UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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No. 09-1044

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RONALD J. RILEY,

Plaintiff-Appellant,

v.

JOHN W. DOZIER, JR. and DOZIER INTERNET LAW, PC

Defendants-Appellees.

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Appeal from a Judgment of the
United States District Court
for the Eastern District of Virginia

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# REPLY BRIEF FOR PLAINTIFF-APPELLANT RONALD J. RILEY

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**CONSTITUTION AND STATUTES**

Ronald Riley's opening brief showed that the district court erred both in its initial ruling that it lacked subject matter jurisdiction over Riley's claim that John Dozier and his law firm deliberately invoked phony trademark and defamation claims to force the hosts of his "gripe" site criticizing Dozier to take the web site off-line, and its ruling on reconsideration that, regardless of whether there was subject mater jurisdiction, *Younger* abstention applies. The brief also argued that dismissal could not be affirmed on two alternate grounds for abstention, under *Burford* and this Court's *Kapiloff* abstention doctrine. Appellees do not defend *Younger* abstention, but advance a series of meritless arguments to seek affirmance of the dismissal.[1]

This reply brief shows why each of the arguments for affirmance should be rejected, but at the outset we note a fundamental inconsistency between the arguments in the first part of the Dozier brief (about subject matter jurisdiction) and the second part of the brief (about abstention). In opposing jurisdiction, appellees argued that the state court trademark infringement lawsuit brought by the Dozier firm is addressed only to the criticism site as it existed on the date that the state court action was brought, and that Riley attempted to mislead the Court by submitting a copy of the criticism site as it appeared on the date that **this** action was filed in federal court,

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[1] As in Riley's opening brief, this brief refers to the appellees jointly as "Dozier," to appellee John Dozier, the individual, as "Mr. Dozier," and to the law firm as "the Dozier firm."

and which, Dozier seems to acknowledge, constitutes free speech to which its state court suit is not addressed. But when it comes time to argue for abstention, appellees switch gears and argue that the federal courts should not hear this case because it involves exactly the same issues as does the state court case.

As Riley's opening brief explained, the record below shows that Dozier sent letters and emails claiming trademark infringement, and threatening contributory infringement liability, to web hosting firms both before and after Riley made the changes reflected in the site at the time the federal action was filed. Dozier's appellate brief never responds to this point; at best, Dozier quibbles about whether one of the threats to a California web host represented a threat to impose liability under federal law, an issue addressed below. But Dozier never shows that the threats and demand letters were confined to the web site as it existed when the Dozier firm sued Riley at the beginning of September 2008. Thus, regardless of what the Dozier firm may be claiming in its state court action – and, as the master of its complaint, the Dozier firm is free to exclude claims and limit its monetary claims to try to avoid making its case removable – **this action** involves a version of the web site and involves federal law issues that Dozier has deliberately decided not to present to the state court. In other words, the Dozier firm can control its state court complaint, but appellees cannot have it both ways: The state court complaint cannot be limited to

certain issues for jurisdictional purposes, while being equivalent to the federal court action for abstention purposes.

## I. THIS COURT HAS SUBJECT MATTER JURISDICTION.

Riley's opening brief argued that the Court has federal question jurisdiction because he seeks a declaratory judgment that his web site does not infringe the Dozier trademark under the Lanham Act, as well as injunctive relief barring Dozier from claiming Lanham Act liability and damages for false claims of Lanham Act infringement. He explained that, although Dozier has chosen to limit his state court complaint to state trademark law, Dozier's threat to impose contributory infringement liability on his former web host pSek, which is located in California, made it essential to obtain a ruling on whether he is violating the Lanham Act, because **in California**, a web host like pSek is immune from liability under the state trademark laws, but **can** be subjected to suit for violations of federal trademark laws in content placed online by others. Br. 23-24, citing *Perfect 10 v. CC Bill*, 488 F3d 1102 (9th Cir. 2007).

Dozier urges the Court to reject this argument because the Eleventh Circuit and a handful of district courts have disagreed with the Ninth Circuit and because, Dozier argues, the Ninth Circuit was wrong to limit the exception to section 230 immunity to **federal** intellectual property claims. But that argument is wholly beside the point. Riley has not argued to this Court that section 230 immunizes web hosting firms

against state law intellectual property claims, but only that for hosting firms like pSek that are **located in California,** where *Perfect 10* is binding precedent, Riley needs to be able to assure pSek and other potential web hosts that they cannot be held liable under the Lanham Act for hosting his web site. After all, a web host cannot be sued in Virginia simply because one of its customers is allegedly misusing a Virginia firm's trademark. *See ALS Scan v. Digital Service Consultants*, 293 F.3d 707, 714-715 (4th Cir. 2002) (web host cannot be sued in plaintiff's forum for copyright infringement).

Indeed, the record reflects that pSek asked Dozier whether he was making a state or federal trademark claim, because the difference affected its exposure to liability if sued in the Ninth Circuit. JA239. Dozier refused to answer but simply reiterated his threat of contributory liability. JA237. Accordingly, Riley needs an adjudication of his Lanham Act liability to Dozier, and because the cause of action on whose validity he seeks a declaratory judgment arises under federal law, there is federal question jurisdiction over his complaint. *See Columbia Gas Transmission Corp. v. Drain*, 237 F.3d 366, 370 (4th. Cir. 2001) ("in a declaratory judgment action, the federal right litigated may belong to the declaratory judgment defendant rather than the declaratory judgment plaintiff").

The district court also has diversity jurisdiction. Dozier repeatedly says that

Riley failed to carry his "burden" of producing evidence to show that more than $75,000 is in controversy, but as Riley's opening brief argued – a point to which Dozier never replies – the well-settled rule is that it is the **defendant** that must show, "to a legal certainty," that the jurisdictional amount cannot be reached and that the legal impossibility of recovery is so certain as to "negate the plaintiff's good faith in asserting the claim." Riley Br. 27, quoting Fourth Circuit and Supreme Court cases. Dozier does nothing to show impossibility that value of the equitable relief in the case, combined with the monetary recovery, will surpass $75,000.

As shown in our opening brief, the value of the declaratory judgment avoiding the $55,000 liability claimed by the Dozier firm, plus the value of the injunction barring further interference with Riley's right to post critical comments, and plus Riley's damages claims, exceeds $75,000. However, the Court need not reach that question because Riley has a statutory claim for attorney fees that alone will exceed $75,000. Dozier argues that the evidence submitted below to show that plaintiff has good reason to expect that his fees will exceed $75,000 – a survey by the American Intellectual Property Lawyers Association about typical fees in a trademark case, and a recent fee application for a trademark case from Riley's counsel – is too "anecdotal" to prove that the amount of fees will likely surpass $75,000. But Dozier has the analysis backwards. That may or may not have been a sound reason for the district

judge to remand the Dozier firm's own suit to state court, because in that case **Riley** had the burden of showing that Dozier's pleaded monetary amounts were wrong. In **this** case, however, Riley enjoys a strong presumption favoring his pleading that the amount in controversy exceeds $75,000, and it is **Dozier** that has the burden of showing the impossibility of reaching that threshhold. Dozier has made no such showing.

Instead, Dozier takes issue with Riley's reliance on his claim for statutory attorney fees, which are expressly permitted by Virginia's trademark statute, to support the jurisdictional amount, on the ground that cases granting diversity jurisdiction based on claims for statutory attorney fees only "state that the attorney fees 'may' be counted toward the jurisdictional amount, not that they must be counted." Dozier Br. 9. To the extent that Dozier is suggesting that the use of the word "may" in the cited cases means that a lower court has discretion to include or not include attorney fees in computing the monetary claims that must be added together to determine whether the jurisdictional amount is in controversy, he is mistaken. Not only does no case so hold, but the Supreme Court has reversed a judgment based on the lower court's exclusion of a fee claim, without suggesting that it found an abuse of discretion. *Missouri State Life Ins. Co. v. Jones*, 290 U.S. 199, 202 (1933). The cases cited in Riley's opening brief used the word "may" in saying

that fees may be counted in computing the jurisdictional amount because a court defers to the plaintiff's allegation of the amount in controversy, and a plaintiff "may" base his allegation of diversity jurisdiction on a fee claim if the statute at issue provides for attorney fee claims, as Virginia's trademark statute does.

## II. THE TRIAL COURT'S ABSTENTION RULING WAS UNWARRANTED.

Dozier does not defend the one reason for abstention given by the district court's order on reconsideration – *Younger* abstention, for which the district court cited *Employers Resource Management Co. v. Shannon*, 65 F.3d 1126, 1134-1135 (4th Cir. 1995). Instead, Dozier argues that the district court was right to cite *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), in a footnote in its initial decision as a basis for abstention, Dozier Br. 11-12, and that the district court should have abstained for the one reason put forward by Dozier below – abstention from deciding a declaratory judgment proceeding when there is a parallel proceeding pending in state court. *Id.* at 11-14, citing *United Capitol Ins. v. Kapiloff*, 155 F.3d 488 (4th Cir. 1998), and similar cases. But Dozier never meets the arguments in Riley's opening brief that showed why neither of these alternate grounds for abstention applies here.

The opening brief argued that both *Burford*, and the precedent under *Burford* cited by the district court, allow abstention to avoid interference with "state efforts" to establish a coherent policy, and that, in this context, "state efforts" means efforts

by state officials, not tort actions brought by private litigants in a state court. Riley Br. 33-34. Dozier makes no response to this point, but simply asserts that trademarks are a matter of "substantial public concern" because Virginia's Corporation Commission registers trademarks. But nothing in Riley's complaint puts the **validity** of Dozier's trademark in his law firm's name at issue, and nothing in Virginia law gives the Corporation Commission – or any other Virginia state official – any role in bringing infringement proceedings. Nor does Dozier point to any action by any Virginia official showing that the State shares his concern about hyperlinks using his name.

Moreover, both the Supreme Court and this Court have consistently described *Burford* abstention as being appropriate only "in a 'narrow range of circumstances' . . . when federal adjudication would 'unduly intrude' upon 'complex state administrative processes.'" *Martin v. Stewart*, 499 F.3d 360, 364 (4th Cir. 2007), quoting *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 361-363 (1989), and *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 726-727 (1996). "[T]he Supreme Court has directed that 'Burford allows a federal court to dismiss a case only' when presented with these 'extraordinary circumstances.'" *Id.*, 499 F.3d at 364, quoting *Quackenbush*. *See also Johnson v. Collins Entertainment Co.,* 199 F.3d 710, 723 (4th Cir. 1999) ("*Burford* abstention requires that we assess the interest

in having federal rights adjudicated in federal court against state interests in the control of state regulatory programs"). We have not found a single *Burford* abstention case in this Circuit that did not involve interference with public officials' enforcement activities. Since no state regulatory process, no administrative process, and no public officials are involved in this case, *Burford* abstention does not apply.[2]

Riley's opening brief showed that the district court was right to disregard Dozier's argument for abstention that is specific to declaratory judgment actions, under *New Wellington Fin. Corp. v. Flagship Resort Dev. Corp.*, 416 F.3d 290, 296 (4th Cir. 2005), and *United Capitol Ins. v. Kapiloff*, 155 F.3d 488 (4th Cir. 1998), because the doctrine does not apply to actions for damages, Riley Br. 35, and because this case does not involve purely state law issues, as *New Wellington* and *Kapiloff* did. This case, at the very least, involves First Amendment defenses to state law

[2] Some circuits hold that *Burford* abstention can only be invoked when the outcome of the administrative proceedings before public officials is subject to review in a specialized state court. *See International College of Surgeons v. City of Chicago*, 153 F.3d 356, 363-364 (7th cir. 1998); *Holmes v. New York City Housing Authority*, 398 F.2d 262, 266-267 (2d Cir. 1968). There is no specialized Virginia court for trademark cases. Although this Court initially agreed with that requirement, *see Educational Serv. v. Maryland State Bd. for Higher Educ.*, 710 F.2d 170, 173 (1983), the en banc Court overruled that decision in *Pomponio v. Fauquier County Bd. of Spvrs.*, 21 F.3d 1319, 1327 (1994). Accordingly, Riley does not so argue in this Court, and in any event there is no administrative procedure for deciding trademark infringement cases and no public officials have sought to enforce Dozier's mark.

claims and issues under the Lanham Act that Dozier has deliberately decided not to present to the state court (to prevent removal). Riley Br. 35.

Moreover, Riley seeks a declaratory judgment that he has not defamed Mr. Dozier and his law firm, JA9, which is another ground on which Dozier demanded that Riley's web hosts take down the web site. JA21. Other issues involved in this case, but not in the state case, include Dozier's affirmative acts trying to bully Riley's web hosts, and the **current** contents of Riley's web site, which Dozier decided to exclude from his state court action so that he could argue that his prayer for an injunction was moot (and hence should not be counted toward the jurisdictional amount in deciding whether to remand). Dozier complains at length about the changes in the web site in arguing about why there is no diversity jurisdiction, but ignores these changes, and the other differences between the issues in the two cases, in arguing for *Kapiloff* abstention.

Finally, even if these reasons were not a sufficient basis for confirming the district court's wisdom in not adopting *Kapiloff* as a ground for abstention, Riley argued in detail that the four *Kapiloff* factors militate in favor of following the "strict duty to exercise the jurisdiction that is conferred on the [federal courts] by Congress," *Myles Lumber Co. v. CNA Financial Corp.*, 233 F.3d 821, 823 (4th Cir. 2000). Instead of addressing those arguments, Dozier just goes through the motions in

putting forward a few lines of argument about each of the four factors. Dozier Br. 13-14. His alternative arguments for abstention should be rejected.

## CONCLUSION

The order dismissing this case should be reversed.

Respectfully submitted,

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April 28, 2009

## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I certify that the foregoing brief was prepared in Word Perfect using Times Roman fourteen point font, and that Word Perfect counted 2620 words in the brief.

Paul Alan Levy

April 28, 2009

## CERTIFICATE OF SERVICE

I hereby certify that, on this date, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF user. In addition, I caused two copies of the foregoing Brief to be served by first-class mail, postage prepaid, on counsel for defendants-appellees as follows:

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