of the parties' relationship and the terms of their agreement. [Id. at ¶¶ 114-24]. These allegations and claims were carried forward to dmarcian's Second Amended Complaint. [Doc. 51].

Several months later, DMARC Advisor's Dutch counsel, Alfred Meijboom, filed pleadings notes in opposition to dmarcian's request for a stay, arguing that the Rotterdam proceedings (which commenced in October 2021)[5] preceded the commencement of proceedings on the merits in the

[4] The Fourth Circuit later affirmed this determination. See dmarcian, Inc. v. dmarcian Eur. BV, 60 F.4th 119, 139-40 (4th Cir. 2023).

[5] DMARC Advisor also contends in its Response that its litigation in The Netherlands was the "first filed," citing the interim relief proceedings commenced on January 29, 2021. [Doc. 190 at 4-8, 23 n.4]. In the Rotterdam Court proceedings, however, the Dutch Court made clear and DMARC Advisor admitted that the question of which action was first filed is a choice between dmarcian's March 12, 2021 Complaint or the October 11, 2021 action on the merits in Rotterdam. [Doc. 173-2 at ¶¶ 5.32-5.39; Doc. 173-1 at ¶ 4.8]. Dutch

U.S. Specifically, Mr. Meijboom asserted that the filing of the U.S. Complaint in March 2021 sought only interim injunctive relief and therefore did not begin "a case on the merits," and that this Court did not commence "proceedings on the merits" until May 22, 2022.[6] [Doc. 173-1 at ¶¶ 4.1-4.5]. These statements are false and misleading. Unlike Dutch law, wherein proceedings on the merits are conducted separately from proceedings for preliminary or summary relief,[7] under U.S. law, a civil action is commenced with the filing of a complaint. Fed. R. Civ. P. 3. There is no separation of the preliminary proceedings and the proceedings on the merits. The complaint sets forth a statement of the claims upon which the plaintiff seeks relief on the merits. Fed. R. Civ. P. 8(a)(2). When a civil action is filed, a plaintiff may seek preliminary relief as part of that action. In order to receive preliminary or interim relief under U.S. law, the party seeking relief must demonstrate a

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interim relief proceedings do not determine the parties' rights in a proceeding on the merits. [Doc. 17: Jansen Decl. at ¶ 14]. Therefore, based on DMARC Advisor's own filings in this Court, the January 2021 interim relief proceedings are irrelevant to the determination of which case is the first-filed merits case.

[6] The basis for Mr. Meijboom's statement in this regard is unclear, as there is no event on the docket that took place on May 22, 2002.

[7] <u>See</u> Margetson, Nicholas, et al. <u>Litigation and Enforcement in The Netherlands: Overview</u>, available at https://uk.praticallaw.thomsonreuters.com/w-015-9107?context Data=%28sc.Default%29&transitionType=Default (last accessed June 26, 2023); <u>see also</u> [Doc. 17: Jansen Dec. at ¶ 14].

likelihood of prevailing *on the merits*. A preliminary relief hearing can even be consolidated with a trial on the merits. See Fed. R. Civ. P. 65(a)(2). Thus, regardless of whether preliminary injunctive relief is sought, what matters for the purpose of determining under U.S. law whether an action on the merits was first to be filed is the filing of the complaint. The complaint sets forth the claims upon which the Court may issue a final judgment, and therefore it is the *filing of the complaint* that commences the proceedings on the merits in a U.S. action.

Mr. Meijboom's false and misleading statements caused the Dutch Court to conclude that dmarcian's Complaint sought only provisional relief and therefore did not constitute a commencement of proceedings on the merits, thereby making DMARC Advisor's commencement of proceedings in the Rotterdam Court in October 2021 the "earlier filed" action. [See Doc. 173-2 at § 5.39 (finding that the U.S. proceedings "commenced" on May 22, 2022 and therefore concluding that the October 2021 Dutch proceedings "take precedence" as the older proceeding)]. The Rotterdam Court, therefore, denied dmarcian's request to stay its proceedings in favor of the U.S. proceedings based on counsel's misrepresentations of U.S. and the application of that law to the facts of this case.

The Court finds that the above-referenced statements made by DMARC Advisor's counsel to the Rotterdam Court to be significant and material misrepresentations. These misrepresentations create a risk of inconsistent, conflicting, and erroneous judgments which will neutralize or negate this Court's rulings. Accordingly, the Court will require DMARC Advisor to promptly correct its misstatements to the Rotterdam Court prior to the commencement of the trial on July 5, 2023. To that end, the Court will require DMARC Advisor to provide a copy of this Order to the Rotterdam Court, along with a certified Dutch translation, as well as a statement from DMARC Advisor's counsel (with certified translations in both English and Dutch) which states as follows:

(1) Counsel is submitting this statement to the Rotterdam Court in order to correct false and misleading representations previously made to the Court in both the Affidavit of Pressly Millen and the pleading notes of Alfred Meijboom;

(2) The proceedings on the merits in the U.S. case began with the filing of the Complaint on March 12, 2021, and DMARC Advisor's representations to the contrary to the Rotterdam Court are entirely untrue;

(3) The U.S. case filed on March 12, 2021 presented claims which put copyright ownership and the terms of the parties' contracts squarely at issue. As such, there appears to be some overlap of issues between the U.S. case and that pending before the Rotterdam Court. DMARC Advisor's representation to the Rotterdam Court that the U.S. case pleads only violations of U.S. copyright and trademark law, and not any infringing actions outside the U.S., is entirely untrue; and

(4) The Preliminary Injunction issued by the U.S. Court did not limit application of the Copyright Act to only acts of infringement within the United States and gave extraterritorial application to reach acts of DMARC Advisor in Europe and elsewhere, and DMARC Advisor's representations to the contrary to the Rotterdam Court are entirely untrue.

Such documents shall be provided to the Rotterdam Court no later than July 3, 2023.[8] No later than July 5, 2023, DMARC Advisor shall provide to this Court an affidavit of service of such documents upon the Rotterdam Court. DMARC Advisor is hereby warned that failure to comply with the directives

[8] Nothing in this Order prevents dmarcian from also filing with the Rotterdam Court a copy of this Order, along with a Dutch translation, by July 3, 2023.

of this Order will result in the imposition of sanctions, up to and including the striking of DMARC Advisor's Answer and the entry of default against it.

<u>**O R D E R**</u>

IT IS, THEREFORE, ORDERED that the Plaintiff dmarcian, Inc.'s Motion for Antisuit Injunction and/or to Require Correction of Misrepresentations Made to the Dutch Court [Doc. 185] is **GRANTED IN PART** and **DENIED IN PART** as follows:

(1) The Motion to Require Correction is **GRANTED**. No later than **July 3, 2023**, the Defendant DMARC Advisor BV shall file copies of this Order and a statement from DMARC Advisor's counsel to the Rotterdam District Court, along with certified translations thereof (in Dutch), in accordance with the terms of this Order.

(2) No later than **July 5, 2023**, DMARC Advisor shall provide to this Court an affidavit of service of such documents upon the Rotterdam Court.

(3) DMARC Advisor's failure to comply with the directives of this Order will result in the striking of DMARC Advisor's Answer and the entry of default against it.

(4) The Motion for Antisuit Injunction is **DENIED**.

IT IS SO ORDERED.

Signed: June 27, 2023

Martin Reidinger
Chief United States District Judge