No. 26A298

IN THE

Supreme Court of the United States

DMARC ADVISOR BV, FORMERLY
KNOWN AS 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

RESPONSE IN OPPOSITION TO APPLICANT'S MOTION TO STAY AND REQUEST FOR ADMINISTRATIVE STAY

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent represents that it does not have any parent entities and does not publicly issue stock. No publicly held entity owns any of its stock or other interest. It has no stock ticker symbol.

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RESPONSE IN OPPOSITION TO APPLICANT'S MOTION TO STAY AND REQUEST FOR ADMINISTRATIVE STAY

Incorrectly asserting a purported circuit split on interpretation of *Abitron Austria GmbH v. Hetronic Int'l, Inc.,* 600 U.S. 412 (2023) in relation to preliminary injunctive relief granted as to Plaintiff's trademark claims, Defendant DMARC Advisor, BV ("DMARC Advisor") has moved for a stay. DMARC Advisor seeks not just the limited stay of trial as previously granted by the Fourth Circuit during the pendency of the appeal [25-1084, Dkt. 23][1], but a stay of the entire Second Amended Preliminary Injunction (regardless of whether such relief is related to the trademark claims which cause the alleged circuit split), as well as the contempt order. This broad relief was never granted by the Fourth Circuit, nor is it warranted now.

The preliminary injunction which has been continuously in force since May of 2021, as modified in August of 2021, and modified again in December of 2023 to address *Abitron, supra* and other developments in the case. There is no basis to change that status quo now to eliminate the protection against irreparable harm to dmarcian. [*See,* W.D.N.C. ECF 39]. The district court's injunctions have been twice affirmed by the Fourth Circuit. The case is once again on the verge of trial and the quickest way to resolve disputes over the preliminary injunction with finality is to try the case.

[1] dmarcian uses the same conventions as DMARC Advisor. "Dkt" refers to docket entries in Fourth Circuit Appeal No. 25-1084 and "W.D.N.C. ECF" refers to the docket entries in the district court.

Nor can DMARC Advisor meet its burden to show irreparable harm from allowing this long-delayed case to proceed to trial which is now set for November 9, 2026. DMARC Advisor's sole basis to administratively stay trial during appeal was defense counsel Mr. Millen's inability to appear due to the sanction imposed by the district court. [Dkt. 14]. That issue was resolved in DMARC Advisor's favor through Mr. Millen's appeal to the Fourth Circuit which vacated that sanction. *dmarcian, Inc. v Millen,* 25-1085, slip Op. at *6 (4th Cir. 2026).

The Fourth Circuit properly denied DMARC Advisor's request to further delay issuance of the mandate. [Dkt. 86]. However, having gotten the relief DMARC Advisor and its counsel requested (Mr. Millen's reinstatement), DMARC Advisor still does not wish to proceed to trial. Moreover, DMARC Advisor effectively asks this Court to pre-determine issues relating to the motion to withdraw filed with the district court after the conclusion of the appeal and scheduled for hearing on September 8, 2026. [W.D.N.C. ECF 489].

DMARC Advisor asserts that dmarcian and the district court are both acting improperly by seeking a prompt resolution to this case which has been pending for five and a half years. [26A-293, DMARC Advisor's Motion for Stay (hereafter "Motion") at 1, 17-20]. To the contrary, in asking the district court to take steps to schedule trial, dmarcian relies on rulings and analysis of both the Dutch Court and the district court which have each carefully weighed comity concerns. On December 20, 2023, the Dutch Court gave deference to the proceedings before the district court under Dutch *lis pendens* rules as the first case filed on the merits once certain misrepresentations by DMARC Advisor were corrected and the Dutch Court was provided with accurate information about when the case on the merits in the district court began. [W.D.N.C. ECF 294-1 at 11-12, ¶ 4.4 & 4.5] ("the Dutch Stay").

DMARC Advisor incorrectly asserts the district court engaged in acts of "interference" and bias by requiring misinformation about the district court proceedings to be corrected. [Motion at 3-4]. The district court's determination that the Dutch Court should be given correct information in order for the latter to make its own informed decisions was accompanied by a thoughtful analysis of comity principles in which dmarcian's requested relief for the misrepresentations, an antisuit injunction, was denied. [W.D.N.C. ECF 216].

DMARC Advisor seeks to change the status quo in the Dutch Court by moving for dissolution of the Dutch Stay, arguing in part to the Dutch Court that the proceedings in the United States are taking too long. [W.D.N.C. ECF 491-2]. A continued stay of trial (temporary or otherwise) puts dmarcian at risk of substantial harm, as it potentially opens dmarcian up once again to a two-front war. The Dutch Court postponed determination of whether to dissolve the Dutch Stay until September 9, 2026. [W.D.N.C. ECF 491-3]. In asking for a scheduling conference, dmarcian indeed wants to be able to demonstrate to the Dutch Court that the U.S. trial will proceed soon.

In contrast, DMARC Advisor's request that this Court enter a stay of proceedings in the district court is intended to obtain a tactical advantage to bolster its efforts to re-start proceedings in its preferred forum, the Netherlands, and thereby change the status quo of the Dutch proceedings. This Court should deny DMARC Advisor's request for a stay in all forms.

STATEMENT

The dispute between dmarcian and DMARC Advisor arises from a licensing agreement in which dmarcian granted DMARC Advisor rights to software and related IP in the context of a contract of collaboration. [W.D.N.C. ECF 1]. When the collaboration broke down, DMARC Advisor took dmarcian's software, IP and website for itself in what the Fourth Circuit previously referred to as "full-rigged piracy" when it affirmed the preliminary injunction during DMARC Advisor's first appeal. *dmarcian, Inc. v. dmarcian Eur. BV*, 60 F.4th 119, 143 (4th Cir. 2023). DMARC Advisor's second interlocutory appeal of the injunction and related orders, filed in January of 2025 on the eve of trial,[2] sought to dissolve the Second Amended Preliminary Injunction which addressed intervening Supreme Court precedent as well as developments in the underlying case by narrowing the scope of the injunction. DMARC Advisor challenged all seven restrictions and the Fourth Circuit again upheld each restriction after a careful analysis of all issues, including among other things the requirements of *Abitron*, *supra.*

[2] The case had been set for trial on four different occasions.

I. **Injunction and Amended Injunction**

The district court issued an injunction in May of 2021 which was amended in August of 2021. [W.D.N.C. ECF 39, 82]. DMARC Advisor, which initially was called "dmarcian Europe BV," rebranded in August of 2021 under its new name so that it would not have to make the required disclosures under the First Amended Preliminary Injunction if using dmarcian's trademarked name. [W.D.N.C. ECF 78, 84].

On July 21, 2023, following this Court's opinion in *Abitron* and the district court's dismissal of dmarcian's copyright claim, DMARC Advisor moved to dissolve or modify the First Amended Preliminary Injunction. [W.D.N.C. ECF 220]. The district court granted that motion in part and modified decretal provisions #3, 4 and 5 of the injunction as shown below, enjoining DMARC Advisor 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://dmarican.com;
>
> (3) making changes to the ~~***copyrighted software***~~ ***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 [required disclose statement];
>
> (5) displaying any website with the "dmarcian" name ***which is accessible to IP addresses from the United States,*** unless that website includes a [required disclosure statement];
>
> (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; …

[W.D.N.C. ECF 403] (emphasis added to reflect changes made by the district court). The Fourth Circuit affirmed the Second Amended Preliminary Injunction in full. [Dkt. 77].

II. Dutch Parallel Proceedings

The Fourth Circuit appeal also addressed issues relating to parallel proceedings in the Netherlands. On March 12, 2021, dmarcian filed its action in the district court. [W.D.N.C. ECF 1]. Seven months later, on October 11, 2021, DMARC Advisor filed its first action on the merits seeking to address the parties' respective intellectual property rights. [W.D.N.C. ECF 189-1].

DMARC Advisor's Motion for Stay to this Court asserts that it "sued dmarcian in the Netherlands in January 2021." [Motion for Stay at 4]. However, DMARC Advisor's January 2021[3] action was for interim relief only,

[3] This *ex parte* proceeding for which default was entered was thereafter reopened upon dmarcian's motion. [W.D.N.C. ECF 17, T. Jansen Decl., ¶¶14-

and such proceedings are not relevant to the question of which case had priority under Dutch *lis pendens* rules which compare the dates of filing of cases on the merits. [W.D.N.C. ECF 17, T. Jansen Decl., ¶14]. The relevant question was whether the complaint filed by dmarcian in the district court on March 12, 2021 had priority over the proceedings on the merits filed by DMARC Advisor in the Netherlands on October 11, 2021.

Pursuant to Article 12 of the Dutch Code on Civil Procedure (**DCCP**, *Wetboek van Burgerlijke rechtsvordering*) (the Dutch *lis pendens* rule), dmarcian asked the Dutch Court to stay the Dutch case in favor of the earlier U.S. proceedings. [W.D.N.C. ECF 189-3 at 17]. Article 12 allows a stay when previously initiated proceedings on the merits are pending before a foreign court addressing the same between the same parties. [W.D.N.C. ECF 173-3]. DMARC Advisor opposed dmarcian's motion, falsely asserting that the case on the merits did not commence until May 22, 2022.[4] [W.D.N.C. ECF 173-1 at 7-8]. The Dutch Court accepted DMARC Advisor's arguments and denied

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16]. The Dutch Court issued a new ruling on May 31, 2021, shortly after the district court entered its injunction on May 26, 2021, but DMARC Advisor refused to agree that the district court's ruling could be submitted to the Dutch Court. [W.D.N.C. ECF 80 at 5-8]. This was the first time that DMARC Advisor took steps to prevent the Dutch Court from having accurate and current information about the status of the U.S. proceedings, thereby increasing the risk of inconsistent or conflicting judgments. *Id.* at 11-14.

[4] There is no docket entry correlating to May 22, 2022, but plainly it was not the commencement of the case on the merits which occurred when dmarcian filed its complaint in the Western District of North Carolina in March of 2021.

dmarcian's motion to stay on December 21, 2022, expressly finding that "the older proceedings take precedence." [W.D.N.C. ECF 189-3 at 17].

Dmarcian sought relief in the district court in the form of either an antisuit injunction or alternatively an order requiring DMARC Advisor to correct its misrepresentation to the Dutch Court regarding when the U.S. case on the merits commenced and related statements about the scope of claims. [W.D.N.C. ECF 185]. While denying the antisuit injunction, the district court found that DMARC Advisor had made material misrepresentations to the Dutch Court about the U.S. proceedings which "created a risk of inconsistent, conflicting and erroneous judgments which will neutralize or negate this Court's findings." [W.D.N.C. ECF 216 at 23]. In July 2023, the district court issued an order requiring DMARC Advisor and its counsel to submit the order to the Dutch Court along with a statement acknowledging the misrepresentations. [W.D.N.C. ECF 216 at 23-24] ("Correction Order").

On December 20, 2023, several months after submission of the Correction Order to the Dutch Court, dmarcian was granted the Dutch Stay based on a finding that the U.S. proceedings were indeed commenced earlier than the Dutch proceedings. [W.D.N.C. ECF 294-1 at 11-12, ¶ 4.4 & 4.5]. In granting the Dutch Stay, the Dutch Court itself acknowledged the importance to avoid conflicting rulings:

> Thus, in this case, if both proceedings are continued, the situation threatens to arise that, on the crucial points of ownership of the IP rights and the originality of the source code, there are two court judgments enforceable in the Netherlands that may be (in whole

> or in part) incompatible with each other. This is the situation that Article 12 Dutch Code of Civil Procedure aims to prevent.

[*Id.* at 12]. In short, the Dutch Court shared the district court's concerns about the need to avoid conflicting rulings and applied Dutch law to give appropriate deference to the U.S. proceedings as the first case filed on the merits.

III. **Contempt and Suspension**

After DMARC Advisor submitted the Correction Order to the Dutch Court but not the separate corrective statement, DMARC Advisor nonetheless continued to baselessly argue to the Dutch Court that the Dutch case was still the first filed case on the merits. [W.D.N.C. ECF 254-1 at 6]. In September of 2023, while the parties awaited ruling from the Dutch Court, dmarcian filed a contempt motion in the district court on the grounds that DMARC Advisor had not fully complied the Correction Order through the submission of a separate statement and compounded the problem by continuing to make arguments which undermined the Correction Order. [W.D.N.C. ECF 253].

The district court found contempt in its order issued on December 20, 2023 (coincidentally, the same day the Dutch Stay was entered). [W.D.N.C. ECF 401]. The district court sanctioned DMARC Advisor $400,000 and suspended Mr. Millen from practice in the Western District of North Carolina unless he purged contempt by submitting a corrective statement by counsel to the Dutch Court. [W.D.N.C. ECF 401 at 28-29]. On appeal, the Fourth Circuit dismissed DMARC Advisor's appeal of the Correction Order and the contempt order as interlocutory. [Dkt. 77 at 20-27]. In the companion appeal, the Fourth Circuit vacated the contempt sanction as to Mr. Millen, finding that the sanction did not address future compliance and lack of clear and convincing evidence of harm. *dmarcian, Inc. v Millen,* 25-1085, slip op. at 14-16.

IV. Stay Rulings in the U.S. Proceedings

At the outset of its appeal to the Fourth Circuit, DMARC Advisor moved both the district court and the Fourth Circuit to stay trial, the preliminary injunction, and the contempt order pending appeal, and at the Fourth Circuit, DMARC Advisor also asked for an administrative stay. [W.D.N.C. ECF 432; Dkt. 14]. Both motions to stay trial were premised on alleged irreparable harm arising from DMARC Advisor's right to have its counsel of choice (Mr. Millen) try the case. [W.D.N.C. ECF 433 at 9-11; Dkt. 14 at 22-23].

The district court denied the motion for stay. [W.D.N.C. ECF 453]. The Fourth Circuit never ruled on the motion to stay but granted an administrative stay of trial only. [Dkt. 23]. Contrary to DMARC Advisor's assertion that the Fourth Circuit "recogniz[ed] 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," [Motion at 8], the Fourth Circuit gave no reasoning for its administrative stay. [Dkt. 23]. There is no basis to assert that the Fourth Circuit granted the stay of trial to address anything other than the one irreparable harm asserted by DMARC Advisor in seeking a stay (i.e., the right to have Mr. Millen try the case), a sanction now vacated.

The Fourth Circuit opinion dissolved the administrative stay upon conclusion of the appeal. [Dkt. 77 at 30]. Following the Fourth Circuit's ruling, DMARC Advisor sought a further stay which was denied. [Dkt. 86].

V. Motion to Withdraw and Trial Scheduling

Both parties had fair warning from the district court as early as May of 2025 that trial would very promptly follow a dissolution of the stay. [W.D.N.C. ECF 490, Transcript of May 2, 2025 hearing at 12]. Anticipating the issuance of the mandate in the near term, on August 11, 2026, dmarcian moved for a scheduling conference so that the parties and the district court could ideally move forward in an informed manner as to what was expected to unfold, and so that the parties would be in a position to provide a meaningful update to the Dutch Court. [W.D.N.C. ECF 481]. The mandate issued on August 26, 2026, thereby effectuating dissolution of the stay. [Dkt. 487].

On August 25, 2026, the day before the mandate issued, DMARC Advisor's counsel moved to withdraw, asserting an unspecified "fundamental disagreement" had arisen between counsel and DMARC Advisor. [W.D.N.C. ECF 485, 486]. Given the lack of information concerning the grounds for the motion, dmarcian did not take a position on the motion to withdraw but objected to delay which might arise from such withdrawal. [W.D.N.C. ECF 491]. DMARC Advisor did not consent to its counsel's motion to withdraw but did not object to it either. [W.D.N.C. ECF 485].

DMARC Advisor was urged by its own counsel as early as August 20, 2026 to find substitute counsel. [W.D.N.C. ECF 486 at 2]. DMARC Advisor's counsel asked for thirty days from the date of an order on the motion to withdraw for DMARC Advisor to find substitute counsel. [W.D.N.C. ECF 486 at 3]. On August 28, 2026, the district court issued an order setting a scheduling conference for September 8, 2026, and notified DMARC Advisor to have substitute counsel present at that hearing if the motion to withdraw was granted. [W.D.N.C. ECF 489]. The district court has set a trial date of November 9, 2026, and an order is expected denying the motion to withdraw.

LEGAL STANDARD

The appeal of a preliminary injunction does not divest the trial court of its jurisdiction to proceed on the merits. *See Columbus-Am. Discovery Grp. v. Atl. Mut. Ins. Co.*, 203 F.3d 291, 302 (4th Cir. 2000). A stay pending appeal "is not a matter of right" and the party seeking a stay bears the burden of demonstrating the presence of the exacting standards for the granting of such relief. *Nken v. Holder,* 556 U.S. 418, 433–34 (2009).

> A stay is an "intrusion into the ordinary processes of administration and judicial review,"… and accordingly "is not a matter of right, even if irreparable injury might otherwise result to the appellant.

Id. at 427. In exercising discretion to determine whether a stay should be granted, the reviewing court balances four factors:

> (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.

Id. at 434 (citation omitted). The first two factors are the "most critical." *Id.*

The movant must make a "strong showing" of likely success on appeal, which requires "more than a mere 'possibility' of relief[.]" *Nken*, 556 U.S. at 434. Mere identification of anticipated arguments falls short of the burden to make a "strong showing" of likelihood of success. *See, Matter of Forty-Eight Insulations, Inc.,* 115 F.3d 1294, 1304 (7th Cir. 1997) (conclusory arguments fail to establish likelihood of success required to obtain a stay).

Unlike the second factor, the harm to non-movants need only be substantial, not irreparable, and a non-movant's ability to financially recover from a harm does not necessarily make that harm insubstantial. *In re Wellington*, 631 B.R. 833, 845 (Bankr. M.D.N.C. 2021). The harm to the non-movant associated with delay is also appropriate to consider. *See, Zurich Am. Ins. Co. v. Tessler*, No. 03-33532, 2006 WL 983896, at *2 (W.D.N.C. Apr. 12, 2006) (denying stay where further delay risks that "memories dim and evidence may be lost that could prove critical"); *In re Pagoda Int'l, Inc.,* 26 B.R. 18, 21 (Bankr. D. Md. 1982) (denying stay where movant "used the processes of four courts to delay the inevitable resolution of this matter").

DMARC Advisor also asks this Court for an administrative stay, i.e. a temporary order "freez[ing] legal proceedings until the court can rule on a party's request for expedited relief." *United States v. Texas*, 144 S. Ct. 797, 798 (2024) (citation omitted).

> That such stays are "administrative" does not mean they are value neutral. Their point is to minimize harm while an appellate court deliberates, so the choice to issue an administrative stay reflects a first-blush judgment about the relative consequences of staying the lower court judgment versus allowing it go to into effect.

Id. at 798. While the *Nken* factors do not control an administrative stay, they "are obviously on the court's radar, and unsurprisingly, they can influence the stopgap decision. *Id.* at 799.

STATEMENT OF LAW AND ARGUMENT

I. THIS COURT SHOULD NOT STAY THE SECOND AMENDED PRELIMINARY INJUNCTION.

a. Defendant cannot show a likelihood of success on the merits and fails to show an actual circuit split or any conflict with Abitron.

In response to Defendant's motion to dissolve the First Amended Preliminary Injunction, the district court revisited the trademark claims in light of *Abitron*. The district court found domestic conduct warranting the continuation of injunctive relief under the Lanham Act, including Defendant's targeting of U.S. customers with a link on its website for customers "in the Americas." (ECF #402 at 11). The district court modified the paragraphs which referred to the trademark claims, limiting the applicable restrictions to use of dmarcian's trademarks on websites accessible from an IP address in the U.S. (ECF #403, ¶¶4, 5).

The Fourth Circuit affirmed, noting that "use in commerce" includes "not just 'direct sales' but also 'marketing, advertising, and distributing activities.'"

[Dkt. 77 at 11-12] (citing *Hetronic Int'l v. Hetronic Ger. GmbH*, 99 F.4th 1150, 1163, 1167 (10th Cir. 2024). The court elaborated:

> When direct sales are at issue, they occur in the United States if the customers are in the United States… When marketing, advertising, and distribution are at issue, they occur in the United States if the intended recipients are in the United States.

[Dkt. 77 at 12]. Applying *Abitron*'s conduct-focused test, the Fourth Circuit found DMARC Advisor's conduct met that standard. DMARC Advisor maintained a "virtually identical" website, accessible in the Americas, using dmarcian's trademark as its domain name to sell the same services as dmarcian, and "featured a button for customers in 'the Americas.'" *Id.* DMARC Advisor "further sent a message to customers in the United States highlighting its software product" and lured at least one U.S. customer to switch providers. *Id.* These facts distinguished the case from companies merely passively operating websites accessible in the U.S. *Id.* at 12-13.

DMARC Advisor incorrectly asserts that a circuit split has been created with three other circuits courts which have implemented the requirements of *Abitron*, namely the Ninth, Tenth and Eleventh Circuits. (Dkt. 84 at 8-12).

<u>Ninth Circuit</u>. In *LegalForce RAPC Worldwide, PC v. LegalForce, Inc.,* 124 F.4th 1122, 1127 (9th Cir. 2024), LegalForce Japan's services were all outside the United States. Unlike DMARC Advisor who targeted "the Americas" on its website and provided services to at least one customer in the United States (Dkt. 77 at 12), LegalForce Japan offered unrebutted evidence that it never offered any products or services in the United States and its efforts to raise equity in the United States were not actions "in commerce" that are required to support a trademark claim. *Id.* at 1125-26.

DMARC Advisor's reliance on *Daramola v. Oracle Am., Inc.,* 92 F.4th 833 (9th Cir. 2024), a Sarbanes-Oxley anti-retaliation case, is similarly misplaced. *Daramola* involved the conduct of an employee residing in Canada and working for a Canadian company under an employment agreement expressly governed by Canadian law. *Id.* at 840. The Ninth Circuit found that, despite contacts with the U.S. parent company, the "locus of the employment relationship was in Canada." *Id.* This presents markedly different circumstances from a competitor in a trademark case targeting U.S. customers and soliciting their business "in the Americas."

Finally, in *Doctor's Best, Inc. v. Nature's Way Prods., LLC,* 143 F.4th 1101, 1109 (9th Cir. 2025), the Ninth Circuit held that transporting goods in the United States was "domestic conduct to which liability could attach" even where the sales were entirely foreign. The Ninth Circuit's conclusion that conduct occurring entirely abroad was beyond the scope of the Lanham Act, *id.* at 1107, is not at odds with the Fourth Circuit's ruling affirming the preliminary injunction which was based on marketing to "the Americas" and providing services to at least one customer in the United States.

<u>Tenth Circuit.</u> The Fourth Circuit expressly agreed with the Tenth Circuit's decision in *Hetronic Int'l, Inc. v. Hetronic Germany GmbH,* 99 F.4th 1150, 1163 (10th Cir. 2024), noting the latter court's finding that direct sales in the United States as well as marketing to customers in the United States support a claim under the Lanham Act. [Dkt. 77 at 12]. There is no split.

Eleventh Circuit. Defendant's citation to the personal jurisdiction analysis in *Jekyll Island-State Park Auth. v. Polygroup Macau Ltd.,* 140 F.4th 1304, 1320 (11th Cir. 2025) is inapposite. *Jekyll Island* stands for the unremarkable position that a company's registration of a trademark in the United States is evidence that it was subject to personal jurisdiction in the United States because it sought out the protection of U.S. law. *Id.*

District Court Decisions. Defendant cites various other district court cases which have not yet progressed to appellate review. Without conceding that they are any more relevant than the cases cited above, they do not create a circuit split and a lengthy discussion of such cases is not required here.

State Court Claims. The state law claims were addressed at length in the Fourth Circuit's opinion affirming the initial preliminary injunction and were not appealed at that time. *dmarcian, Inc. v. dmarcian Eur. BV,* 60 F.4th 119, 138, 142-43 (4th Cir. 2023). In its first appeal, DMARC Advisor argued that the district court impermissibly applied North Carolina law, citing *Sawyer v. Market Am., Inc.,* 661 S.E.2d 750, 754 (N.C. Ct. App. 2008) as it also does in the filing before this Court. [Fourth Circuit Case No. 21-1721, Dkt. # 20 at 54]. In affirming the injunction on the first appeal, the Fourth Circuit disagreed, noting that the "relevant laws all concern [DMARC Advisor's] conduct, which notably touched *American* customers." *dmarcian*, 60 F.4th at 138 (emphasis in original). Addressing dmarcian's tortious interference claims, the Fourth Circuit considered DMARC Advisor's conduct in the U.S. as well as harm that befell dmarcian in North Carolina. *Id.* at 142-43.[5]

DMARC Advisor seeks a second bite at the apple on the state law claims, claiming that *Abitron* somehow opens the door to a new challenge to those provisions of the injunction affirmed in the first appeal. [Motion at 14-15]. In *Abitron*, this Court examined Congress' intent as to whether the Lanham Act could be applied extraterritoriality as a matter of federal statutory construction. *Abitron*, 600 U.S. at 417-18. *See also,* Court expressed this presumption as follows: *RJR Nabisco v. Eur. Cmty.,* 579 U.S. 325, 335 (2016) ("Absent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application.") In short, it is a canon of statutory interpretation which applies to federal statutes, not state statutes. *Wudi Indus. (Shanghai) Co. v. Wong*, 143 F.4th 250, 259 (4th Cir. 2025) (citing *Abitron, supra* and *RJR Nabicso, supra).*

[5] North Carolina law indeed supports the Fourth Circuit's conclusion. *See e.g., Worley Claims Servs., LLC v. Jefferies*, 429 F. Supp. 3d 146, 157–58 (W.D.N.C. 2019) (law of the state where the claimant sustained its injuries governs tort claims); *Synovus Bank v. Parks*, 2013 NCBC 40, *24, 2013 WL 3965424 (N.C. Sup. Ct. July 30, 2013) ("the suffering of damages ... [is] the last event necessary to make [another] party liable" in tort); *Islet Sciences, Inc. v. Brighthaven Ventures, LLC*, 2017 WL 925846, at *5 (Sup. Ct. Wake Co. March 6, 2017) (conferring jurisdiction where California resident interfered with license agreement between two North Carolina companies).

This creates no circuit split nor are there grounds for Supreme Court review of state court claims at this interlocutory stage on an issue which was resolved in the prior appeal. Allowing DMARC Advisor review of issues for which it did not seek further review after the 2023 Fourth Circuit opinion affirming the injunction would be contrary to principles of finality and encourage piecemeal litigation. *See, e.g., Ritzen Grp., Inc. v. Jackson Masonry, LLC,* 589 U.S. 35, 47, (2020) (dismissing attempted appeal of denial of relief from automatic stay in appeal of subsequent order as untimely "second bite"); *In re Cellular 101, Inc.,* 539 F.3d 1150, 1155 (9th Cir. 2008) (party which failed to raise issues in first appeal not entitled to second bite in subsequent appeal); *In re Webb*, No. 2024-114, 2024 WL 1364359, at *1 (Fed. Cir. Apr. 1, 2024) (denying mandamus petition raising same due process issue that was already considered and rejected in prior appeal, noting that "[m]andamus review does not afford [ ] a second bite at the appellate apple").

b. DMARC Advisor is not Irreparably Harmed by the Second Amended Preliminary Injunction.

In its motion for stay made to the Fourth Circuit, DMARC Advisor argued that it would suffer irreparable harm as a result of the enforcement of the preliminary injunction pending appeal. [Dkt. 14 at 20-22]. This relief was never granted by the Fourth Circuit. The injunction remained in effect and enforceable throughout the appeal.

Although the purported basis for the petition is an alleged circuit split arising from the trademark restrictions in relation to *Abitron*, DMARC Advisor offers no argument as to how it is irreparably harmed by the provisions of the injunction that in any way relate to the trademark restrictions. Indeed, it cannot assert that irreparable harm, as DMARC Advisor rebranded in August of 2021 after the preliminary injunction was first entered so it would not have to make the disclosures required if it continued to use the name "dmarcian."

Rather, DMARC Advisor argues irreparable harm from the provisions which prevent Defendant from "making changes to the trade secret code," the restrictions on its ability to expand into certain markets, and the prohibitions on public statements concerning dmarcian. [Dkt. 84 at 14]. None of these alleged harms have anything to do with the trademark provisions at issue in the purported circuit split concerning application of *Abitron* discussed above.

All versions of the injunction prohibited making changes to the source code "except as expressly allowed or directed by this Order." (ECF #39 at 76, ECF #82 at 2, ECF #403 at 2).[6] The same restrictions on code changes have been in place since entry of the original injunction upheld by the Fourth Circuit, and yet at that time DMARC Advisor chose not to further challenge the injunction based on irreparable harm or balance of equities. *dmarcian, Inc.,* 60 F.4th at 143. DMARC Advisor sought no further appeal of that ruling or any stay of these provisions of the injunction at that time, and it should not be permitted to now assert irreparable harm to support an appeal of the long-

[6] The injunction provisions which protect dmarcian's code are also supported claims under the Defense of Trade Secrets Act, which has a broad jurisdictional provision that extends extraterritorially. (Dkt. 77 at 13-15].

standing prohibition against changing the source code, making statements about dmarcian, or expanding into other markets. Again, DMARC Advisor is not entitled to a second bite at the apple.

The appeal of a preliminary injunction does not divest the trial court of its jurisdiction to proceed on the merits. *See Columbus-Am. Discovery Grp.*, 203 F.3d at 302. Indeed, allowing the case to go to trial will very shortly moot the preliminary injunction – either a permanent injunction will issue if dmarcian prevails or the preliminary injunction will be dissolved if DMARC Advisor prevails. Rather than take up a piecemeal appeal of issues, this Court should allow the case to be fully resolved before addressing the merits of a preliminary injunction for a case which is on the verge of trial as opposed to addressing whatever issues remain based on the terms of a permanent injunction assuming one is issued after trial. If DMARC Advisor truly thought it was likely to win relief from the injunction at trial, it would be far more logical to push the case forward to a conclusion than seek further delay.

c. Plaintiff would be substantially harmed by a stay of the Second Amended Preliminary Injunction and by a stay of trial.

Both the original and the amended injunction were issued because the district court found irreparable harm to dmarcian and both versions of the injunction have been upheld by the Fourth Circuit. [W.C.N.C. ECF 39 at 66-71]. DMARC Advisor's argument regarding harm to dmarcian does not actually discuss the harm that dmarcian would suffer if the *injunction* was stayed. [Motion at 17-20]. Rather, in asserting that the Second Amended Preliminary

Injunction should be stayed, DMARC Advisor's argument about alleged lack of harm to dmarcian all focus on why a stay of the *trial* will purportedly not harm dmarcian. *Id.* DMARC Advisor not only fails to meet its burden to show how a stay of the *preliminary injunction* would not harm dmarcian, but the assertions it makes about alleged lack of harm in a stay of *trial* are based on faulty grounds.

DMARC Advisor argues that dmarcian seeks to somehow improperly "leverage" the U.S. proceedings by having the U.S. Court reach a ruling first [Motion at 20]. DMARC Advisor summarily dismisses any concerns about dmarcian's right to have its claims arising under U.S. statutes and related claims addressed in the first instance by a U.S. Court (where the first case on the merits was filed). [Motion at 17-20]. In affirming the Second Amended Preliminary Injunction, the Fourth Circuit noted the "fundamental promise of our laws 'that the courthouse door is open to [American companies] when their intellectual property is misused.'" (Dkt. 77 at 10). In seeking to preserve its right to have its claims timely adjudicated in the U.S. court system, dmarcian is doing no more than seeking to have that promise fulfilled.

Moreover, under Dutch *lis pendens* rules, it is entirely proper to stay parallel proceedings on the same or similar claims to allow the first-filed case on the merits to conclude before proceeding further. Indeed, the Dutch Court, applying its own rules, stayed the Dutch proceedings once the Correction Order clarified that U.S proceedings commenced on the merits first upon the filing of the complaint in March of 2021 rather than the fictitious date of May 22, 2022. Asking the Dutch Court to implement its own *lis pendens* rules is not in a form of disrespect as DMARC Advisor incorrectly implies.

DMARC Advisor also incorrectly argues that dmarcian is not harmed if the Dutch case goes to trial first while its case in the United States proceeds further through the appellate courts. [Motion at 18]. Several courts have found that having to fight a two-front war is indeed irreparable harm. *See, e.g. Ciena Corp. v. Nortel Networks Inc.,* No. 2:05 CV 14, 2005 WL 1189881, at *7 (E.D. Tex. May 19, 2005) (finding irreparable harm arising from inconvenience, disruption of its business, loss of good will, and financial business hardship from the duplicative actions); *see also, Gen. Protecht Grp., Inc. v. Leviton Mfg. Co.,* No. CIV 10-1020 JB/LFG, 2010 WL 5559750, at *26 (D.N.M. Nov. 30, 2010), *order clarified sub nom. Gen. Protecht Grp., Inc. v. Leviton Mfg. Co.,* No. CIV 10-1020 JB LFG, 2010 WL 5477266 (D.N.M. Dec. 7, 2010), and *aff'd sub nom. Gen. Protecht Grp., Inc. v. Leviton Mfg. Co.,* 651 F.3d 1355 (Fed. Cir. 2011) (finding irreparable harm if plaintiff were required to litigate on a second front, the International Trade Commission, and the district court).

In arguing that dmarcian will not be harmed, DMARC Advisor demonstrates that it simply wants this Court to issue a stay to buttress its efforts to first proceed in its forum of choice (i.e., the Dutch Court). [Motion at 17-20]. In short, DMARC Advisor seeks a stay to try and overturn the Dutch Stay and to delay or avoid trial with a judge which has issued at least some rulings not to DMARC Advisor's liking (despite the fact that several key rulings have indeed gone its way as the Fourth Circuit noted in denying DMARC Advisor's request for reassignment on remand). [Dkt. 77 at 28-29]. Seeking this kind of tactical advantage is an impermissible use of a stay:

> While "[a] stay pending appeal is designed to keep an appellant's position from eroding while the issues on appeal are decided" that "stay should not operate to give an appellant a tactical advantage it would not have enjoyed had it been successful in the lower court."

In re Franklin, No. 19-80661, 2020 WL 603900, at *4 (Bankr. M.D.N.C. Feb. 6, 2020) (citation omitted); *Murata Mach. USA v. Daifuku Co.,* 830 F.3d 1357, 1360 (Fed. Cir. 2016) (considering factor of whether a "clear tactical advantage" for the moving party will result from a stay).

The harm to dmarcian will be further exacerbated if DMARC Advisor is now freed from all constraints under the preliminary injunction. However, even with the preliminary injunction in place the Plaintiff is substantially harmed both competitively and financially by the delay in getting to permanent relief at trial. The preliminary injunction (as originally issued and as amended) was carefully balanced to minimize harm to DMARC Advisor by allowing its continued use of dmarcian's trade secrets. For each day that trial is delayed, DMARC Advisor gains a competitive advantage from being able to continue using dmarcian's trade secrets, free of royalties (at least until determination of damages at trial), and to lure in new customers. Only at a trial on the merits may dmarcian seek a permanent injunction to fully stop use of its trade secrets and other intellectual property and seek recovery of damages.

d. A stay of the Second Amended Preliminary Injunction is not in the public interest.

DMARC Advisor's arguments that the public interest weighs in favor of a stay are premised on an alleged "near-certain" likelihood of reversal. [Motion at 21]. As discussed above, there is no circuit split warranting Supreme Court review of these interlocutory orders and the Fourth Circuit's opinion is consistent with the requirements of *Abitron*. Contrary to DMARC Advisor's assertions, judicial economy does not support piecemeal appeals.

There is a public interest in the protection of trade secrets and intellectual property of a North Carolina company and in preventing consumers from being misled. [W.D.N.C. ECF 39, pp. 73-74]. The fact that the district court modified the preliminary injunction but denied DMARC Advisor's request to totally dissolve it does not mean that the public interest is benefitted by a stay, as argued by DMARC Advisor. [Motion at 21]. DMARC Advisor cites the case of *Scott v. Fam. Dollar Stores, Inc.,* No. 308CV00540MOCDSC, 2016 WL 4267954, at *2 (W.D.N.C. Aug. 11, 2016) for the proposition that prior modifications or reversals on appeal justify a stay due to the risk of retrial. [Motion at 21]. To the contrary, the district court's decisions in the instant case have largely been upheld, and when *Abitron* changed the legal landscape, it acted appropriately in modifying the injunction. Moreover, in *Scott*, the court ***denied*** the stay, finding among other things that the "public interest supports moving this case forward" as the case was seven years old and "the public interest in the prompt resolution of cases suggests that a stay is inappropriate." Dmarcian is entitled to move forward to prove its case in the court where the case has been litigated for five and a half years.

There is nothing about this case that warrants a departure from the general rule that piecemeal appeals should be avoided. This Court should deny the stay and, if review is later sought, consider the issues upon a final judgment.

II. NO STAY OF TRIAL OR OTHER ORDERS SHOULD ISSUE.

The Fourth Circuit correctly determined that there is no basis for an interlocutory appeal of the Correction Order or the contempt order. This case has been on the trial docket no less than four times, and there is no good reason to delay trial yet again. While the *Nken* factors do not strictly control, they do properly inform whether a "stopgap" order should issue as opposed to allowing the district court to proceed to manage its docket. *See, United States v. Texas*, 144 S. Ct. at 799.

a. The Correction Order is not an injunction, and there is no basis for immediate appeal.

"Generally, a party may only appeal an order that is final, that is, nothing remains for the district court to do except execute the judgment." *United States ex rel. Lutz v. United States*, 853 F.3d 131, 136 (4th Cir. 2017). There are limited and narrow exceptions, one of which allows interlocutory appeals of orders "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions." 28 U.S.C. § 1292(a)(1); *Lutz*, 853 F.3d at 137.

Although an injunction is broadly defined as an order proscribing or requiring specific conduct to be completed by a deadline, *Wudi Indus. (Shanghai) Co. v. Wong,* 70 F.4th 183, 188 (4th Cir. 2023), many interlocutory orders require action by a specified deadline and not all such orders are considered "injunctions" for the purposes of immediate appeal pursuant to 28 U.S.C. § 1292(a)(1):

> Most court orders are injunctions at some level of generality, but Congress did not envision that every interlocutory order restraining a party's actions could be appealed under § 1292(a)(1). Like the collateral order doctrine, § 1292(a)(1) **"was intended to carve out only a limited exception to the final-judgment rule"** and, therefore, a litigant must also show "more than that the order has a practical effect" of an injunction to immediately appeal an interlocutory order.

Lutz, 853 F.3d at 139 (citing *Carson v. American Brands, Inc.,* 450 U.S. 79 (1981).

"An order by a federal court that relates only to the conduct or progress of litigation before that court ordinarily is not considered an injunction and therefore is not appealable under § 1292(a)(1)." *Gulfstream Aerospace Corp. v. Mayacamas Corp.,* 485 U.S. 271, 279 (1988) (holding that orders granting or denying stays on equitable grounds due to other pending litigation are not immediately appealable). The exception allowing an interlocutory appeal under section 1292(a)(1) is a narrow one which this Court has directed must be approached "somewhat gingerly lest a floodgate be opened that brings into the exception many pretrial orders." *Switzerland Cheese Ass'n, Inc. v. E. Horne's Mkt., Inc.,* 385 U.S. 23, 24 (1966). Orders that relate only to pretrial procedures as opposed to the merits of the claims are not the kind of interlocutory orders warranting immediate appeal under § 1292(a)(1). *Id.* at 25; *see also, Gardner v. Westinghouse Broad. Co.,* 437 U.S. 478, 482 (1978).

Orders that are not directed to the merits of the underlying action are generally not subject to interlocutory appeal under § 1292(a)(1), even if punishable by contempt. *In re Braxton,* 258 F.3d 250, 257 (4th Cir. 2001).

> [I]ngenious counsel have found injunctions lurking in virtually every ruling that a district court can be called upon to make.
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> With the exception of orders [that enjoin the commencement or prosecution of other actions], it can be broadly stated that an order incidental to a pending action that does not grant [part] or all of the ultimate injunctive relief sought is not an injunction, however mandatory or prohibitory its terms, and indeed, notwithstanding the fact that it purports to enjoin.

Rigaku Corp. v. Ferrofluidics Corp., 800 F.2d 1115, 1117 (Fed. Cir. 1986) (citing 9 *Moore's Federal Practice,* § 110.20[1] (2d ed. 1985)); *see also Managed Care Advisory Grp., LLC v. United Healthcare of N. Carolina*, No. 21-10247, 2022 WL 792267, at *3 (11th Cir. Mar. 16, 2022) (holding that "an injunction in the traditional sense must be an order that gives some or all of the substantive relief sought in the complaint.") Orders directed to counsel are typically not "on the merits." *Chron. Pub. Co. v. Hantzis*, 902 F.2d 1028, 1030 (1st Cir. 1990) (order denying party's motion to prevent law firm from turning over work product not immediately appealable).

The district courts are empowered "to act in the face of contumacious conduct so expressly designed to undercut, and even sabotage, their adjudicative authority," and that such power provides the court with the right to redress conduct occurring both within and outside the courtroom. *Keyes L. Firm, LLC v. Napoli,* 120 F.4th 139, 143 (4th Cir. 2024) (invoking inherent authority to sanction law firm for asking state court to enjoin further proceedings in the federal court action in an effort to obstruct federal proceedings); *see also, Chambers v. NASCO, Inc.,* 501 U.S. 32, 43 (1991) (holding that a federal court has the inherent power to manage their own affairs, including power to control admission to its bar and to discipline attorneys).

The Correction Order does not resolve the merits of any claim and did not grant any relief in the complaint. The district court denied dmarcian's request for an anti-suit injunction and instead granted alternative curative relief under the court's inherent authority to protect the integrity of judicial proceedings and its jurisdiction. Specifically, in granting the Correction Order, the district court was requiring DMARC Advisor and its counsel to correct misstatements made to the Dutch Court to ensure that both courts were operating with a correct common understanding of proceedings (i.e. "singing off the same song sheet"). The order thereby aided the district court in the management of pretrial proceedings by avoiding a risk of "inconsistent, conflicting, and erroneous judgments which will neutralize or negate this

Court's rulings." [W.D.N.C. ECF 216 at 23]. Indeed, Dutch Court itself shared this same concern. [W.D.N.C. ECF 294-1 at 12].

In short, the Correction Order issued to mitigate a threat to the district courts own judicial authority and proceedings, is not an order directed to the merits, is not an "injunction" warranting immediate appeal.

b. Nor does the Correction Order have the "practical effect" of an injunction.

When an order not expressly denominated as an injunction, the Court must further assess whether the Order has the "practical effect" of granting an injunction. *Carson*, 450 U.S. at 83. In that event, the appellant must make an additional showing that the order: "(1) may have a 'serious, perhaps irreparable consequence' and (2) can only be 'effectually challenged' through immediate appeal," rather than upon final judgment." *Selective Ins. Co. of Am. v. Westfield Ins. Co.,* 73 F.4th 239, 243 (4th Cir. 2023) (citing *Carson,* 450 U.S. at 84) (order holding that insurer had a duty to defend, even if injunctive in nature, did not "presently produce any immediate or pressing event" and therefore was not immediately appealable under 28 U.S.C. § 1292(a)(1)). DMARC Advisor cannot make this showing.

The Correction Order was entered in June of 2023. Neither Defendant nor its counsel chose to seek certification of the Correction Order for immediate appeal under 28 U.S.C. § 1292(b). DMARC Advisor appealed the Correction Order but did not seek a stay at that time, and instead chose just to ignore the part of the order which required submission of a separate statement. *Compare*

Manness v. Meyers, 419 U.S. 449, 458 (1975) ("[A]ll orders and judgments of courts must be complied with promptly. If a person to whom a court directs an order believes that order is incorrect the remedy is to appeal, but, absent a stay, he must promptly comply with the order pending appeal.").

The Correction Order submitted to that court advised about the actual date of commencement of the proceedings on the merits (i.e. March 12, 2021) and the scope of claims at issue. The date of commencement on the merits under U.S. law was the key determination that caused the Dutch Court to reverse its decision on the applicability of its *lis pendens* rule, once that was clarified by the district court. [W.D.N.C. ECF 294-1 at 11-12, ¶ 4.4 & 4.5]. DMARC Advisor has no basis whatsoever to argue that the proceedings on the merits commenced any later than March 21, 2021 under U.S. law, a point which it obscured in its submissions to the Dutch Court.

DMARC Advisor argues that it will suffer irreparable harm absent a stay of trial because its reputation has been damaged with the Dutch Court. [Motion at 23-24]. Assuming that it has lost credibility with the Dutch Court, what actually caused that harm was the fact DMARC Advisor made misrepresentations and got caught. As DMARC Advisor points out, this toothpaste can't be put back in the tube. *Id.* However, an order reversing the requirement for submission of a separate statement will not change that result. As the Fourth Circuit noted, any alleged harm arising from what DMARC Advisor characterizes as interference with the Dutch proceedings is "retrospective" because the district court's order has already been filed with the Dutch court, and the bell can't be unrung either now or after final judgment. [Dkt. 77 at 22]. What DMARC Advisor asks for is not to avoid interference with the Dutch proceedings, but further interference. This is not a proper purpose for a stay.

c. There is no circuit split on the issue of appellate jurisdiction.

No circuit split is created by the Fourth Circuit's decision to dismiss the appeal as interlocutory. DMARC Advisor contends that other circuits have "not required a showing of irreparable harm for immediate appeal that effectively *grant* an injunction." [Motion at 25] (emphasis in original). However, an order which is not styled as an injunction but has the "practical effect" of one (as DMARC Advisor argues here) does indeed have to show that the order "might have a 'serious, perhaps irreparable, consequence,' and that the order can be 'effectually challenged' only by immediate appeal." *Carson,* 450 U.S. at 84.

In *La Belle Dairy, LLC v. Sharpe Holdings, Inc.,* 183 F.4th 606, 611-12 (8th Cir. 2026), the district court entered an order styled as a "temporary restraining order" preventing the defendant from interfering with possession of leased premises, but the order had no expiration date and was open-ended. Therefore, it had the practical effect of a preliminary injunction rather than a non-reviewable temporary restraining order, and moreover neither party disputed that it was a preliminary injunction. *Id.* In that case, unlike the instant case, there was no dispute that the relief granted, preventing interference with leased premises, was injunctive in nature.

DMARC Advisor's reliance on *Salazar ex rel. Salazar v. D.C.,* 671 F.3d 1258 (D.C. Cir. 2012) is also misplaced. There, the D.C. Circuit found that the order in question was not reviewable as having the "practical effect" of an injunction because it was not one that "affect[s] predominantly all the merits." *Id.* at 1265. Moreover, the court there held that, even if it had satisfied that *Carson* requirement, the order did not satisfy the second requirement of serious, irreparable consequence. *Id.*

The other cases relied on by DMARC Advisor also fail to support its position. In *Gov't Emps. Ins. Co. v. Patel*, 166 F.4th 280, 291 (2d Cir. 2026), the court considered a stay of parallel state proceedings and held that the risk of inconsistent judgments (the very harm that the motivated the district court to act in the instant case) was irreparable harm that warranted relief. In *Def. Distributed v. Att'y Gen. of New Jersey,* 972 F.3d 193, 198 (3d Cir. 2020), the district court's decision to stay a second action filed on the same claims was held not to be the equivalent of denying an injunction, because relief could effectively be obtained in the first filed action and further was an order that "relates only to the conduct or progress of litigation before that court" which is not ordinarily appealable under § 1292(a)(1). These are much the same conclusions reached in the instant case – parallel proceedings create a risk of inconsistent judgments and rulings which relate only to the conduct of litigation, including orders entered to avoid conflicts among parallel proceedings, are not immediately appealable.

d. DMARC Advisor will not be irreparably harmed.

A stay of the Correction Order (i.e., a now very belated stay of the submission of the separate statement, which is the only outstanding obligation) will do nothing in furtherance of any legitimate interest of DMARC Advisor.

i. <u>The motion to withdraw does not supply irreparable harm.</u>

The sanction as to Mr. Millen has been vacated. If for whatever reason DMARC Advisor and/or its counsel determine that Mr. Millen should not appear, or the court allows the motion to withdraw, that is not a basis for seeking immediate appeal. *See, Richardson-Merrell, Inc. v. Koller,* 472 U.S. 424, 435 (1985) (disqualification of counsel not immediately appealable because client has various available effective remedies for review); *Lay v. Storm Smart Bldg. Sys., Inc.,* No. 23-13500, 2024 WL 209175, at *1 (11th Cir. Jan. 19, 2024) (order granting motion to withdraw not immediately appealable, citing *Richardson, supra*).

The fact that a trial would quickly follow conclusion of the appeal was made plain in 2025. [W.D.N.C. ECF 490, Transcript of May 2, 2026 at 12]. DMARC Advisor has known the outcome of the appeal since the opinions were issued on July 10, 2026. [Dkt. 77]. DMARC Advisor was told on August 20, 2026 by its own counsel to obtain substitute counsel. [W.D.N.C. ECF 486 at 2]. DMARC Advisor has at least one other law firm very familiar with its case, namely counsel who has represented DMARC Advisor in the appellate proceedings (including the instant filings). If DMARC Advisor has not taken steps to ensure readiness to proceed in whatever fashion it deemed appropriate, seeking the extraordinary remedy of a stay from this Court should not be used to as a backstop to indefinitely delay a trial which DMARC Advisor knew was imminent, or to predetermine how the district court should manage its trial docket.

ii. <u>Inability to make changes to code does not support irreparable harm allegedly arising absent a stay of trial.</u>

Movant argues that the provisions of the preliminary injunction which prohibit it from changing its code constitutes irreparable harm. [Motion at 27]. A stay of trial will do nothing to address this alleged irreparable harm. Indeed, a delay of trial prolongs that alleged harm and the quickest way to resolve that question is to proceed with trial. *See*, Section I(b) above.

iii. <u>Monetary damages do not support irreparable harm.</u>

DMARC Advisor asserts irreparable harm because it is subject to monetary sanctions [Motion at 27], a condition that has continuously been in place since the contempt order was first entered. Irreparable injury must be more than monetary loss. *Long v. Robinson*, 432 F.2d 977, 980 (4th Cir. 1970).[7]

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[7] If DMARC Advisor wishes to stay execution of the contempt sanction pending appeal, it should be required to post a supersedeas bond. *See, Matter of Campbell*, 761 F.2d 1181, 1186 (6th Cir. 1985). *See also*, F.R.A.P. 8(a)(2)(E) (relief by way of a stay may be conditioned on filing of a bond). However, DMARC Advisor's chief complaint on this point is that it should not be deprived of monetary resources and it makes no offer to post such a bond.

Monetary sanctions are not the kind of irreparable harm justifying immediate appeal and do not result in an inability to obtain effective review if not immediately appealed. *Omaha Prop. Manager, LLC v. Mustafa*, No. 23-1222, 2023 WL 7000742, at *1 (4th Cir. Oct. 24, 2023) (civil contempt sanctions not immediately appealable).

The cases cited by DMARC Advisor, all dealing with harm to public resources or the public, do not support its position. [Motion at 27]. *See, W. Virginia v. United States Env't Prot. Agency,* 90 F.4th 323, 331 (4th Cir. 2024) (considering costs incurred by the State in processing permits as a result of challenged EPA action and likely electricity rate hikes); *City of Alexandria v. Helms,* 719 F.2d 699, 700 (4th Cir. 1983) (considering irreparable harm from public exposure to increased decibel levels); *Doran v. Salem Inn, Inc.,* 422 U.S. 922, 931, 95 S. Ct. 2561, 2568, 45 L. Ed. 2d 648 (1975) (considering irreparable harm arising from injunction prohibiting enforcement of criminal laws by a State); *Underwood v. Harkleroad,* No. 5:04CV193-MU-02, 2010 WL 324416, at *2 (W.D.N.C. Jan. 19, 2010) (finding that State could suffer irreparable harm from expending limited resources to retry criminal defendant who appealed based on ineffective assistance of counsel); *Nat'l Institutes of Health v. Am. Pub. Health Ass'n,* 145 S. Ct. 2658 (2025) (challenging district court judgment vacating government's termination of research-related grants). Such considerations are not at issue in this dispute between private parties, particularly given that the third and fourth factors merge when the Government is the opposing party. *Nken,* 556 U.S. at 435.

e. dmarcian will be irreparably harmed by a stay of trial and public interest is not served by a stay.

Whereas a continued stay of trial pending resolution of DMARC Advisor's anticipated petition to this court does nothing to protect it from any alleged irreparable harm, it does considerable harm to dmarcian by continuing to delay the long-postponed trial of its claims and exposing it to potential re-engagement in a two-front war at DMARC Advisor's behest. The arguments set forth in Section II(c) above are incorporated herein by reference. Finally, DMARC Advisor got the relief it wanted, namely the ability to have Mr. Millen try the case. Dmarcian acted appropriately by bringing the issue to the attention of the court rather than the bar, as all it sought was correction of the record for the Dutch Court.

It is time for trial to proceed. The district court has now set that trial for November 9, 2026.

<u>CONCLUSION</u>

For the reasons set forth above, dmarcian respectfully requests that all requests for stay and administrative stay be denied.

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