

**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 SUR-REPLY IN OPPOSITION TO MOTION TO DISMISS

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INTRODUCTION

The Defendants' Reply Memorandum in Support of Motion to Dismiss ("Reply Brief") (Dkt-36) contains new argument concerning the use of Plaintiff's Trademarks on the Know Your Enemy Patreon page ("KYE Patreon Page"). For the first time, Defendants argue the page "essentially asks, "Who are the ideological enemies of the left?" It then answers by identifying three prominent conservative organizations, including Plaintiff's Young Americans for Freedom. (Dkt-36 at 1). Defendants further contend that this constitutes political speech which, citing *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346 (1995), "occupies the core of the protection afforded by the First Amendment." (Dkt-36 at 1) Therefore, Defendants contend that their use of Plaintiff's YOUNG AMERICANS FOR FREEDOM and YAF marks (collectively, "Plaintiff's Trademarks") is protected political speech. This argument was not originally contained in Defendant's Motion to Dismiss.

ARGUMENT

In addition to numerous hypotheticals and potential third party interpretations, which are all outside of the allegations of the Verified Complaint, that can be drawn from the KYE Patreon Page already posited in Defendants' initial brief, Defendants' Reply Brief adds yet another, this time contending the page "essentially asks, "Who are the ideological enemies of the left?" Defendant then answers by identifying three prominent conservative organizations, including Plaintiff's Young Americans for Freedom. (Dkt-36 at 1). In addition, Defendants continue their practice of offering commentary and interpretations of the KYE Page throughout the Reply Brief. *See, e.g.*, Reply Brief at 7 "ironic and critical reference...." These arguments are improper and must be disregarded.

When considering a motion to dismiss, a 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). Accordingly, the court must disregard all Defendants' hypotheticals, assumptions, comments and suggested interpretations and consider Plaintiff's claims and Defendants' use of Plaintiff's Trademarks solely as set forth within the confines of Plaintiff's Verified Complaint. What is left, then, evident from the KYE Patreon Page itself (see Plaintiff's Opposition to Defendants' Motion to Dismiss, Dkt-31 at 7) is the Defendants' use of Plaintiff's Trademarks as source identifiers for a service, e.g., podcast membership.

While *Jack Daniel's Properties, Inc. v. VIP Prod. LLC*, 599 U.S. 140 (2023) did not disturb *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989), it drew a line in the sand when a trademark is used as a source identifier and held the *Rogers* test does not apply in such situations.

Here, Defendants' use of Plaintiff's Trademarks as source identifiers is clear on the face of the Verified Complaint (Dkt-2 ¶¶33-35) and the KYE Patreon page. Defendants' speculation concerning matters outside the pleadings to create unsupported conclusions of how a third party would interpret the use of Plaintiff's Trademarks is irrelevant must be disregarded. *Ashcroft v. Iqbal*, *supra*. Therefore, the Motion to Dismiss must be denied.

Defendants further contend that use of Plaintiff's Trademarks constitutes political speech and is therefore protected. (Dkt-36 at 1). Defendants argue that as political speech, the *Rogers* test still applies and such use as criticism and commentary is an acceptable fair use. (Dkt-36 at 5-7). As an initial matter, couching the matter in terms of political speech is irrelevant where the use complained of is use as a source identifier. The *Jack Daniel's* Court made that clear by recognizing

inapplicability of *Rogers* to such uses. Also, on August 28, 2024, the Sixth Circuit followed *Jack Daniel's* holding, “where a defendant uses the trademark as a source identifier, the Lanham Act does not offend the First Amendment by imposing liability in the political arena.” *Libertarian National Committee, Inc. v. Saliba* 2024 WL 3964005 (6th Cir. 2024). Furthermore, the *Libertarian* court relied on *United We Stand America, Inc. v. United We Stand, America New York, Inc.* 128 F.3d 86, 88 (2d Cir. 1997). In *United*, the defendant created an offshoot political coalition to engage in political activities. The Second Circuit deemed the defendant's trademark use within the scope of the Lanham Act and outside the protection of the First Amendment because the offshoot group used the trademark “as a source identifier” for the group's political services rather than to pose “commentary on [the trademark's] owner.” *Id.* at 92. Accordingly, such use subjected the defendant to Lanham Act liability even though the offshoot coalition “might communicate its political message more effectively by appropriating [the trademark].” *Id.* at 93. Accordingly, Defendants’ First Amendment defense fails.

Additionally, citing *Radiance Found., Inc. v. NAACP*, 786 F.3d 316 (4th Cir. 2015), Defendants posit that titling a Podcast membership tier with Plaintiff’s Trademarks is ironic and critical and, therefore, a fair use. (Dkt-36 at 7). This argument also fails. *Radiance Foundation* does not apply to this matter. There, the NAACP complained of Defendant’s use of its trademark as the title of an article critical of the NAACP and, among other things, the organization’s support for Planned Parenthood. *Id.* at 319. The article was titled NAACP: NATIONAL ASSOCIATION FOR THE ABORTION OF COLORED PEOPLE. *Id.* at 319-320. There, in the context of the whole article, the *Radiance* court found that use of the NAACP’s trademark was protected, stating:

Within the context of the article, the use of the NAACP's famous marks unquestionably framed and referenced the NAACP's policy positions, or at least *Radiance's* view of what those positions are. The article repeatedly referred to the NAACP's purported support for abortion and Planned

Parenthood, using sexual and other graphic metaphors to hammer the point home. Even if we were to take the title out of context and view it separately from the rest of the article, the use was still nominative, because it explicitly referred to what the author believes the NAACP stands for: the abortion of African American children. *Id.* at 331.

In the case at bar, Defendants use Plaintiff's Trademarks to identify a singular item: a podcast membership tier. Unlike the article in *Radiance*, the face of the KYE Patreon Page does not give any context to such use. The only "context" behind Defendants' use of Plaintiff's Trademarks comes from Defendants' unsupported speculation of how third parties would view the use of Plaintiff's Trademarks, which this Court must disregard.

Finally, Defendants also contend *Radiance Foundation* stands for the proposition that the Fourth Circuit has adopted nominative fair use as defined in *Rosetta Stone Ltd. v. Google, Inc.*, 676 F.3d 144 (4th Cir. 2012). This is not the case. While the *Radiance Foundation* court cited *Rosetta Stone*, the court did not make wholesale adoption of that doctrine. Rather, it applied the concept to a unique and highly distinguishable set of facts: a title to an article, which by its very nature came with its own contextual setting against which to measure use of the NAACP trademarks. This does not apply to the current matter. Here, as clear from the KYE Patreon Page (Dkt-31 at 7), there is no similar context—rather Plaintiff's marks are used as source identifiers for that service.

CONCLUSION

Defendants' new arguments and continued reliance on unsupported speculative arguments outside the allegations of Plaintiff's Verified Complaint cannot be the basis for its Motion to Dismiss. As fully developed in Plaintiff's Response In Opposition to Defendants' Motion to Dismiss, Plaintiff has sufficiently pled a cause of action based on Defendant's use of Plaintiff's Trademarks as source identifiers. Accordingly, the Motion to Dismiss must be denied.

Respectfully submitted this 5th day of September, 2024.

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CERTIFICATE OF SERVICE

I, Jeffrey R. Adams, certify that on September 5, 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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