

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION**

YOUNG AMERICA’S FOUNDATION

Plaintiff,

Case No.: 1:24-cv-00923-RDA-LRV

v.

MATTHEW SITMAN, an individual; SAM
ADLER-BELL, an individual;
FOUNDATION FOR THE STUDY OF
INDEPENDENT SOCIAL IDEAS, INC.; and
KNOW YOUR ENEMY, INC.

Defendants

PLAINTIFF’S OPPOSITION TO MOTION TO DISMISS

Plaintiff, YOUNG AMERICA’S FOUNDATION (“Plaintiff”), by and through its undersigned attorneys, responds to Defendants, MATTHEW SITMAN, an individual; SAM ADLER-BELL, an individual; FOUNDATION FOR THE STUDY OF INDEPENDENT SOCIAL IDEAS, INC.; and KNOW YOUR ENEMY, INC. (collectively “Defendants”), Motion to Dismiss and in support thereof states as follows:

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INTRODUCTION

Plaintiff Young America's Foundation (“YAF”) is involved in youth education and outreach and is a leading organization for young conservatives helping students understand and promote conservatism. Plaintiff is a conservative organization, and Defendants, with their Know Your Enemy podcast (“KYE Podcast”), are leftist. As such, they are competitors, much the same as two companies selling widgets. Although Defendants prefer to frame this dispute as a “political” dispute, it is not. The legal analysis applicable to this dispute would be the same as if General Motors and Ford Motor Company were the parties. The fact that the parties here are engaged in the “sale” and promotion of ideas is irrelevant, contrary to the Defendants’ characterization. Like Defendants, YAF firmly believes Americans have the right to critique their political adversaries and honest debate is healthy. However, unlike Defendants, Plaintiff does not believe this right extends to engaging in trademark infringement and confusing potential consumers. Defendants attempt to convince this Court their use of YAF’s trademarks are fair game in the political ideology realm. However, after peeling back the onion layers and viewing Defendants’ use of YAF’s trademarks objectively, the Court will see this is a classic case of consumer confusion.

Defendants’ use of Plaintiff’s YOUNG AMERICANS FOR FREEDOM and YAF trademarks to sell a membership tier of the Know Your Enemy podcast constitutes the very type of use prohibited by the Lanham Act. There is nothing “funny” or “ironic” about the Defendants’ infringing use. At this stage, Defendants’ claims of fair use and First Amendment protection do not apply and the Court must deny the Motion to Dismiss.

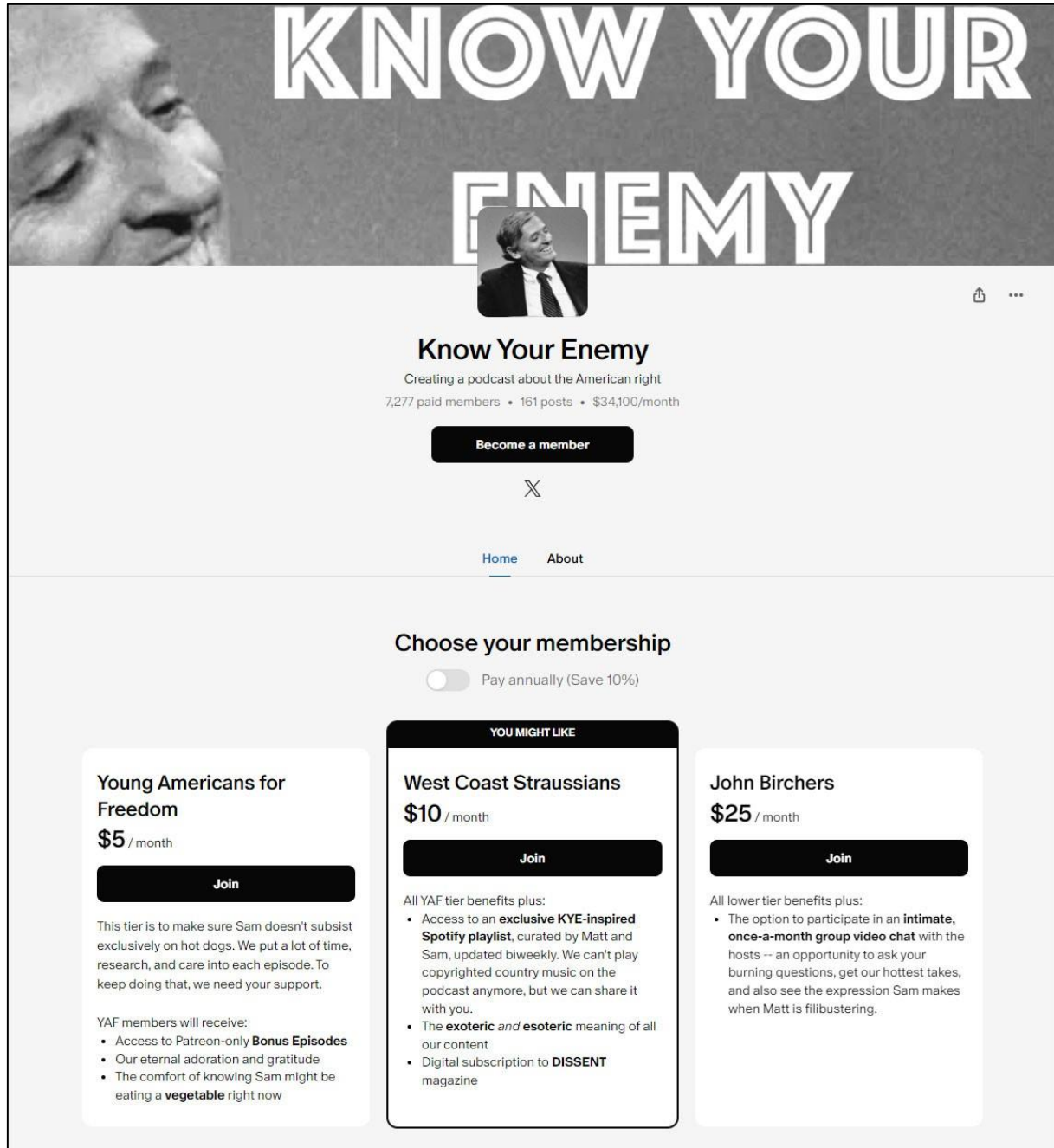
FACTS

Plaintiff YAF is owner by assignment of United States Trademark Registration Number 2,609,307 for the mark “YOUNG AMERICANS FOR FREEDOM” (Dkt-2 at ¶ 24),

and United States Trademark Registration Number 2,634,488 for the mark “YAF” (Dkt-2 at ¶ 28) (collectively “Plaintiff’s Trademarks”). Each of Plaintiff’s Trademarks are registered for “indicating membership in a conservative youth organization.” Plaintiff and its predecessors in interest have used Plaintiff’s Trademarks in commerce throughout the United States continuously since at least September 11, 1960. (Dkt-2 at ¶ 25, 29)

Nearly 60 years after Plaintiff and its predecessors began offering services under Plaintiff’s Trademarks, Defendants Matthew Sitman and Sam Adler-Bell decided to try their hand at podcasting and political punditry. (Dkt-2 at ¶ 15). In 2019, Sitman and Adler-Bell, along with Defendants Foundation For The Study Of Independent Social Ideas, Inc. and Dissent Publishing Corporation (aka Dissent Magazine), launched the Know Your Enemy podcast (“KYE Podcast”). The KYE Podcast offers political commentary and describes itself as a “leftist’s guide to the conservative movement.” (Dkt-2 at ¶ 15). The podcast is available globally through the Apple, Spotify, Patreon, and other such platforms. (Dkt-2 at ¶ 16).

The KYE Podcast page on the Patreon platform (“KYE Patreon Page”) (a screen shot is excerpted below, *see also* Dkt-2 Ex. C) contains the KNOW YOUR ENEMY title at the top of the page and a subtitle “Creating a Podcast About the American Right.” Immediately below that is a link to click in order to subscribe to the podcast. (*Id.*). Below that, three different membership levels are listed, including one bearing Plaintiff’s YOUNG AMERICANS FOR FREEDOM and YAF marks. (*Id.*). The other two tiers are named WEST COAST STRAUSSIANS and JOHN BIRCHERS. (*Id.*). There is additional copy in the description of the YOUNG AMERICANS FOR FREEDOM membership tier. (*Id.*). This copy reads “This tier is to make sure Sam does not subsist solely on hot dogs. We put a lot of time, research and care into each episode. To keep doing that, we need your continued support.” (*Id.*),



To join the “Young Americans for Freedom” membership tier, consumers pay \$5.00 per month and in exchange they receive access to Patreon-only bonus episodes. (Dkt-2 at ¶ 35) The other membership tiers have their own parameters and costs. (Dkt-2 at ¶ 34). Plaintiff has never authorized the use of its YOUNG AMERICANS FOR FREEDOM and YAF trademarks to Defendants herein or to any other party. (Dkt-2 at ¶ 33).

HISTORY AND CURRENT STATUS

Similar to Defendants' arguments hoping to have the Complaint dismissed, Defendants mischaracterize the history of the pending dispute. On February 24, 2023, Plaintiff filed an action against these same Defendants in the United States District Court for the Eastern District of Virginia styled *Young America's Foundation v. Matthew Sitman, Sam Adler-Bell, Foundation For The Study Of Independent Social Ideas, Inc. and Dissent Publishing Corporation*, Case No. 1:23-cv-00253 ("the 2023 Action") raising claims of trademark infringement and unfair competition based on Defendants' unauthorized use of Plaintiff's Trademarks in connection with the KYE Podcast. The Defendants requested and filed a Second Consent Motion For Extension of Time to Respond To Complaint. (See Defendants' Second Consent Motion For Extension of Time to Respond To Complaint, Case No. 1:23-cv-00253 Docket Item 30, attached as Exhibit 1.) As the basis for their request, Defendants claimed the briefing on their intended motion to dismiss would be informed by the U.S. Supreme Court's pending consideration of *Jack Daniel's Properties, Inc. v. VIP Products LLC*, Case No. 22-149. *Id.* Additionally, due to a mere technicality which the parties met and conferred on, Plaintiff agreed to voluntarily dismiss the 2023 Action on July 17, 2023, without prejudice, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i). (See Order Granting Notice of Voluntary Dismissal, Case No. 1:23-cv-00253 Docket Item 36, attached as Exhibit 2.)

Plaintiff refiled this action on May 31, 2024 (Dkt.-1) and on June 5, 2023, after a discussion with Defendants' counsel concerning the proper Defendant parties, Plaintiff filed its revised and operative Complaint. (Dkt.-2) Any suggestion by Defendants' counsel that the original Complaint or current Complaint was dismissed on any sort of substantive basis is unsupported by the record. Plaintiff's complaint contains claims for relief under the Lanham Act for trademark infringement,

counterfeiting, and false advertising, as well as claims brought pursuant to Virginia law, specifically claims for unfair competition and common law trademark infringement. Defendants now move to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) arguing that when certain First Amendment defenses are considered Plaintiff fails to state any claim. (Dkt.-29).

ARGUMENT

Defendants seek dismissal of Plaintiff's Complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). When considering a motion to dismiss, the court must consider all the allegations of the complaint and view those allegations in the light most favorable to the plaintiff. *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009). Further, the court is to take all well-pleaded factual allegations as true and *ignore any facts outside the complaint*. *Id.* at 678-79 (emphasis added). If a complaint states a plausible claim for relief on its face, a motion to dismiss must be denied. *Id.* (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-56, 570 (2007)). The requisite plausibility exists where a "plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556); *see also Tobey v. Jones*, 706 F.3d 379, 385-86 (4th Cir. 2013). The requirement of facial plausibility has no correlation to probability. *Id.* (citing *Twombly*, 550 U.S. at 556).

Thus, the issue at bar is not whether Plaintiff will *prevail* on the merits, but instead is whether Plaintiff has sufficiently *pled* a claim for relief. To state a claim for trademark infringement, a plaintiff must allege that it owns a protectable trademark and that defendant's use of that mark is likely to cause confusion among consumers. *American Airlines, Inc. v. Shahi World & Travels, LLC*, 2023 WL 3952332 at *6, *13 (E.D.Va. 2023), *citing Synergistic Intern., LLC v. Korman*, 470 F.3d 162, 170 (4th Cir.2006). *See also Lone Star Steakhouse & Saloon, Inc. v. Alpha*

of Va., Inc., 43 F.3d 922, 930 (4th Cir.1995) (a plaintiff must show “it ha[d] a valid, protectible trademark and that the defendant's use of a colorable imitation of the trademark is likely to cause confusion among consumers.”) For the reasons that follow, Plaintiff has met this burden and, further, none of the alleged defenses raised by Defendants apply to the instant matter. Accordingly, the Motion to Dismiss must be denied.

1. Nominative Fair Use Is Inapplicable

Defendants claim that their use of Plaintiff's Trademarks to identify membership tiers constitutes nominative fair use. (Dkt-29 at 8). In support, Defendants cite *Rosetta Stone Ltd. v. Google, Inc.*, for the proposition that nominative fair use applies to situations “in which the defendant uses the plaintiff's trademark to identify the plaintiff's own goods.” *Rosetta Stone Ltd. v. Google, Inc.* 676 F.3d 144,154 (4th Cir. 2012). (Dkt-29 at 7). This argument fails for a multitude of reasons.

First, while Defendants urge this Court to dismiss the Complaint based on the nominative fair use doctrine, the *Rosetta Stone* court specifically stated “... [w]e are not adopting a position about the viability of the nominative fair-use doctrine as a *defense* to trademark infringement or whether this doctrine should formally alter our likelihood-of-confusion test in some way.” *Id.* at 155 (emphasis added). Further, the Fourth Circuit has not recognized nominative fair use as a defense to infringement claims since the *Rosetta Stone* decision. Accordingly, nominative fair use is inapplicable and Defendants' arguments invoking same are ineffective.

Second, even if this Court would apply the nominative fair use doctrine, Defendants' use of Plaintiff's Trademarks do not satisfy the test to be considered nominative fair use. Defendants' use of Plaintiff's Trademarks never identify Plaintiff's own goods as required by *Rosetta*. Unlike the typical infringement fact-pattern wherein the defendant “passe[s] off another's mark as its own”

and “confus[es] the public as to precisely whose goods are being sold,” *Id.*, a **nominative** use is one in which the defendant uses the plaintiff’s trademark *to identify the plaintiff’s own goods*, see *Tiffany (NJ) Inc. v. eBay Inc.*, 600 F.3d 93, 102 (2d Cir.2010), and “makes it clear to consumers that the plaintiff, not the defendant, is the source of the trademarked product or service,” *Century 21 Real Estate Corp. v. Lendingtree, Inc.*, 425 F.3d 211, 220 (3d Cir.2005); see *Tiffany*, 600 F.3d at 102 (explaining that a “**nominative fair use**” does not create “confusion about the source of [the] defendant’s product” (internal quotation marks omitted)) (emphasis added). An example of this type of use would be where an automobile repair shop specializing in foreign vehicles runs an advertisement using the trademarked names of various makes and models to highlight the kind of cars it repairs. See *New Kids On The Block v. News Am. Publ’g, Inc.*, 971 F.2d 302, 306–07 (9th Cir.1992). The Defendants never identify what services the Plaintiff provides and therefore cannot avail themselves of the nominative fair use doctrine. Defendants confusingly argue that the KYE Patreon Page, *supra* at 6, does not identify Plaintiff as the source behind the KYE Podcast. (Dkt-29 at 7). Assuming *arguendo* this was true, which it is not, that is not the standard required by *Rosetta* for nominative fair use to apply. In fact, by admitting that the KYE Patreon Page does not identify Plaintiff as the source, the Defendants are admitting that nominative fair use does not apply. Defendants must identify *Plaintiff’s own goods*, **not** Defendants’ goods. Nowhere on Defendants’ website does it even mention what Plaintiff’s goods/services are. Because the Defendants do not identify what services the Plaintiff provides the nominative fair use defense is inapplicable here.

Here, Defendants produce and distribute podcasts and related content. Defendants provides access to the podcasts and content by selling different tiers of membership and uses Plaintiff’s Trademarks to identify one such tier. (Dkt-2 at ¶ 34-36). Therefore, Defendant is not using

Plaintiff's Trademarks to identify Plaintiff's services, but is instead using Plaintiff's Trademarks to identify Defendants' own offerings.

Because the Fourth Circuit has not recognized nominative fair use as a defense to infringement claims since the *Rosetta Stone* decision and because the Defendants do not use Plaintiff's Trademarks to identify the Plaintiff's own goods, nominative fair use is inapplicable and provides no basis for dismissal. Accordingly, this Court must deny Defendants' Motion to Dismiss.

In addition, Defendants argue use of Plaintiff's Trademarks are for "comedic effect" and constitutes "irony." Further, Defendants urge this Court to believe the use of Plaintiff's Trademarks as a membership tier does not serve any source identification function. (Dkt-29 at 8). The Court simply has to look at the KYE Patreon Page, *supra* at 6. The KYE Patreon Page contains the statement "Creating a podcast about the American right" and then lists the three membership tiers. It is entirely possible for a consumer to interpret this language as meaning the KYE Podcast's subject matter is "about the American right" as the Defendants' own language claims. It does not state, for instance, that Defendants' podcast is an "attack" on the "American right." Furthermore, at this stage it is improper for this Court to look outside the pleadings or accept argument of counsel as an explanation of what the Defendants claim is their attempt at irony or comedy. *Iqbal, supra* at 678-79 (2009). There is nothing humorous or ironic on the face of the KYE Patreon Page, *supra* at 6. Rather, it is a page that simply identifies three podcast membership tiers with the names YOUNG AMERICANS FOR FREEDOM, WEST COAST STRAUSSIANS and JOHN BIRCHERS. Further, although Defendants argue that the irony is in the fact that Plaintiff is an "enemy" there is nothing on the KYE Patreon Page describing Plaintiff as the enemy, *See* KYE Patreon Page, *supra* at 6. In the end, then, on its face, the Patreon page only displays the Plaintiff's

trademark, YOUNG AMERICANS FOR FREEDOM, as a membership tier without any explanation or attempt at humor or irony as currently argued by Defendants.

2. Ironically, Defendants' Infringement Is Not Protected By The First Amendment

Defendants next argue that Defendants' use of Plaintiff's Trademarks is protected by the First Amendment. (Dkt-29 at 9-18). According to Defendants, by applying the test set out in *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989) its "tongue-in-cheek use" of Plaintiff's Trademarks "artistically relevant expression" (Dkt-29 at 12) is protected by the First Amendment. Just like Defendants misplaced reliance on *Rosetta Stone, supra*, Defendants' reliance on *Rogers* is similarly misplaced.

The *Rogers* test was created to address the tension between the Lanham Act and the First Amendment by limiting applicability of the Act to cases where "the public interest in avoiding consumer confusion outweighs the public interest in free expression." *Rogers, supra* at 999. For *Rogers* to apply in the first instance, a defendant must "make a threshold legal showing that its allegedly infringing use is part of an expressive work protected by the First Amendment." *Gordon v. Drape Creative, Inc.*, 909 F.3d 257, 261 (9th Cir. 2018). If so, the Lanham Act will not apply unless "the defendant's use of the mark (1) is not artistically relevant to the work or (2) explicitly mislead consumers as to the source or the content of the work." *Id.* If both prongs of the test are met, the First Amendment protects a defendant from claims of trademark infringement.

However, *Rogers* does not provide "an automatic safe harbor." *Gordon, supra* at 261. Notably, the Supreme Court limited the reach of *Rogers* in *Jack Daniel's Properties, Inc. v. VIP Prod. LLC*, 599 U.S. 140 (2023). *Jack Daniel's* involved a dog toy that imitated the iconic square-shaped Jack Daniel's whiskey bottle, mimicked Jack Daniel's trade dress, and replaced the Jack

Daniel's name with BAD SPANIELS. The lawsuit contained claims of trademark infringement and dilution.

In the District Court, defendant argued the dog toy was an expressive work, thus, under *Rogers*, defendant's use of plaintiff's trademarks was protected. *VIP Prod. LLC v. Jack Daniel's Properties, Inc.*, 2016 WL 5408313 (D.Az. 2016) at *5. Plaintiff argued *Rogers* was inapplicable because defendant used the adapted trademarks as trademarks to market its dog toys. *Id.* at *6.

The District Court agreed with plaintiff finding *Rogers* inapplicable where defendant used the Jack Daniel's trademark and trade dress for the "dual purpose of making an alleged expressive comment as well as the commercial selling of a non-competing product." *Id.* at *6. Without the First Amendment protection afforded by *Rogers*, the case became a standard trademark infringement action and the significant question became one of likelihood of confusion. *Id.* at *5. The Ninth Circuit reversed, holding that the dog toy was an expressive work and therefore the District Court should have applied the *Rogers* test. *VIP Prod. LLC v. Jack Daniel's Properties, Inc.*, 953 F.3d 1170, 1175-6 (9th Cir. 2020).

The Supreme Court reversed the Ninth Circuit holding that *Rogers* does not apply "when the accused infringer has used a trademark to designate the source of its own goods—in other words, has used a trademark as a trademark. That kind of use falls within the heartland of trademark law and does not receive special First Amendment protection." *Jack Daniel's* 599 U.S. at 145. Citing Section 1127 of the Lanham Act, 15 U.S.C. § 1127, the Court noted the definition of "trademark" as "[a]ny word, name, symbol, or device, or any combination thereof" that a person uses "to identify and distinguish his or her goods ... from those manufactured or sold by others and to indicate the source of the goods." *Jack Daniel's* 599 U.S. at 145. With further reference to source identification, the Court recognized "[t]he cardinal sin under the [Lanham Act] is to

undermine that function. It is to confuse consumers about source—to make (some of) them think that one producer's products are another's. And that kind of confusion is most likely to arise when someone uses another's trademark as a trademark—meaning, again, as a source identifier—rather than for some other expressive function.” *Jack Daniel’s* 599 U.S. at 157.

In the instant matter, Plaintiff’s Complaint alleges Defendants are using Plaintiff’s Trademarks to sell memberships to access Defendants’ KYE Podcast. (Dkt-2 at ¶ 33-37). In other words, using Plaintiff’s Trademarks as trademarks. The Complaint further alleges Defendants are using Plaintiff’s Trademarks to identify a Podcast membership tier. (Dkt-2 at ¶ 33-37, 49, 56). The court must take these allegations as true and view them in the light most favorable to Plaintiff. (*Iqbal*, *supra* at 678-9; *Twombly*, *supra* at 555-6). As such, these allegations establish Defendants’ use of Plaintiff’s Trademarks as trademarks which, at this stage, precludes application of the *Rogers* test as held by *Jack Daniel’s*. With *Rogers* inapplicable, Defendants cannot claim that use of Plaintiff’s Trademarks is protected by the First Amendment and there is no First Amendment basis to dismiss the Complaint.

The result is the same even where use of a mark has other expressive meanings. *Jack Daniel’s*, *supra*, at 157-8. This includes instances where a defendant uses a mark to also make an expressive comment or a parody. *Id.* at 156, citing *Tommy Hilfiger Licensing, Inc. v. Nature Labs, LLC* 221 F.Supp.2d 410, 415 (S.D.N.Y 2002). In the instant matter, Defendant has claimed its use of Plaintiff’s Trademarks creates irony because Plaintiff, as a conservative, is an “enemy” to Defendants, who are leftist. (Dkt-29 12-15). As an initial matter, any opinion or claim as to the “ironic” or “comedic” nature of Defendants’ use are matters outside the complaint. On a Rule 12(b)(6) motion to dismiss, the court should not consider such matters. *Iqbal*, *supra*. at 678-79. Accordingly, all of Defendants comments relating to why the use of Plaintiff’s Trademarks is

humorous or ironic (i.e., “Defendants’ ironic use of [Plaintiff’s Trademarks] is humorously effective because it accurately identifies a conservative organization as an “enemy.””) should be excluded and disregarded by this Court. Similarly, Defendants’ hypotheticals (i.e., Why would a leftist podcast enroll its audience in an “enemy” conservative organization?) must be ignored. Accordingly, the Court must consider Defendants’ use of Plaintiff’s Trademarks solely on the basis of how it appears on the face of the KYE Patreon Page, *supra* at 6.

As discussed above, nothing on the face of the KYE Patreon Page suggests any humorous or ironic use of Plaintiff’s Trademarks. In fact, the KYE Patreon Page only shows use of Plaintiff’s Trademarks as the identifier of a podcast subscription tier, i.e., functioning as a trademark. Therefore, Defendant’s claims of humor and irony are unsupported by the facts shown on the face of the KYE Patreon Page. Further, even if Defendants’ use of Plaintiff’s Trademarks is intended to be ironic, humorous or some sort of a parody, those expressive effects are in addition to the clear use of Plaintiff’s Trademarks as trademarks identifying a Podcast membership tier and pursuant to *Jack Daniel’s, Rogers* is of no avail to the Defendants.

3. Likelihood Of Confusion

Given the manner of Defendants’ use of Plaintiff’s Trademarks, *Rogers* does not apply and the ultimate question becomes whether such use creates a likelihood of confusion. Reaching for a footnote in *Jack Daniel’s, supra*, Defendants argue that the question of likelihood of confusion can be dispatched at the motion to dismiss stage. (Dkt-29 at 16). Defendants reference comments made by the Court after it likened the *Rogers* test to an “an escape from the likelihood-of-confusion inquiry and a shortcut to dismissal.” *Jack Daniel’s* 599 U.S. at 157. The footnote acknowledged that there may still be instances where a source identifying use does “not present any plausible likelihood of confusion—because of dissimilarity in the marks or various contextual

considerations. And if, in a given case, a plaintiff fails to plausibly allege a likelihood of confusion, the district court should dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6).”

Jack Daniel’s 599 U.S. 157 fn 2.

Read properly, this footnote does not stand for the proposition that a full analysis of the likelihood of confusion question can be dispatched at the 12(b)(6) stage. Rather, the Court only delineated a few instances where the likelihood of confusion analysis could be sidestepped as under *Rogers*. Here, none of these are applicable. Defendants are using Plaintiff’s Trademarks verbatim, so there is no dissimilarity in marks. Second, as discussed below, contextual considerations are inapplicable. Finally, this is not a case where Plaintiff has failed to plausibly allege likelihood of confusion.

a. Plaintiff Has Sufficiently Alleged Likelihood Of Confusion.

In order to state a claim for trademark infringement, a Plaintiff must allege that it owns a protectable trademark and that defendant’s use of that mark is likely to cause confusion among consumers. *American Airlines, Inc., supra*; *Synergistic Intern., LLC, supra*; *Lone Star Steakhouse, supra*. In terms of the likely to cause confusion element, in the Fourth Circuit, a Plaintiff does not have to “plead with specificity how the infringing trademark causes confusion.” *Rothy’s, Inc. v. JKM Techs., LLC*, 360 F. Supp. 3d 373, 386 (W.D. Va. 2018), *see also Sigma Gamma Rho Sorority, Inc. v. Seven Pearls Foundation, Inc.*, 2023 WL 6627806 (E.D.N.C. 2023) (*citing Rothy’s*). Accordingly, there is no requirement that Plaintiff allege detailed facts supportive of all factors identified in *Pizzeria Uno Corp. v. Temple*, 747 F.2d 1522, 1527 (4th Cir. 1984) as Defendants would infer. Rather, the allegations of likelihood of confusion in the Complaint, specifically at Paragraphs 51 and 58 which allege “Defendants’ infringing acts as alleged herein have caused and are likely to cause confusion, mistake, and deception among the relevant

consuming public as to the source or origin of the Podcast’s services and have and are likely to deceive the relevant consuming public into believing, mistakenly, that the Podcast’s services originate from, are associated or affiliated with, or otherwise authorized by Plaintiff” are sufficient. (Dkt-2 at ¶¶ 51, 58). This is especially true when those allegations and the inferences that can be drawn from them are construed in Plaintiff’s favor. *Iqbal*, *Twombly*, *supra*. Accordingly, Defendants’ claims that the Complaint somehow fails to state a claim because of deficiencies in pleading likelihood of confusion are without merit and do not support dismissal of Plaintiff’s complaint.

b. Parody Or Irony Do Not Change The Plausibility Of Likelihood Of Confusion.

Defendants also claim that its “ironic references to Young Americans for Freedom are unlikely to cause confusion” and cites to and provides inadmissible factual assertions outside of the Complaint in an attempt to justify the use of Plaintiff’s Trademarks on the KYE Patreon Page¹. However, as discussed above, under *Jack Daniels*, if use of a mark has a dual function of indicating source and some other expressive meaning—including irony or parody—the likelihood of confusion factors will still apply. Further, as also discussed above, Defendants’ use of Plaintiff’s Trademarks must be viewed as appearing on the face of the KYE Patreon Page, *supra* at 6, with its sole reference to KNOW YOUR ENEMY followed by identification of three podcast membership tiers. Even assuming there was irony or parody, this is not a situation where such additional expressive meaning is clear and therefore does not rise to the situation where the contextual considerations giving rise to same are so apparent that there is no plausible likelihood of confusion.

¹ Again, all of Defendants’ statements explaining how its use of Plaintiff’s Trademarks is ironic or humorous are matters outside the Complaint that this Court must disregard under *Iqbal*, *supra*.

4. Dismissal Of Count Six (False Advertising) Is Not Warranted.

Defendant seeks dismissal of Count Six of the complaint, which is premised on False Advertising under Section 1125 of the Lanham Act. 15 U.S.C. 1125(a)(1)(B) because Plaintiff has not alleged that Defendants use of Plaintiff's Mark was both misleading and caused actual confusion. This argument fails.

Plaintiff has alleged "Defendants have attempted to confuse consumers into falsely believing Plaintiff is in collaboration with Defendants or otherwise permits use of Plaintiff's Trademarks by Defendants when it hasn't." (Dkt-2 at ¶77) and "Defendants infringing acts alleged herein have caused and are likely to cause confusion, mistake and deception among the relevant consuming public as to the source or origin of the Podcast's services and have had or are likely to deceive the relevant consuming public into believing, mistakenly, that the Podcast's services originate from, are associated with or otherwise authorized by Plaintiff." (Dkt-2 at ¶78).

In Paragraph 77 Plaintiff expressly alleges that Plaintiff is attempting to press a false belief on consumers, which, constitutes misleading. (Dkt-2 at ¶77). Further, as noted above, Paragraph 78 clearly alleges actual confusion. (Dkt-2 at ¶78). Given the foregoing and the fact that court must take these allegations as true and view them in the light most favorable to Plaintiff (*Iqbal*, supra at 678-9; *Twombly*, supra at 555-6), these allegations demonstrate that Plaintiff has sufficiently pled a cause of action for false advertising under the Lanham Act.

5. Dismissal of Counts Three and Four (Counterfeiting) Is Not Warranted.

As an additional basis to dismiss Counts Three and Four of Plaintiff's Complaint, Defendants argue Plaintiff has not plausibly alleged trademark counterfeiting. Quite to the contrary, Plaintiff has sufficiently alleged claims for counterfeiting and, therefore, dismissal of Counts Three and Four is not proper.

In order to state a claim for trademark counterfeiting, a plaintiff must allege that “defendant (1) intentionally used a counterfeit mark in commerce; (2) knowing that the mark was counterfeit; (3) in connection with the sale, offering for sale, or distribution of goods, and (4) its use was likely to confuse or deceive.” *Match.com LLC v. Fiesta Catering International, Inc.* 2013 WL 428056 at *6 (E.D.Va. 2013), citing *Chanel, Inc. v. Banks*, No. WDQ-09-843, 2011 WL 121700, at *5 (D.Md. Jan.13, 2011) and *State of Idaho Potato Comm'n v. G & T Terminal Packaging, Inc.*, 425 F.3d 708, 721 (9th Cir.2005).

A “counterfeit mark” is defined by the Lanham Act as “a spurious mark which is identical with, or substantially indistinguishable from” the plaintiff’s mark.” 15 U.S.C. § 1127. Here there is no doubt that Defendants are using Plaintiff’s Trademarks in identical form. Additionally, Plaintiff has alleged all of the requisite elements. Plaintiff has alleged Defendants have used Plaintiff’s Trademarks intentionally and knowingly (Dkt-2 at ¶¶ 64, 68) in connection with offering their podcast memberships (*Id.*) and knowing such use was likely to cause confusion. (Dkt-2 at ¶¶ 51, 58). Therefore, Plaintiff has sufficiently pled trademark counterfeiting by Defendants. Thus, the court must deny Defendants’ Motion to Dismiss Counts Three and Four of the Complaint.

Defendants next claim that the counterfeiting claims fail because Defendants have not used Plaintiff’s Marks on the identical goods identified in Plaintiff’s trademark registrations. (Dkt-29 at 19). Plaintiff’s Marks are registered for “indicating membership in applicant which is a conservative youth organization to further the purposes and goals of the organization.” (Dkt-2 at ¶¶ 24, 28, Ex. A and Ex. B) Defendants use Plaintiff’s Marks to recruit members to receive their podcasts and other content to further their political ideology the “leftist guide to the conservative movement.” (KYE Patreon Page, *supra*, see also Dkt-2 Ex. C) Although the Parties may not agree

on politics, that does not overcome the fact that Defendants are using Plaintiff's Marks for the same purpose as Plaintiff does. The Defendant is using Plaintiff's Trademarks in attempt to increase membership. The exact same purpose as Plaintiff's use of its Trademarks. Further, Lanham Act Section 1114 does not specifically require a counterfeit to be a "stitch-for-stitch copy" as Defendants contend. Section 1114 prohibits use of a counterfeit mark "in connection with the sale, offering for sale, distribution, or advertising of *any goods or services* on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive" 15 U.S.C. § 1114, emphasis added. Accordingly, Defendants' argument fails and does not provide a basis to dismiss the Complaint.

Last, Defendants erroneously postulate "it is logically impossible to counterfeit a collective membership mark" (Dkt-29 at 20). While it may be true that collective marks are unique, the Lanham Act makes no distinction between trademarks, service marks and collective marks for purposes of counterfeiting. Section 1114 creates a cause of action against any defendant who "use[s] in commerce any reproduction, counterfeit, copy, or colorable imitation of a *registered mark* in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive." 15 U.S.C. § 1114 (A)(1)(a), emphasis added. Section 1127 provides meaning to Section 1114 and defines "counterfeit" as "a *spurious mark* which is identical with, or substantially indistinguishable from, a *registered mark*" 15 U.S.C. § 1127. Additionally, Section 1127 defines "registered mark" as "a mark registered in the United States Patent and Trademark Office" and specifically states "[t]he term *mark* includes any trademark, service mark, collective mark, or certification mark." *Id.* emphasis added. Given the foregoing, it is clear the Lanham Act includes collective marks within the realm of marks that can be counterfeited.

Therefore, it is not “logically impossible” to counterfeit a collective mark but, rather, based on the clear definitions within the act, “logically impossible” to conclude otherwise.

None of the arguments directed at the counterfeiting claims in Counts Three and Four are applicable. Accordingly, the court must disregard those arguments and deny the Motion to Dismiss.

6. The Virginia Anti-SLAPP Statute Does Not Apply.

Defendants argue that Plaintiff’s state law claims in Count Seven (Unfair Competition under Va. Stat. Ann. 59.1-196, et seq.), Count Eight (Common Law Trademark Infringement) and Count Nine (Common Law Unfair Competition) should all be dismissed pursuant to Virginia’s Anti-SLAPP law, Va. Code § 8.01-223.2. Defendants further argue they should be awarded costs and attorney fees pursuant to that statute.

Applicability of the Virginia Anti-SLAPP statute in this matter wholly depends on the outcome of the arguments made above. Plaintiff’s state law claims are based upon the same operative facts as its Federal law claims. Therefore, the state law claims will rise or fall on the strength of the arguments advanced with respect to same. As fully articulated above, not only has Plaintiff sufficiently alleged those claims, but none of the First Amendment defenses raised by Defendants apply. Accordingly, no Constitutional rights are impacted and the Anti-SLAPP statute is irrelevant.

CONCLUSION

Nothing in Defendants’ Motion to Dismiss warrants dismissal of this action. Therefore, Plaintiff respectfully requests the Court deny the Motion to Dismiss in its entirety.

Respectfully submitted this August 19, 2024.

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CERTIFICATE OF SERVICE

I, Jeffrey R. Adams, certify that on August 19, 2024, a true and correct copy of the foregoing document was filed electronically with the Clerk of the Court for the U.S. District Court for the Eastern District of Virginia by using the CM/ECF system. I certify that all counsel in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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