No. 17-1704

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

VERISIGN, INC.,

Plaintiff–Appellee,

v.

XYZ.COM, LLC and DANIEL NEGARI,

Defendants–Appellants.

On Appeal from the United States District Court
for the Eastern District of Virginia, Alexandria Division
No. 1:14-cv-01749 (Hon. Claude M. Hilton)

APPELLANTS' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1 and Local Rule 26.1, appellees XYZ.com LLC and Daniel Negari make the following disclosures:

1. Is the party a publicly held corporation or other publicly held entity?

No.

2. Does the party have any parent corporations?

No.

3. Is 10% or more of the stock of the party owned by a publicly held corporation or other publicly held entity?

No.

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))?

No.

5. Is the party a trade association?

No.

6. Does this case arise out of a bankruptcy proceeding?

No.

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JURISDICTIONAL STATEMENT

Plaintiff–Appellee Verisign, Inc. brought this action against Defendants–Appellants XYZ.com, LLC and its CEO Daniel Negari (together, "XYZ") under Section 43 of the Lanham Act, 15 U.S.C. § 1125(a). The district court had jurisdiction under 28 U.S.C. § 1331. This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES

A. Wrong evidentiary standard. The Supreme Court held that proving an exceptional case does not require clear and convincing evidence, but rather a preponderance of the evidence. The district court required XYZ to prove this was an exceptional case by clear and convincing evidence. Did the district court err by requiring clear and convincing evidence rather than a preponderance of the evidence?

B. Bad faith not required. The Supreme Court held that a showing of bad faith or sanctionable conduct is not required for a prevailing Lanham Act defendant to recover fees. Here, the district court required XYZ to prove Verisign's intent was "malicious, fraudulent, willful, or deliberate" and that it engaged in "egregious conduct such as a false declaration." Did the district court err by requiring XYZ to prove bad faith to recover fees?

C. Circumstantial evidence is sufficient. The Supreme Court held that circumstantial evidence is sufficient to prove facts. The district court dismissed XYZ's circumstantial evidence of Verisign's intent to harass and deter competition as mere "speculation." Did the district court err by not analyzing XYZ's circumstantial evidence of Verisign's improper motive?

STATEMENT OF THE CASE

A. Verisign, the largest top-level domain operator on the internet, sued its new competitor XYZ for false advertising.

Verisign and XYZ compete in the top-level domain industry. (*See* Joint Appendix ("JA") 1249–50; *see also* Sealed Appendix ("SA") 337, 339, 1125–26.) Verisign is the industry giant, operating the .com and .net top-level domains. (*See* JA 798, 1249–50; *see also* SA 1125–26.) In 2014, several competitors including XYZ entered the industry. (*See* JA 798, 1249–50; *see also* SA 1126.) XYZ emerged as one of Verisign's largest competitors. (*See* JA 1249.)

Verisign sued XYZ and its CEO, Daniel Negari, for false advertising under the Lanham Act. (*See* JA 45–59.) Before discovery started, XYZ sent Verisign a letter detailing why Verisign's claim lacked merit under longstanding legal precedent. (*See* JA 866, 1159–64.) Verisign refused to discuss the merits of its case or settlement, insisting on proceeding with litigation. (*See* JA 866.)

B. Verisign misused the discovery process in an attempt to uncover competitors' trade secrets, harass XYZ, and expose XYZ's confidential information.

During discovery, Verisign deposed every XYZ employee. (*See* JA 813; *see also* SA 1776.) Verisign sought XYZ's pricing strategies, confidential agreements with business partners, internal business and marketing practices, and financial statements. (*See* JA 813, 865, 1004–19.)

In an attempt to expose XYZ's competitive information, Verisign moved to redesignate thousands of XYZ's most sensitive and confidential documents to a lower level of protection under the protective order. (*See* SA 1–12.) The court redesignated only seven documents, recognizing the need to safeguard the rest. (*See* JA 277.)

Nonetheless, Verisign's trial exhibit list included descriptions of XYZ's confidential business information in detail. (JA 813–14.) It revealed dozens of sensitive emails with business partners, exposing XYZ's competitive pricing and confidential agreements. (*Id.*) XYZ protested because this violated the protective order. (JA 814.) By the time Verisign amended the trial exhibit list, the information was already published on the internet. (*Id.*) An industry publication wrote "if you emailed Daniel Negari about .xyz, there's a good chance Verisign has reviewed that email." (JA 814, 818–20.) Customers and business partners contacted XYZ—some

cancelling deals and others upset that private emails and contracts were exposed. (JA 814–15.)

Verisign used discovery not to find facts about false advertising but to gain a competitive advantage with information from competitors. (*See* SA 1775–77.) It aggressively subpoenaed documents from over a dozen third parties throughout the country. (*See* SA 1775.) Verisign served a subpoena on ICANN, the domain-name industry regulator, for agreements from top-level domain competitors other than XYZ. (*See* SA 1775, *see also* JA 942–51.) ICANN and Verisign litigated the scope of that subpoena before the Central District of California because the subpoena was so broad. *See Verisign, Inc. v. XYZ.com, LLC*, No. 15-MC-229-CAS(Ex) (C.D. Cal. Aug. 31, 2015).

Verisign subpoenaed confidential documents from Donuts, Inc.—a Washington State-based competitor. (*See* SA 1775, 1777; *see also* JA 891–913.) The Western District of Washington quashed the portion of Verisign's subpoena that called for proprietary, irrelevant information. (*See* SA 1777; *see also* JA 914–16.) Undeterred, Verisign filed a motion for reconsideration—which the court denied. (*See* SA 1777; *see also* JA 917–26.)

The Central District of California quashed Verisign's subpoena to Mr. Negari's accountant seeking his personal tax returns. (*See* SA 1776; *see also* JA

868–75, 880–90.) Verisign subpoenaed third-party KBE in Delaware demanding agreements and communications with XYZ related to top-level domains other than .xyz, irrelevant to this case. (*See* SA 1777; *see also* JA 989–95.) The District of Delaware ruled that "the time allotted for compliance was unreasonable and effectively gave defendants one business day…to seek protection of documents." *See Verisign, Inc. v. XYZ.com, LLC*, No. 15-mc-175-RGA-MPT, 2015 WL 7960976, at *3 (D. Del. Dec. 4, 2015).

C. After XYZ prevailed, the district court denied XYZ's motion for fees and required XYZ to show an exceptional case under the Lanham Act by clear and convincing evidence.

After 17 third-party document subpoenas, 25 depositions, eight expert opinions, and seven ancillary actions across the country, the district court entered summary judgment in favor of XYZ. (*See* SA 1775–77; *see also* JA 797–811.) The court found that none of the alleged false claims constituted a false statement of fact actionable under the Lanham Act. (*See* JA 802–05.) Verisign had no evidence that any alleged false claim was material, in that it was likely to influence consumer purchasing decisions. (*See* JA 805–06.) Verisign had no evidence of consumer deception. (*See* JA 806–07.) And Verisign had no evidence of harm. (*See* JA 808–10.)

On appeal, this Court affirmed summary judgment. (*See* JA 1248–67.) Both this Court and the district court relied on much of the same authority that XYZ provided to Verisign in XYZ's letter sent shortly after the case was filed. (*Compare* JA 1256–57, 1261–63 (this Court's order) *and* JA 802–04, 808–10 (district court's order) *with* JA 1161–63 (XYZ's letter).)

After prevailing on summary judgment, XYZ moved for attorney's fees under 15 U.S.C. § 1117—which provides that the "court in exceptional cases may award reasonable attorney fees to the prevailing party." (*See* SA 1766; *see generally* SA 1756–74.) The district court indicated that a "case is exceptional if the non-prevailing party's conduct was malicious, fraudulent, willful, or deliberate." (*See* JA 1270; *see generally* JA 1269–74.) The court stated that the prevailing party has the burden to prove an exceptional case with clear and convincing evidence and held that "Defendant did not prove with clear and convincing evidence that this is an exceptional case." (*See* JA 1270–71.)

The court held that unless "a claim or defense is so unreasonable that no reasonable litigant would make it, an award of attorney fees is not warranted under the first factor." (JA 1271.) The court held that "the prevailing party must show egregious conduct such as a false declaration." (*Id.*) The court repeated that

"Defendants have not met their burden to prove with clear and convincing evidence that Plaintiff's case was exceptional." (JA 1272.)

The court denied XYZ's motion for fees in a brief opinion that offered a conclusory, three-page analysis and no formal factual findings. (JA 1270–72.) Without analysis, the court dismissed XYZ's circumstantial evidence of Verisign's motive as "speculation." (JA 1271–72.) The court did not analyze whether Verisign's position—even if reasonable when it filed the case—became unreasonable over time. (*Id.*) And the court did not acknowledge or address that Verisign's legal theories were thoroughly rejected at summary judgment and on appeal. (*Id.*)

XYZ timely appealed the district court's denial of XYZ's request for attorney's fees. (*See* JA 1275–77.)

SUMMARY OF THE ARGUMENT

The Lanham Act provides that a court may award fees to a prevailing party in exceptional cases. After winning summary judgment that was affirmed on appeal, XYZ sought its attorney's fees, which the court denied. The Court should remand because the district court abused its discretion for three reasons.

First, the district court erred by requiring XYZ to prove this case is exceptional by clear and convincing evidence. In a patent case, the Supreme Court

rejected the requirement that an exceptional case be established by clear and convincing evidence. This Court concluded that the same standard should apply in Lanham Act cases. The Supreme Court indicated that a preponderance of the evidence standard is generally applicable. Each circuit court that has considered the issue has held that preponderance of the evidence applies. This Court should follow other circuits and remand to require the district court to analyze whether this is an exceptional case under a preponderance of the evidence standard.

Second, the district court erred by requiring XYZ to show Verisign's bad faith in order to recover fees. Relying on authority that is no longer good law, the district court stated that the non-prevailing party's conduct must be "malicious, fraudulent, willful, or deliberate" for an exceptional case. The district court also indicated that a case is not exceptional unless the losing party has engaged in "egregious conduct such as a false declaration." But the Supreme Court held that recovery of fees by a Lanham Act defendant is not limited "to the rare case in which a court finds that the plaintiff acted in bad faith." This Court should remand with instructions that the prevailing party is not required to show bad faith for a Lanham Act case to be exceptional.

Third, the district court erred by not considering circumstantial evidence of Verisign's improper motive in pursuing this lawsuit. XYZ presented circumstantial

evidence proving that Verisign's motive was to intimidate XYZ, bleed it dry through expensive litigation, and expose trade secrets. Without analysis, the district court dismissed this evidence as mere speculation.

The district court also did not consider—as another district court did in a similar case—that "a party's position and litigation approach may move from being objectively reasonable to becoming unreasonable and perhaps exceptional." The Court should instruct the district court to consider whether Verisign's litigation approach, over time, moved to unreasonable and exceptional. The Court should remand with instructions that the district court consider circumstantial evidence of Verisign's motive and the reasonableness of its conduct throughout the litigation.

STANDARD OF REVIEW

The Court reviews a district court's decision on the award of Lanham Act attorney's fees for an abuse of discretion. *Shell Oil Co. v. Commercial Petroleum, Inc.*, 928 F.2d 104, 108 n.6 (4th Cir. 1991). A court necessarily abuses its discretion when its ruling is based on "an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990).

ARGUMENT

A. The district court erred by requiring clear and convincing evidence when the proper standard is preponderance of the evidence.

The Lanham Act provides that a court may award attorney's fees to a prevailing party in exceptional cases. *See* 15 U.S.C. § 1117(a). The district court required XYZ to establish this case was exceptional by clear and convincing evidence.

But in *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749 (2014), the Supreme Court rejected the "requirement that patent litigants establish their entitlement to fees under [the exceptional-case standard] by 'clear and convincing evidence.'" 134 S. Ct. 1758. The Court noted the statute imposed "no specific evidentiary burden, much less such a high one" on prevailing parties. *Id.* Rather, a "preponderance of the evidence standard…is the standard generally applicable in civil actions, because it allows both parties to share the risk of error in roughly equal fashion." *Id.* (citations omitted) (internal quotation marks omitted).

The same standard applies to this Lanham Act case. As this Court noted in *Georgia-Pacific Consumer Prods. LP v. von Drehle Corp.*, 781 F.3d 710 (4th Cir. 2015), "the language of [the Lanham Act] § 1117(a) and [the Patent Act] § 285 is identical, and we conclude that there is no reason not to apply the *Octane Fitness*

standard when considering the award of attorney's fees under § 1117(a)." 781 F.3d at 721.

Every circuit court to consider the issue has concluded that *Octane Fitness* applies to the Lanham Act. Sitting en banc, the Ninth Circuit cited this Court's *Georgia-Pacific* case, and required district courts to evaluate Lanham Act fee requests using a preponderance of the evidence standard. *SunEarth, Inc. v. Sun Earth Solar Power Co.*, 839 F.3d 1179, 1181 (9th Cir. 2016) (en banc) (overturning all prior precedent to the contrary). The Fifth Circuit noted that the Supreme Court "rejected the 'clear and convincing' evidentiary hurdle" and "provided clear guidance from which we do not stray" in Lanham Act cases. *Baker v. DeShong*, 821 F.3d 620, 623–25 (5th Cir. 2016). The Third and Sixth Circuits agree that *Octane Fitness* applies to Lanham Act cases. *Fair Wind Sailing, Inc. v. Dempster*, 764 F.3d 303, 313–15 (3d Cir. 2014); *Slep-Tone Entm't Corp. v. Karaoke Kandy Store, Inc.*, 782 F.3d 313, 317–18 (6th Cir. 2015).

The Second Circuit has not yet decided whether *Octane Fitness* applies to Lanham Act cases. *Penshurst Trading Inc. v. Zodax L.P.*, 652 F. App'x 10, 12 (2d Cir. 2016) ("We have not yet decided whether [the *Octane Fitness*] rule applies in the context of the Lanham Act, but we need not do so here."). Only the Seventh Circuit continues to apply pre-*Octane Fitness* standards to Lanham Act fee

requests, but it has done so without mentioning *Octane Fitness* or distinguishing it. *Burford v. Accounting Practice Sales, Inc.*, 786 F.3d 582, 588–90 (7th Cir. 2015).

In its order below, the district court provided that a prevailing party seeking fees under Section 1117(a) "has the burden to prove [an exceptional case] with clear and convincing evidence." (JA 1270.) That high burden of proof has been expressly rejected by both of the circuit courts that directly addressed the issue. *See SunEarth*, 839 F.3d at 1181; *Baker*, 821 F.3d at 623–25. This Court should require the district court to apply a preponderance of the evidence standard.

When a trial court imposes an incorrect burden of proof in a civil case, the proper remedy is to remand the case for a determination under the correct standard. *Humphrey v. Humphrey*, 434 F.3d 243, 247 (4th Cir. 2006) (citing *Pullman–Standard v. Swint*, 456 U.S. 273, 292 (1982); *Kelley v. S. Pac. Co.*, 419 U.S. 318, 331–32 (1974)). Remand is especially prudent when, as here, the district court employed too high a burden of proof. *Humphrey*, 434 F.3d at 248.

B. The district court erred by requiring XYZ to show bad faith when the Supreme Court held an exceptional case does not require bad faith.

The Supreme Court held that "Congress did not intend rigidly to limit recovery of fees by a [Lanham Act] defendant to the rare case in which a court finds that the plaintiff acted in bad faith…." *Octane Fitness*, 134 S. Ct. at 1757 (alteration in original) (internal quotation marks omitted). The Court also held that

"sanctionable conduct is not the appropriate benchmark" for determining whether a case is exceptional when a party acted unreasonably. 134 S. Ct. at 1756–57.

This Court held that an exceptional-case analysis requires courts to consider whether, under the totality of the circumstances there is an unusual discrepancy in the merits of the parties' positions, or the non-prevailing party litigated the case in an unreasonable manner, or other circumstances require a fee award for compensation or deterrence purposes. *Georgia-Pacific*, 781 F.3d at 721.

The district court acknowledged these factors, but applied an old standard that a "case is exceptional if the non-prevailing party's conduct was malicious, fraudulent, willful, or deliberate." (JA 1270.) The court cited *Retail Servs., Inc. v. Freebies Publ'g*, 364 F.3d 535, 550 (4th Cir. 2004) for this proposition. But *Retail Servs.* is no longer good law because it was decided before *Octane Fitness*, which expressly rejected a bad-faith requirement. 134 S. Ct. at 1756–57.

Relying on *Retail Servs.*' more demanding definition of "exceptional," the district court required that XYZ "must show egregious conduct such as a false declaration" to prove Verisign litigated unreasonably. (JA 1271.) But after *Octane Fitness*, evidence of bad faith such as a false declaration is "not the appropriate benchmark" to determine whether a case is exceptional. 134 S. Ct. at 1751, 1756–57.

By providing for a fee award in exceptional Lanham Act cases, Congress necessarily intended a lower standard than Fed. R. Civ. P. 11, 28 U.S.C. § 1927, and the court's inherent power to sanction. And the Supreme Court has three times "declined to construe fee-shifting provisions narrowly on the basis that doing so would render them superfluous" to laws that allow for an award of fees in every civil case. 134 S. Ct. at 1758 (citing *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 419 (1978); *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402, n.4 (1968) (per curiam)).

The district court erred by requiring XYZ to show Verisign filed in bad faith and committed sanctionable conduct. The Court should remand with instructions that an exceptional case "is simply one that stands out from others with respect to the substantive strength of a party's litigating position (considering both the governing law and the facts of the case) or the unreasonable manner in which the case was litigated." *Octane Fitness*, 134 S. Ct. at 1756.

C. The district court erred when it disregarded circumstantial evidence of Verisign's improper motive, including Verisign's unreasonable manner of litigation.

A plaintiff's motivation in filing or maintaining a lawsuit remains relevant to the exceptional-case inquiry. *Octane Fitness*, 134 S. Ct. at 1756, n.6; *Georgia-Pacific*, 781 F.3d at 720–21. Direct evidence of motive or intent is difficult to establish. *See,*

e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228, 271 (1989) ("direct evidence of intentional discrimination is hard to come by."). And "direct evidence of a fact is not required. Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence." *Michalic v. Cleveland Tankers, Inc.*, 364 U.S. 325, 330 (1960).

1. The district court ignored circumstantial evidence of Verisign's improper motive in bringing this lawsuit.

The Seventh Circuit recognized that the expense of Lanham Act litigation allows "the potential for businesses to use Lanham Act litigation for strategic purposes—not to obtain a judgment or defeat a claim but to obtain a competitive advantage independent of the outcome of the case by piling litigation costs on a competitor." *Nightingale Home Healthcare, Inc. v. Anodyne Therapy, LLC*, 626 F.3d 958, 962 (7th Cir. 2010). The court noted that this posed an especially grave risk to "new entrants" like XYZ. *Id.* at 962–63. District courts have embraced the concept that aggressive pursuit of an ultimately meritless claim gives rise to an inference of improper motive under *Octane*. *See, e.g.*, *Farouk Systems, Inc. v. AG Global Prods., LLC*, No. 15-0465, 2016 WL 6037231, at *3–4 (S.D. Tex. Oct. 14, 2016); *see also Leapers, Inc. v. SMTS, LLC*, No. 14-12290, 2017 WL 3084370, at *5–6 (E.D. Mich. July 20, 2017).

XYZ presented circumstantial evidence showing that Verisign's motive in pursuing its claim was to destroy XYZ through expensive litigation, and intimidate XYZ and Verisign's other new competitors. Verisign aggressively sought XYZ's most sensitive trade secrets and competitive information, even though irrelevant to the false-advertising claim. Verisign harassed XYZ's business partners with numerous third-party subpoenas that ancillary courts around the country quashed. Verisign asked the court to redesignate thousands of confidential documents so they would be publicly exposed. And Verisign publicly filed confidential information in violation of the protective order, which harmed XYZ's business relationships.

The district court concluded that XYZ "speculated that Plaintiff filed this suit to harass and deter competition" and "speculat[ed] as to Plaintiff's motive in filing this case." (JA 1271–72.) But XYZ did not merely speculate. Verisign filed a case based on weak legal theories which were wholly rejected at summary judgment and on appeal. Courts across the country quashed Verisign's overreaching subpoenas. Verisign deposed every XYZ employee regardless of their connection to the false-advertising claim.

This conduct supports a finding of improper motive. Verisign used its dominance in corporate size, revenue, and longevity to drain XYZ of resources by

burdening it with expensive, distracting, and destructive litigation. The district court's opinion offered no analysis on these points beyond its conclusion that XYZ was merely speculating. (*See* JA 1270–72.)

2. The district court should have evaluated circumstantial evidence of Verisign's improper motive from its continued pursuit of implausible claims.

Chief Judge Osteen of the Middle District of North Carolina offered a thoughtful analysis before awarding attorney's fees to a prevailing defendant in a case similar to this one. *Design Res., Inc. v. Leather Indus. of Am.*, No. 1:10CV157, 2016 WL 5477611 (M.D.N.C. Sept. 29, 2016). Like here, the plaintiff filed a false-advertising case that survived early motion practice but was thoroughly dismissed on summary judgment. *Id.* at *2–3. This Court affirmed the trial court's decision granting summary judgment. *See Design Res., Inc. v. Leather Indus. of Am.*, 789 F.3d 495, 505 (4th Cir. 2015). The defendant filed an exceptional-case motion. 2016 WL 5477611, at *1. The plaintiff contended that its claim could not be frivolous, without merit, or otherwise exceptional because it survived a motion to dismiss. *See id.* at *2–3.

But in his ruling, Judge Osteen reasoned that "over time, a party's position and litigation approach may move from being objectively reasonable to becoming unreasonable and perhaps exceptional." *Id.* at *4. So each party "has an on-going

responsibility to evaluate the merits of its case and positions." *Id.* And "a party should continue to evaluate the reasonableness of its litigation strategy as the case progresses to ensure that conduct does not cross the line from reasonable to questionable." *Id.*

The court found that "Plaintiff's failure to continually assess the substantive strength of its litigation position, particularly by the conclusion of discovery" supported an award of attorney's fees under *Georgia-Pacific*'s "unusual discrepancy in the merits" factor. 2016 WL 5477611, at *6. Similarly, this same "failure to continually assess the plausibility of its claims" was sufficient to establish an "unreasonable manner of litigation." *Id.* And "the importance of deterring litigants from pursuing their claims even when the claim has fallen apart" reinforced the court's decision to award fees under the "compensation or deterrence" factor. *Id.* at *7.

The *Design Res.* court made its determination on circumstantial evidence that is similar to the evidence in this case. Because *Design Res.* was decided after briefing on the motion for attorney's fees, the district court did not have the benefit of Judge Osteen's analysis. And as a district-court decision, the opinion only has persuasive value. But this Court should instruct the district court to follow Judge Osteen's observation that the *Georgia-Pacific* factors are properly evaluated over

the course of the entire litigation. Continuing to pursue a claim when it has fallen apart provides evidence of an exceptional case.

The Court should remand with instructions that the district court carefully evaluate XYZ's circumstantial evidence of Verisign's improper motive.

CONCLUSION

The district court abused its discretion by applying a clear and convincing evidence standard when the proper standard is preponderance of the evidence. The court also erred by requiring XYZ to establish that Verisign acted in bad faith. The Supreme Court said evidence of bad faith is no longer required. And the court erred by disregarding circumstantial evidence as "speculation."

If the district court applies the proper standard, it should find that this case is exceptional. This Court should remand with instructions to (1) apply a preponderance of the evidence standard, (2) analyze whether the case is exceptional without requiring XYZ to establish Verisign's bad faith, and (3) analyze circumstantial evidence of improper motive and reasonable inferences drawn from it, such as whether Verisign's position became exceptional over time.

DATED this 31st day of July, 2017.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Case No. 17-1704

Counsel for Defendant-Appellants hereby certifies that:

1. The brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because, exclusive of the exempted portions, it contains 4074 words as counted by the word-processing program used to prepare the brief; and

2. The brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared using Microsoft Office Word 2016 in a proportionally spaced typeface: Equity Text B, font size 14.

DATED this 31st day of July, 2017.

/s/ Derek A. Newman
Derek A. Newman

Counsel for Defendants–Appellants
XYZ.COM, LLC and Daniel Negari

CERTIFICATE OF SERVICE

Case No. 17-1704

I certify under Fed. R. App. P. 25(b) that I caused the foregoing Appellants' Opening Brief to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system on July 31, 2017. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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DATED this 31st day of July, 2017.

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