

Case No. 13-2003

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

GEORGIA PACIFIC CONSUMER PRODUCTS, LP,

Plaintiff – Appellee,

v.

VON DREHLE CORPORATION,

Defendant – Appellant.

On Appeal from the United States District Court for the Eastern District of North
Carolina, at Raleigh, Civil No. 5:05-cv-00478-BO

**REPLY BRIEF FOR APPELLANT
VON DREHLE CORPORATION**

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INTRODUCTION AND OVERVIEW

Georgia-Pacific Consumer Products, LP (“GP”) faces and cannot overcome a basic problem that reaches across the four issues presented in this appeal: the district court applied incorrect legal standards, and GP is helpless to deny or repair those clear errors. Instead, GP expressly or implicitly asks this Court to affirm on alternative grounds, but those grounds either find no support in the law or would rest on deeply contested factual determinations that the district court did not make.

Thus, the district court plainly failed to apply basic principles of inter-circuit comity as it fashioned the scope of its injunction, prohibiting as unlawful even conduct undertaken in another circuit that had deemed the conduct lawful. GP would have this Court avoid addressing these principles and the related comity interests in respecting the determinations of separate circuits regarding a national commercial practice affecting many third parties not before the Court. For the enhancement of the jury’s award, the district court applied the incorrect, automatic trebling provision of 15 U.S.C. § 1117(b) and followed a decision of this Court addressing that provision – rather than undertaking the inquiry into the adequacy of compensation required by Section 1117(a), which GP admits applies here. GP asks this Court to disregard the differences between Sections 1117(a) and 1117(b) – despite the clearly different language, standards, purposes, and requisite determinations reflected in the separate provisions. And, as to attorney fees (and

the related issue of pre-judgment interest), the district court was permitted to award fees only in “exceptional” cases, as GP admits, but it relied here on factors that form the basis for *every* finding of contributory infringement. GP would have this Court deem this case “exceptional” on record-intensive grounds never addressed by the district court – and in certain respects contrary to determinations the court did make. In all these respects, however, the district court’s decision is beyond repair.

ARGUMENT

I. The District Court Abused Its Discretion By Awarding Injunctive Relief Contrary To Or Preempting The Legal Determinations Of Other Circuits.

GP opens its argument (Br. 23-24) by criticizing von Drehle Corporation (“von Drehle”) for not raising all the injunction-related arguments it made before the district court, and instead focusing on a single, crucial error related to the geographic scope of the injunction. Specifically, the district court erred by entering an injunction regulating von Drehle’s and, indirectly, its distributors’ behavior in other circuits, including: (i) one circuit, the Eighth, that had deemed the very practice at issue to be lawful; (ii) another circuit, the Sixth, that had held that GP was barred from securing relief against those undertaking that same practice; and (iii) other circuits that had not addressed the lawfulness of the practice or the validity of defenses that von Drehle’s distributors or others might

raise. *See* Appellant's Br. 50-56. Nowhere in its opposition does GP explain how a district court can enjoin conduct that other circuits had found lawful, had determined that GP cannot enjoin, or had yet to address in this highly contested matter affecting third parties.

Throughout, GP sidesteps the significant comity principles violated by the injunction's scope. For example, GP misses the clear import of this Court's decision in *Virginia Society*, which invalidated a district court's "nationwide injunction" against enforcement of a federal election regulation because the injunction "encroache[d] on the ability of other circuits to consider" the same question. *Va. Soc'y for Human Life v. FEC*, 263 F.3d 379, 392-93 (4th Cir. 2001), *overruled in part on other grounds by McConnell v. FEC*, 540 U.S. 93, 189-94 (2003). GP argues that this Court in *Virginia Society* limited injunctive relief to the named plaintiff, Br. 30-31, but ignores that one ground for doing so was that an injunction applicable to other parties would "impos[e] [this Court's] view of the law on all the other circuits" and "preclud[e] other circuits from ruling on the constitutionality" of the regulation. 263 F.3d at 393-94. Thus, this Court held that the district court's nationwide injunction was an abuse of discretion because it did not permit the FEC "to press its position in those circuits that have not yet ruled" on the issue. *Id.* at 394.

Virginia Society alone refutes GP's assertion that there is "sparse authority"

for the proposition that comity principles should restrain courts from issuing injunctions that interfere with the authority of sister courts, *see* Br. 30, but GP also fails to confront von Drehle's other authorities. Appellant's Br. 52-53. For example, GP fails to distinguish *United States v. AMC Entertainment, Inc.*, 549 F.3d 760, 773 (9th Cir. 2008), which limited injunctions where they would otherwise be in "direct conflict" with another circuit's precedent, beyond asserting that the conflict between the injunction here and the Sixth and Eighth Circuits' decisions is merely "abstract tension." Br. 32. But, the clash could not be any more direct and concrete: the injunction forbids von Drehle from pursuing a commercial practice nationwide that the Eighth Circuit held to be lawful and that the Sixth Circuit held to be beyond GP's ability to redress. *AMC* establishes that a court exercising its power to craft injunctive relief should avoid this sort of discord with other courts' rulings. 549 F.3d at 770-73. GP also asserts that *Herman Miller, Inc. v. Palazzetti Imports & Exports, Inc.*, 270 F.3d 298 (6th Cir. 2001), rested on federalism grounds, Br. 32, but that is not so: *Herman Miller* did not even directly mention them. Instead, the court focused on the importance of avoiding injunctive relief that conflicts with the law of other jurisdictions, such as an injunction "'prohibiting otherwise lawful conduct'" in another jurisdiction. 270 F.3d at 327. This is precisely what the district court's injunction does.

The natural and direct application of these comity principles is reflected as

well in a recent series of injunctions involving the copyright implications of over-the-air television retransmitted via the Internet. The Second Circuit held this practice to be lawful, *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676 (2d Cir. 2013), *cert. granted sub nom. Am. Broad. Cos. v. Aereo, Inc.*, 134 S. Ct. 896 (2014), and a district court likewise denied a preliminary injunction, *Hearst Stations Inc. v. Aereo, Inc.*, No. 13-11649, 2013 WL 5604284 (D. Mass. Oct. 8, 2013), *appeal docketed*, No. 13-2822 (1st Cir. Oct. 15, 2013). Other federal district courts have disagreed, but they have all limited the geographic scope of their injunctions based on principles of comity – even though, in contrast to the Lanham Act provisions at issue here, the underlying copyright statute commands nationwide relief, 17 U.S.C. § 502(b). A California district court limited its injunctive relief to the Ninth Circuit because “principles of comity prevent the entry of an injunction that would apply to the Second Circuit,” and even “[i]f other circuits do not have law that conflicts with this decision, they might adopt such law when presented with the choice.” *Fox Television Stations, Inc. v. BarryDriller Content Sys. PLC*, 915 F. Supp. 2d 1138, 1148 (C.D. Cal. 2012) (citing *AMC Entertainment*), *appeal docketed*, No. 13-55156 (9th Cir. Jan. 25, 2013). Similarly, a Utah district court held that the same practice violated copyright law, but limited injunctive relief to the Tenth Circuit. *See Cmty. Television of Utah v. Aereo*, No. 2:13CV910DAK (D. Utah Feb. 19, 2014), *appeal docketed*, No. 14-420 (10th Cir. Feb. 20, 2014).

Another district court likewise found a copyright violation but exempted the Second Circuit from the resulting injunction because “in some cases comity may require courts to limit the scope of injunctions,” and the Second Circuit’s decision “conflict[ed]” with its own and remained “binding precedent” there. *See Fox Television Stations, Inc. v. FilmOn X LLC*, No. 13-758, 2013 U.S. Dist. LEXIS 126543 at *59 (D.D.C. Sept. 5, 2013), *appeal docketed*, No. 13-745 (D.C. Cir. Sept. 17, 2013).¹

GP incorrectly argues that the nationwide injunction does not interfere with the *Myers* and *Four-U* decisions “[b]ecause the injunction restricts only von Drehle’s conduct, [and] it does not forbid anything that the Sixth or Eighth Circuits – addressing *other* parties – allowed.” Br. 29. That argument is belied by the close commercial arrangements between von Drehle and its distributors nationally and by GP’s own claim that the injunction applies to von Drehle’s actions “through agents or others ‘in active concert with’ it.” *Id.* (quoting Fed. R. Civ. P. 65(d)(2)).

More fundamentally, GP’s argument ignores the holdings of *Myers* and *Four-U*. The Eighth Circuit focused on the lawfulness of the underlying commercial practice at issue, not the party that was sued. *Myers* rejected a claim that the industry practice of “stuffing” generic paper in branded dispensers

¹ Even the district court appeared to acknowledge the force of these principles before ultimately ignoring them. *See* JA845 (noting that the “injunction can’t go into Ohio and Tennessee where [GP] lost”).

amounted to contributory trademark infringement – a form of secondary liability. It affirmed the trial court’s conclusion that “stuffing” causes no likelihood of confusion and is a permissible commercial practice. *See Ga.-Pac. Consumer Prods. LP v. Myers Supply, Inc.*, 621 F.3d 771, 777 (8th Cir. 2010); *id.* at 778 (“GP concedes that it is a common and acceptable practice in the industry to put a different brand of towel in an unleased dispenser bearing another manufacturer’s trademarks.”). Likewise, the Sixth Circuit concluded that GP was not entitled to relief against that practice in that circuit. That court determined that *Myers*’ finding – that the “general, pervasive industry practice[] of ‘stuffing’ paper towel dispensers with generic products” does not constitute trademark infringement – barred GP’s claims against another von Drehle distributor for the same underlying conduct. *See Ga.-Pac. Consumer Prods. LP v. Four-U-Packaging, Inc.*, 701 F.3d 1093, 1097-98 (6th Cir. 2012). The district court’s injunction is contrary to the rationale and holding of both circuits.

Nor is von Drehle’s objection to the injunction “merely a repackaging of [its] waived preclusion arguments.” Br. 26-27. The preclusion defense addressed whether von Drehle and GP had a particular relationship to a prior judgment, such that the judgment operated “[t]o bar [a party] from litigating [an] issue . . . entirely.” *In re Coleman*, 426 F.3d 719, 729 (4th Cir. 2005); *see Peugeot Motors of Am., Inc. v. E. Auto Distribs., Inc.*, 892 F.2d 355, 359 (4th Cir. 1989) (“res

judicata bar[s] claims that were raised and fully litigated”); *Pittston Co. v. United States*, 199 F.3d 694, 704 (4th Cir. 1999) (claim preclusion). Here, von Drehle clearly raised its objection to the scope of the injunction in a timely fashion. The principles underlying that objection are not dependent on the strict preclusion requirements related to the earlier judgment and indeed could be raised by parties who did not participate in any manner in the earlier litigation against parties also unrelated to the prior judgment, as the retransmission cases and other cases confirm. *See supra* pp. 3-6. The district court had an obligation, unrelated to its prior proceedings and based on the control each federal court exercises over the law within its jurisdiction, to respect co-equal courts when fashioning injunctive relief. von Drehle was as entitled as any other litigant to call upon the court to fulfill that obligation.²

Finally, GP understates the comity principles at issue when it argues that the injunction should extend to the Sixth Circuit even if it does not extend to the Eighth. Br. 32-33. This argument ignores how comity principles should operate in this case to limit the injunction to the Fourth Circuit, *see supra* p. 3; Appellant’s

² *Bouchat v. Baltimore Ravens Ltd.*, 619 F.3d 301 (4th Cir. 2010), is inapposite. *See* Br. 28. In *Bouchat*, this Court merely held that the plaintiff’s claims for injunctive relief were *not* barred by claim preclusion because they involved “different acts of infringement” than his prior claims. 619 F.3d at 316-17. It did not address any issue concerning the effect of preclusion defenses on a district court’s authority to fashion injunctive relief.

Br. 55-56, but in any event the offense to the Sixth Circuit would be as great as to the Eighth. The Sixth Circuit has finally determined that GP's nationwide attack on the "stuffing" practice at issue cannot succeed within that jurisdiction, *see Four-U*, 701 F.3d at 1097-98, and an injunction that provides just that relief within the Sixth Circuit is hardly consistent with inter-circuit comity.

II. The District Court's Award Of Treble Damages Rested On An Erroneous Legal Standard And Cannot Be Upheld Under Any Alternative Legal Theory.

A. The District Court Applied An Erroneous Standard From 15 U.S.C. § 1117(b), Not The Correct Standard Of § 1117(a).

GP does not dispute that the enhancement of the jury award in this case is governed by Section 1117(a), not Section 1117(b), and acknowledges that the decision applied by the district court, *Larsen v. Terk Techs. Corp.*, 151 F.3d 140, 150 (4th Cir. 1998), "addressed a counterfeiting claim under Section 1117(b), which erects a presumption of treble damages." Br. 47. These points effectively concede that the district court used the wrong legal standard, applying Section 1117(b)'s rule of near-automatic trebling upon a finding that infringement is "willful and intentional," JA855-56 – the rule from *Larsen* – and failing to make the determinations about adequate compensation that Section 1117(a) requires. Applying the wrong legal standard is an abuse of discretion. *ESAB Grp., Inc. v. Zurich Ins. PLC*, 685 F.3d 376, 393 (4th Cir. 2012).

GP would have the Court ignore the distinction between Sections 1117(a)

and 1117(b), Br. 41-48, but very substantial differences exist between the provisions. Section 1117(b) provides for near-automatic trebling upon a finding of intentional infringement because, as GP recognizes, it is limited to the particular context of counterfeiting. Br. 47. Counterfeiting requires the use of a “spurious mark” indistinguishable from a competitor’s trademark, *see* 15 U.S.C. § 1127, and is “the most blatant and egregious form of ‘passing off.’” 4 J. McCarthy, *McCarthy on Trademarks and Unfair Competition* § 25:10 (4th ed. 2013). Section 1117(b) thus provides that “in a case involving use of a counterfeit mark or designation,” the court “*shall*, unless the court finds extenuating circumstances, enter judgment for three times” the profits or damages. Limited to a specific type of especially egregious conduct, Section 1117(b) – unlike Section 1117(a) – permits a penalty intended to deter and punish. *See Louis Vuitton S.A. v. Lee*, 875 F.2d 584, 588 (7th Cir. 1989). As in other contexts, automatic treble damages, “not being compensatory, tend to have a punitive aim.” *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 692 (7th Cir. 2008) (en banc) (civil remedy provision of the Anti-Terrorism Act); *see Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981) (Sherman Antitrust Act).

Section 1117(a), in contrast, applies to a much broader range of conduct, including inadvertent infringement, and thus focuses on compensation of the plaintiff and requires the court to make specific findings on that issue. It addresses

a plaintiff's "recovery," limits that recovery to three classes of actual loss (profits, damages, and costs), and requires that any resulting award, including enhancement, "shall constitute compensation and not a penalty." 15 U.S.C. § 1117(a). There is no reference to trebling an award of profits (such as the award here), which may be adjusted only "[i]f the court shall find that the amount of the recovery based on profits is either inadequate or excessive"; and the enhancement may be only to "such sum as the court shall find to be just." *Id.* Any enhancement of damages apart from profits cannot "exceed[] three times such amount" – providing a cap, not an automatic adjustment to that level. *Id.*; see Appellant's Br. 22-23; *infra* pp. 13-14. The district court made none of these required findings regarding inadequacy of the awarded profits or the need for additional compensation, and its trebling was not directed to that compensatory objective.

GP claims that the district court merely drew "guidance" from *Larsen*, Br. 46-47, but that wishful thinking ignores the district court's opinion and GP's own pleadings that gave rise to it. The district court applied exactly the analysis Section 1117(b) dictates: it automatically trebled the profit award once the conduct was deemed intentional. JA855-856. The court never undertook the compensatory assessment required by Section 1117(a) or found the profit award was somehow "inadequate." This error was exactly what GP urged the court below to do. GP's opening remedies brief did not address the language, purpose, or limitations of

§1117(a), and instead argued that “it is within the Court’s discretion to award treble damages if the defendant’s infringement is intentional or willful.” D.E. 326 at 19 (citing *Larsen*, 151 F.3d at 150). It gave no further grounds for enhancing damages. GP’s reply brief again cited *Larsen* and added only that “deterrence of intentional infringement” is also an “appropriate reason for enhancement.” D.E. 345 at 6-7.³

Implicitly acknowledging that the district court applied the standard that Section 1117(b) confines to counterfeiting cases, GP now argues that von Drehle’s actions “provide a close parallel” to counterfeiting. Br. 47. That argument could not justify the district court’s application of an incorrect legal standard, and is quite wrong in any event. von Drehle did not reproduce GP’s trademarks or place any mark on its paper toweling (and it placed its own brand on its packaging). *See infra* pp. 21-23. Indeed, this entire controversy arises from use of a *generic* paper product. The district court did not suggest that its remedial order rested on this basis and, in fact, had earlier granted summary judgment to von Drehle on GP’s counterfeiting claim (a ruling GP did not appeal). JA126-29; 140-41. Applying the standard and analysis from Section 1117(b) was simply an error.

³ On remand from this Court, GP relied on or repeated its earlier arguments on this point. *See* D.E. 383 at 1; D.E. 400 at 6.

B. Trebling Of The Jury's Profit Award Cannot Be Upheld Based On A View That § 1117(a) Provides Open-Ended Discretion In Enhancing The Award.

1. Section 1117(a) Does Not Authorize Open-Ended Discretion.

a. GP seeks to have this Court overlook the district court's error and affirm on an alternative ground: that Section 1117(a) provides "broad discretion," "wider" than that under Section 1117(b), and unbounded by any requirement to focus on compensation rather than punishment. Br. 40-44.

GP's argument disregards the language and specific limitations of Section 1117(a) in several crucial respects. Initially, it ignores – indeed, inverts – the clearly different function and higher standard applicable to Section 1117(a), compared to Section 1117(b). *See supra* pp. 9-11. In particular, under Section 1117(a), the plaintiff is "entitled . . . to recover" only certain classes of losses, further limited in the balance of the subsection, and that entitlement is "subject to the principles of equity" – which serve as a constraint rather than an open-ended authorization for windfalls. 15 U.S.C. § 1117(a). The particular adjustments to recovery either for damages or for profits (separately indicated in the subsection) must further "constitute compensation and not a penalty." *Id.*

These limitations ignored by GP are particularly stark for the adjustment of an award of profits, at issue in this case. Section 1117(a) provides: "[i]f the court shall *find* that the amount of the recovery based on profits is *either inadequate or*

excessive the court may in its discretion enter judgment for such sum as the court shall find to be just, according to the circumstances of the case.” 15 U.S.C. § 1117(a) (emphases added). This provision provides a measure of discretion but also tightly constrains it: it requires findings of fact that the district court did not make in this case, that are record-intensive matters that this Court would not usually address in the first instance, and that the record would not support in any event. *See infra* pp. 19-20; *JTH Tax, Inc. v. H & R Block E. Tax Servs., Inc.*, 28 F. App’x 207, 216 (4th Cir. 2002) (per curiam) (unpub.) (“While the district court had the discretion under the Act to enter judgment for a sum it deemed just if it found under the circumstances that an award of Block’s profits was ‘inadequate,’ there is no indication that this is what the court did.”).

For related reasons, there is no merit to GP’s claim, advanced without citation to any authority, that enhancements of profits and damages are subject to the same standard. Br. 40.⁴ The section itself separately lists, as types of losses a plaintiff is entitled to recover, “(1) defendant’s profits, [and] (2) any damages sustained by the plaintiff” It then sets forth the findings required to adjust a

⁴ Although GP briefly suggests that *Synergistic Int’l, LLC v. Korman*, 470 F.3d 162 (4th Cir. 2006), “refutes von Drehle’s claim that damages and profits should be analyzed differently,” Br. 41, it later recognizes that *Synergistic* did not involve an enhanced award, Br. 52, and it ignores that those factors are equitable considerations in addition to other requirements of Section 1117(a). *See infra* p. 21.

profit award in a separate sentence from the distinct standard prescribed for adjusting a damages award. *See* 15 U.S.C. § 1117(a); *see also* Appellant's Br. 22. Profit awards, unlike damages awards, may be adjusted without regard to the trebling cap, but only *after* a proper finding that the jury award is "inadequate" and that the enhanced recovery is "such sum as the court shall find to be just." 15 U.S.C. § 1117(a); *see Thompson v. Haynes*, 305 F.3d 1369, 1380 (Fed. Cir. 2002) (Tenth Circuit law) ("The court may not, as it did here, simply lump profits together with damages and apply the same measure of enhancement to both.").

There is also no merit to a necessary element of GP's argument, that Section 1117(a)'s requirement that an adjustment reflect "compensation and not a penalty" is purely semantic, meant to label *any* increased award as compensatory no matter why a district court imposes it and however large the enhancement. Br. 42-44. This interpretation would read the provision out of the statute, and courts have uniformly rejected it. They have held instead that an enhancement may be used to "compensate" a plaintiff but may not have a "punitive motivation." *Skydive Ariz., Inc. v. Quattrocchi*, 673 F.3d 1105, 1115 (9th Cir. 2012) (reversing enhancement "because the district court's decision to enhance the damages award hinged upon punishing the willful conduct of" defendant); *see also, e.g., La Quinta Corp. v. Heartland Props. LLC*, 603 F.3d 327, 345 (6th Cir. 2010); *Jurgens v. McKasy*, 927 F.2d 1552, 1564 (Fed. Cir. 1991) (Eighth Circuit law); *Getty Petroleum Corp. v.*

Bartco Petroleum Corp., 858 F.2d 103, 108-13 (2d Cir. 1988); *Elecs. Corp. of Am. v. Honeywell, Inc.*, 487 F.2d 513 (1st Cir.) (per curiam), *aff'd* 358 F. Supp. 1230, 1233-35 (D. Mass. 1973). Indeed, Section 1117(a) requires an explicit finding that an enhancement would constitute compensation, based on “evidence of substantial damages not reflected in the jury award.” *Taco Cabana Int’l, Inc. v. Two Pesos, Inc.*, 932 F.2d 1113, 1127 (5th Cir. 1991), *aff’d*, 505 U.S. 763 (1992).

GP does not cite a single Lanham Act case to support its interpretation, and the commentators that it cites (Br. 42) do not support its argument. McCarthy notes that “[i]n *the Author’s opinion*, this somewhat vague language seems to create a green light” for damages enhancements “so long as there is some ‘remedial’ aspect of the increase,” but concedes that many circuits have rejected that position and “forbidd[en] a [Section 1117(a)] increase in damages as a penalty for deliberate and intentional infringement.” 5 McCarthy, *supra*, at § 30:57 (emphasis added). McCarthy cites only one case that approved an enhanced award without first considering compensation: *Gorenstein Enters., Inc. v. Quality Care-USA, Inc.*, 874 F.2d 431 (7th Cir. 1989). However, *Gorenstein* ignored the provision entirely, *id.* at 435-36, and later Seventh Circuit decisions have conformed with those of other circuits. *See, e.g., Badger Meter, Inc. v. Grinnell Corp.*, 13 F.3d 1145, 1157 (7th Cir. 1994) (“Under this section any recovery to the plaintiff must constitute ‘compensation’ for its own losses or for the defendant’s

unjust enrichment; section 1117(a) (unlike section 1117(b)) does not allow a ‘penalty’ against the defendant.”). The other commentator cited by GP, while opining that the clause is “an invitation to increase damages in appropriate cases,” observes that “[c]onscientious courts do take seriously the seeming constraint that flows from a simple reading of the clause.” R. Brown, *Civil Remedies for Intellectual Property Invasions: Themes and Variations*, Law & Contemp. Probs., Spr. 1992, at 45, 75 (citing *Taco Cabana*, 932 F.2d 1113; *Jurgens*, 927 F.2d 1552). Like the courts, another commentator has rejected the argument GP makes, noting that the Lanham Act’s drafters modeled the clause on a similar provision in the copyright laws that merely ensured some “recompense” when “the rules of law render difficult or impossible proof of damages or discovery of profits.” See J. Koelemay, Jr., *Monetary Relief for Trademark Infringement Under the Lanham Act*, 72 Trademark Rep. 458, 522 (1982) (quoting *Douglas v. Cunningham*, 294 U.S. 207, 209 (1935)); see *supra* p. 13 (Section 1117(a) directs that a plaintiff “shall be entitled” to “recover” profits, damages, and costs, underscoring the compensatory focus).

b. GP suggests that von Drehle somehow waived arguments related to Section 1117(a) or conceded the willful infringement standard, Br. 46, but that is clearly incorrect. von Drehle emphasized below that the scope for enhancement was limited because the jury awarded profits; specifically invoked Section

1117(a)'s direction that adjustments must “constitute compensation and not a penalty”; argued that any upward adjustment “is not based upon the evidence and would be for the sole purpose of penalizing von Drehle”; and pointed out that even if a willful infringement finding were made, “an award of treble damages is warranted only if the verdict amount is insufficient to compensate Georgia-Pacific,” which it argued was not the case because GP had received all the damages it sought and provided no proof of further harm. D.E. 339 at 8-9; *id.* at 9 (“[a]bsent any proof of the insufficiency of damages awarded, speculative damages” such as GP’s enhancement claims “are not compensable”). On remand from this Court, von Drehle reiterated these objections, D.E. 396 at 4-5.⁵ As these statements in the post-trial remedies phase confirm, von Drehle hardly waived, and could not have waived, any argument by using the term “damages” *at trial*. Br. 39.⁶

⁵ At the remedies hearing, von Drehle responded to GP’s arguments about the meaning of “willfulness” as used in *Synergistic*, see JA829 (arguing that “intentionally creat[ing] this 810 towel” is “not the same thing as intentionally infringing”), but did not waive arguments made in its briefs.

⁶ At trial, both parties and the judge at times used the term “damages” to refer to the monetary relief at issue. In its closing argument, for instance, GP told the jury that “[t]he damages we want . . . is for them to give up the profits” from the 810B towels. JA541. Even so, there is no factual dispute that the \$791,431 awarded by the jury represents “defendant’s profits” and not “damages sustained by the plaintiff,” as Section 1117(a) categorizes them. See JA043 (Trial Exhibit 266 showing von Drehle’s 810B profit from 2004 to 2011); JA493.

2. GP's Alleged "Additional Harms" Could Not Satisfy Section 1117(a).

For the first time, GP now suggests that it suffered “an array of additional harms” (Br. 37-38), but, apart from not being presented below, the claims of alleged harms find no support in the record and would not justify affirmance in any event.

GP did not raise any argument in its post-trial briefing or at the remedies hearing that the jury award was inadequate or failed to compensate it for all of its injuries. *See* D.E. 326 at 19-20; D.E. 345 at 6-7; D.E. 383 at 1; D.E. 396 at 6; JA817-18. Nor did GP introduce any evidence on these issues at the remedies stage, or point the district court to any such evidence from trial. In opening and closing arguments before the jury, GP barely mentioned reputational harms, instead stating that “the only damages” it sought were “the profits [von Drehle] made on this wrongful product.” JA269. GP never gave the district court any reason to think that those damages were “inadequate.”

Unsurprisingly, GP can point to no material record support for its newly-minted allegations of additional harm. GP points (Br. 37-38) only to speculative and very indirect suggestions that its reputation for reliability could conceivably have suffered – such as anecdotal trial testimony by a GP executive that “people . . . will say” the dispenser “doesn’t work” if a stuffed dispenser malfunctions, JA354, and vague comments about “quality” in internal von Drehle

emails. JA057.

For several reasons, these suggestions are insufficient for purposes of Section 1117(a). A plaintiff who has truly suffered unredressed injury must at least prove the fact of that injury, such as additional “advertising needed to prevent or dispel customer confusion,” Koelema, *supra*, at 505, or an infringer’s foreclosure of “lucrative markets within [the plaintiff’s] natural zone of expansion.” *Taco Cabana*, 932 F.2d at 1127 n.20. GP could have pursued those avenues below, but failed to do so. Nor can GP show that any “misrepresent[ation]” or “stonewalling” by von Drehle prevented it from quantifying the alleged harm to its goodwill, which could support a claim of inadequacy. *Bos. Prof’l Hockey Ass’n v. Dallas Cap & Emblem Mfg., Inc.*, 597 F.2d 71, 77 (5th Cir. 1979). And, the suggestions it now points to, even if actually developed in the record, could not show that the jury’s profit award was in any manner “inadequate” or that additional compensation was appropriate: that award was based on von Drehle’s gross profits for the generic paper toweling at issue, was not offset for toweling used in dispensers other than GP’s, and included toweling sold in circuits where the practice has been held lawful. *See* Appellant’s Br. 24-25.

3. The Synergistic Factors Provide Additional Reasons GP Cannot Prevail.

Finally, GP cannot establish that it meets the additional factors required to

support a damages award, set out in *Synergistic*, 470 F.3d at 174-76 , and does not even contest that the district court failed to articulate the findings that that decision requires.

GP initially contends that *Synergistic* is inapplicable to enhancement questions, dealing only with the question *whether* to award damages. Br. 52. That argument is directly opposite to the position it took before the district court, where it acknowledged that the factors applied and argued that they supported an enhancement of the award. JA817-18. Even had its current argument not been forfeited, it is incorrect. Beyond the various inquiries and findings required by Section 1117(a) directly, a plaintiff's "entitle[ment]" to "recovery" is further limited and "subject to the principles of equity." As part of that inquiry, this Court has spelled out "six factors to guide the process" of "making a damages award under the Lanham Act," and that involve not only "whether an award is appropriate," but also "the amount thereof." *Synergistic*, 470 F.3d at 175-76. Certain of the *Synergistic* factors do "have no bearing on the adequacy of compensation," Br. 52, but that is entirely consistent with the recovery-limiting function of the equitable principles: several of the factors – the adequacy of other remedies, unreasonable delay by the plaintiff – are traditional equitable reasons to deny extraordinary relief.

GP's contention that the *Synergistic* factors favor it, Br. 48, 53-55, comes to

this Court without any district court conclusion that “explain[s] its reasoning and the impact of the relevant factors,” which is a predicate to proper appellate review. *Synergistic*, 470 F.3d at 176. In any event, the claims are without merit. On sales diversion, GP could have proven that von Drehle’s acts caused diverted sales beyond the time frame covered at trial or to other competitors, but it did not. Nor has GP provided any evidence that the injunction and profit award are inadequate remedies, or that the public interest supports an enhancement (beyond its incorrect claim of willful infringement). GP complains about the asymmetry of the “unreasonable delay” factor, Br. 54, but this factor simply restates the doctrine of laches. And GP does not explain how von Drehle could have “palmed off” its goods – that is, intentionally “misrepresent[ed] to the public that the defendant’s products were really those of the plaintiff,” *Synergistic*, 470 F.3d at 176 – when the towel product at issue did not bear a trademark. There is no evidence of an intent to cause confusion, *see infra* pp. 23, 26-27, and the district court in *Myers* and the Eighth Circuit ultimately concluded that no such confusion occurred. See Appellant’s Br. 29-31. To note this is not to raise preclusion “through the back door,” Br. 49, but simply to point out that von Drehle could reasonably, if erroneously, have concluded *ex ante* that its actions in conformity with a common business practice would not confuse anyone. For similar reasons, GP cannot successfully argue that it satisfies the first *Synergistic* factor, ““intent to confuse or

deceive,’” 470 F.3d at 175, based solely on the jury’s verdict. Br. 48. Although the jury found that the use of von Drehle’s paper in GP’s dispensers was “likely to cause confusion,” JA565, it was never instructed that it had to find – nor does the verdict support an inference – that von Drehle *intended* to cause confusion. See JA565-67. Nor, contrary to GP’s claims, Br. 50-51, does von Drehle’s unremarkable desire to compete with GP, *see* JA061; JA109, show that it intended to violate the law or confuse consumers, or that it acted in bad faith. *See also infra* pp. 26-27.

III. The District Court Abused Its Discretion By Deeming This Case Exceptional Based Only On The Jury’s Finding Of Liability And By Awarding Attorney Fees To GP Without Any Analysis Or Proof Of Bad Faith.

GP’s arguments regarding the fee award fail to address the district court’s use of an incorrect legal standard to award attorney fees, erring both by (1) deeming this case “exceptional” based on findings that are required to produce liability for contributory infringement in any case; and (2) failing to apply the bad faith requirement established by this Court. Appellant’s Br. 34-48.

GP’s arguments confirm that, under the district court’s standard, Section 1117(a) would operate as a fee-shifting provision in all contributory trademark infringement cases, not just in “exceptional” ones as Section 1117(a) requires. GP does not dispute that the district court’s sole basis for awarding attorney fees – evidence that von Drehle intentionally provided paper towels known to be destined

for GP's dispensers, coupled with the jury's finding that such conduct amounted to infringement, *see* JA855-56 – is no more than what was required to establish liability here and for any contributory trademark infringement claim. GP therefore fails to engage, much less refute, von Drehle's principal argument (Appellant's Br. 35-37) that this is hardly an "exceptional" case.

Rather than defend the district court's rationale, GP claims that the district court's award was based on "much more" than what the district court stated, and encompassed such factors as von Drehle's allegedly "illicit motives," its "steal[ing]" of GP's sales, and its "flagrant misconduct" in responding to GP's cease-and-desist letter and as reflected in certain e-mails. Br. 58-59. These statements are nothing more than GP's vigorously disputed view of the record and reflect no findings in the district court's decision. GP's self-serving view on these deeply fact-bound issues therefore cannot save a fee award that is based on an improper legal standard.

GP likewise does not dispute that the district court awarded it attorney fees without requiring it to show that von Drehle acted in bad faith. It acknowledges that this Court's decisions have construed Section 1117(a)'s "exceptional" case provision as requiring a prevailing plaintiff to show that the defendant acted in "bad faith," but asserts that "bad faith" and "willfulness" are necessarily equivalent, such that the district court's finding that von Drehle's conduct was

“willful” satisfies the “bad faith” requirement. *See* Br. 59 (asserting that “willfulness . . . *demonstrates* bad faith”); *id.* (district court was not required to make “a separate finding of ‘bad faith’ *beyond* [its] determination that the infringement was willful”).

GP’s argument ignores that the terms “bad faith” and “willfulness” often cannot be equated. In particular, GP fails to refute von Drehle’s showing that the district court’s finding of “willfulness” here does not amount to a “bad faith” determination. *See* Appellant’s Br. 40-43. As courts in this circuit and others have recognized, Section 1117(a)’s “exceptional” case requirement requires proof that a defendant willfully violated the trademark laws or willfully engaged in other bad acts, not merely that the act of infringement was done deliberately and intentionally. *See* Appellant’s Br. 41-43 (collecting cases). The latter standard “falls far short of the kind of culpability required to render a case ‘exceptional’” because the only conduct that would *not* qualify as exceptional would be “accident[al]” or “innocent” acts, which Congress could not have intended. *Motor City Bagels, L.L.C. v. Am. Bagel Co.*, 50 F. Supp. 2d 460, 488 (D. Md. 1999) (quotation omitted). GP does not address, much less distinguish, any of the many authorities set forth by von Drehle on this point.

In some cases, but not here, a finding that the relevant acts were committed willfully or intentionally is tantamount to a finding of bad faith. For example,

most trademark disputes allege the copying or use of another's trademark, *i.e.*, mismarking, which necessarily dilutes the owner's trademark and creates a likelihood of confusion in the marketplace. When such mismarking is found to be willful or deliberate, such that the defendant knew that it was infringing another's trademark, this Court and others have not hesitated to award attorney fees. *See, e.g., Newport News Holdings Corp. v. Virtual City Vision, Inc.*, 650 F.3d 423, 441 (4th Cir. 2011) (defendant's continued use of plaintiff's trademark in web address after arbitration body informed it of defendant's rights in the trademark); *Emp'rs Council on Flexible Comp. v. Feltman*, 384 F. App'x 201, 207-08 (4th Cir. 2010) (per curiam) (unpub.) (executive reserved former employer's trademark to prevent the company from renewing its expired corporate charter); *Irwin Indus. Tool Co. v. Worthington Cylinders Wis., LLC*, 747 F. Supp. 2d 568, 589 (W.D.N.C. 2010) (defendant intentionally changed product and label to resemble plaintiff's).

The claims in this contributory infringement case are far different and, as a result, the district court's "willfulness" finding is not a finding of bad faith. Because von Drehle indisputably sold its paper towels in boxes bearing its own trademarks, which look nothing like GP's trademarks, and the towels themselves are unmarked, Appellant's Br. 47-48, this case does not involve any deliberate copying or misuse of another's trademark. The district court found that von Drehle intentionally distributed the unmarked paper and knew the towels would be used in

GP's dispensers, JA855-56, but did not find that von Drehle knew or should have known that this conduct – which was consistent with longstanding industry practice, *see* Appellant's Br. 46-48 – was unlawful. Nor could it have made such a finding. Until the judgment in this case in January 2012,⁷ no court had found the relevant conduct to be trademark infringement, and von Drehle and its distributors had consistently prevailed in court. In similar circumstances where a defendant had a good faith, reasonable belief that the willful conduct it engaged in was lawful, this Court and others have declined to find bad faith or award attorney fees. *See PETA v. Doughney*, 263 F.3d 359, 370 (4th Cir. 2001) (fees unwarranted where defendant “thought that he had a legitimate First Amendment right” to parody plaintiff's website) (internal quotation marks omitted); *Martin's Herend Imps., Inc. v. Diamond & Gem Trading USA, Co.*, 112 F.3d 1296, 1305 (5th Cir. 1997) (fees unwarranted where relevant Lanham Act issues were a “difficult subject” and plaintiffs “did not believe that the [conduct at issue was] illegal”). Accordingly, the district court could not have found that von Drehle's trademark violations were committed in bad faith, and abused its discretion by failing to consider this legal requirement.

⁷ As GP notes (Br. 57), it only requested attorney fees incurred *before* that date.

IV. The District Court Abused Its Discretion By Awarding Prejudgment Interest.

GP does not dispute that the sole basis for the district court's prejudgment interest award was its finding that this case is "exceptional" and that interest is "appropriate in exceptional case[s] under the Lanham Act." JA858 (citing *Am. Honda Motor Co. v. Two Wheel Corp.*, 918 F.2d 1060, 1064 (2d Cir. 1990) (interest in Lanham Act cases is "normally served for 'exceptional' cases")); Appellant's Br. 49-50. The district court's reliance on its "exceptional case" finding was an abuse of discretion because, as shown *supra*, at pp. 23-27, its conclusion that this case is "exceptional" itself reflected legal error.

GP suggests that the district court's interest award is nevertheless defensible because of the duration of this litigation and what it deems von Drehle's "dilatory strategies," Br. 62-63, but the district court did not base its award on these grounds. Nor could it have done so, because that conclusion would be inconsistent with von Drehle's initial successes in this case and its continuing victories in other jurisdictions. Indeed, the district court originally granted summary judgment to von Drehle and later ruled in its favor on the preclusion defenses. Nor could the court have found that von Drehle bears responsibility for the court's own schedule. Accordingly, the district court's award of prejudgment interest is unfounded and should be reversed.

CONCLUSION

For the foregoing reasons and those stated in the opening brief, the awards of attorney fees, treble damages, and prejudgment interest should be reversed. The injunction should be limited to the boundaries of this circuit.

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February 26, 2014
Date

/s/ Carter G. Phillips
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CERTIFICATE OF SERVICE

I hereby certify that on February 26, 2014, I caused the foregoing to be electronically filed with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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