

No. 20-5409

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

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ALAN RUPP,

*Plaintiff-Appellant,*

v.

THE COURIER-JOURNAL, INC.,

*Defendant-Appellee.*

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On Appeal from the United States District Court  
for the Western District of Kentucky  
Civil Action No. 3:18-cv-277-RGJ

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**BRIEF FOR APPELLEE COURIER JOURNAL, INC.**

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Jon L. Fleischaker  
Michael P. Abate  
Kaplan Johnson Abate & Bird LLP  
710 West Main Street, Fourth Floor  
Louisville, Kentucky 40202  
[jfleischaker@kaplanjohnsonlaw.com](mailto:jfleischaker@kaplanjohnsonlaw.com)  
[mabate@kaplanjohnsonlaw.com](mailto:mabate@kaplanjohnsonlaw.com)

*Counsel for Appellee Courier Journal, Inc.*

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to 6th Cir. R. 26.1, Appellee Courier Journal, Inc. makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

*Yes. The Courier Journal, Inc. is a Delaware corporation whose ultimate parent company is Gannett Co., Inc. (NYSE: GCI).*

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

*Except as noted in the response to question 1 above, no publicly traded company has a financial interest in the outcome of this appeal.*

s/ Michael P. Abate  
\_\_\_\_\_  
*Counsel for Courier Journal, Inc.*

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**STATEMENT REGARDING ORAL ARGUMENT**

Appellee believes that the issues in this case may be resolved based on the parties' briefs. However, Appellee stands ready to argue the case if the court believes it will assist its resolution of the matter.

## STATEMENT OF JURISDICTION

The district court had federal question jurisdiction over this case pursuant to 28 U.S.C. § 1332. The court entered judgement in favor of Appellee, the Courier Journal, on March 19, 2020. *See* Memorandum Opinion and Order (“Mem. Op.”), Judgment, R. 21-22, Page ID # 174-184. Appellant timely appealed on April 17, 2020. *See* Notice of Appeal, R. 23, Page ID # 185-186. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

## STATEMENT OF ISSUES

1. Whether the district court correctly concluded that the Courier Journal’s news articles did not constitute “trademark use” of Plaintiff’s mark as a matter of law.
2. Whether the First Amendment defense against trademark infringement claims, recognized by this Court in *ETW Corp. v. Jireh Pub., Inc.*, 332 F.3d 915 (6<sup>th</sup> Cir. 2003), applies to news reporting in addition to artistic works.

## STATEMENT OF THE CASE

### I. Factual Background

Published in Louisville, the Courier Journal is the paper of record for the Commonwealth of Kentucky. For over 150 years, the Courier Journal has covered news, politics, sports, entertainment, culture, and other content relevant to its readers. Each year, the paper devotes a substantial amount of coverage to the Kentucky Derby—the state’s preeminent sporting event, which draws tens of thousands of people from around the world to Louisville. The paper’s coverage touches on a wide



range of Derby-themed subjects, from the race itself to coverage of the many cultural and social events held throughout the community in the run-up to, and in conjunction with, the race itself. As relevant here, the paper often publishes stories on the local restaurants, and their Derby-themed food and events, which are of great interest both to Kentuckians and those just visiting for the race. These stories are widely read every year.

This case arose out of the paper's annual Derby news coverage in 2017. On Kentucky Derby day in 2017, the Courier Journal published a recipe as part of an article ("Article 1") bearing the headline "Bourbon makes this Derby pie a state original." Complaint (Exh. B), R. 1-2, Page ID # 10. The article discussed a "recipe from The Courier Journal archive – provided years ago by the fine folks up river at Captain's Quarters" and included a picture of the dessert captioned "Chocolate-walnut bourbon pie from Captain's Quarters." *Id.* The recipe was titled "Derby chocolate-walnut pie." *Id.*

Shortly after the Courier Journal published the story, Plaintiff Alan Rupp notified The Courier Journal that he believed the article infringed on his trademark rights. Complaint (¶ 10), R. 1, Page ID # 2. Since the 1950s, Plaintiff's family has sold various products using the trademark DERBY-PIE (the "Mark"), which they registered with the US Patent and Trademark Office in October 1969. *Id.* (¶ 5). Plaintiff's pie does not include bourbon among its ingredients.

The following month, the Courier Journal published an article (“Article 2” and, together with Article 1, the “Challenged Articles”) reporting on the opening of a new bakery named Derby City Macarons. *See* Complaint (Exh. C), R. 1-3, Page ID # 12. Article 2 discussed the story of a young entrepreneur who had been baking with her mother since the age of six and who learned to bake macarons (a French almond flour pastry) after discovering she had a gluten allergy. *See id.* Plaintiff does not allege that *the article* infringed on the Mark in any way. Rather, he claims that the Courier Journal infringed the Mark by captioning a photo accompanying the story with the names of the bakery’s offerings: “Derby Pie, Mint Julep and Peach Tea macarons from Derby City Macarons.” *Id.* Plaintiff does not dispute that Derby City Macarons baked and sold a pastry it called a “Derby Pie macaron,” or that Article 2 plainly stated that Derby City Macarons was the source of the dessert.

Plaintiff also does not dispute that the Courier Journal does not sell any desserts itself. Rather, it publishes news relevant to its readers, including news about the Kentucky Derby (on whose fame Plaintiff’s Mark capitalizes) as well as the local food and business scene, among many other topics.

## **II. Procedural History**

Plaintiff filed a three-count complaint against the Courier Journal alleging trademark infringement, trademark dilution, and fraud. The Courier Journal sought dismissal of Plaintiff’s claims multiple grounds. *See* Memorandum in Support of Motion to Dismiss (“MTD”), R. 12-1, Page ID # 55-73. First, it noted that this Court

has held that trademark protections must give way when a defendant was exercising protected First Amendment rights like news reporting, unless the alleged infringement has no relevance to the protected expression and the expression constitutes an overt misrepresentation as to the source of the allegedly infringing products. *See, e.g., ETW Corp. v. Jireh Pub., Inc.*, 332 F.3d 915 (6th Cir. 2003) (adopting test from *Rogers v. Grimaldi*, 875 F.2d 994 (2d. Cir. 1989). Because neither factor was met here, the Courier Journal argued none of Plaintiff's claims could survive dismissal. *See* MTD, R. 12-1, Page ID # 64-66.

The Courier Journal also argued in the alternative that trademark infringement claim (Count I) failed because the news coverage that Plaintiff attacks was not “trademark use”—that is, it did not try to pass off Plaintiff's products as its own. *Id.* (Page ID # 67-68). As Defendant's motion explained, this Court has repeatedly found trademarks claims to fail as a matter of law where plaintiffs challenge only non-trademark use. *See, e.g., Kassa v. Detroit Metro Convention & Visitors Bureau*, 672 Fed. App'x 575, 576 (6th Cir. 2017); *Oaklawn Jockey Club, Inc. v. Kentucky Downs, LLC*, 687 Fed. App'x 429, 432 (6th Cir. 2017); *Hensley Manufacturing v. ProPride, Inc.*, 579 F.3d 603, 611 (6th Cir. 2009); *Interactive Prod. Corp. v. a2z Mobile Office Sols., Inc.*, 326 F.3d 687, 695 (6th Cir. 2003).

Regarding the trademark dilution claim (Count II), the Courier Journal sought dismissal on the ground that the statute Plaintiff invoked *expressly forbids* such claims to be filed against newspapers; Congress explicitly provided that “[a]ll forms of news

reporting and news commentary” are excluded from the Trademark Dilution Act’s reach. *See* 15 U.S.C. § 1125(c)(3)(B). The Courier Journal also argued that the dilution statute did not apply because Plaintiff’s Mark simply is not famous enough to warrant protection under the heightened standards required by that statute, which only protects brands of international renown. *See* MTD, R. 12-1, Page ID # 68-71. Plaintiff grudgingly withdrew Count II of the Complaint without acknowledging it was expressly precluded by statute. *See* Opposition to Motion to Dismiss (“MTD Opp.”), R. 17, Page ID # 91 (“Here, because there is no need to address whether Derby-Pie® is a ‘famous’ mark, as direct and continuing infringement has been shown, Plaintiff withdraws his dilution claim, Count II.”).

Finally, the Courier Journal argued that Plaintiff’s fraud claim (Count III) fails because it was not pled with particularity. It also contended the claim was doomed to fail in any event because Plaintiff cannot show any detrimental reliance on allegedly fraudulent statements made by the Courier Journal or any alleged injury resulting therefrom. *See* MTD, R. 12-1, Page ID # 71-73.

The district court granted the Courier Journal’s motion to dismiss. The court first acknowledged that Plaintiff had withdrawn his trademark dilution claim (Count II). *See* Mem. Op., R. 21, Page ID # 177-78. Consequently, the Court dismissed that claim. *Id.*, Page ID # 178.

The court next considered whether the First Amendment bars all of Plaintiff’s claims. Although it acknowledged that this Court has applied that constitutional

defense in the context of trademark claims challenging artistic works, it nevertheless refused to apply the defense to newsgathering activities—which, unlike works of artistic expression, are expressly mentioned in the First Amendment. *See* Mem. Op., R. 21, Page ID # 178. The court did not explain why newsgathering activities are not entitled to the existing First Amendment defense; it simply noted that this Court “has yet to extend it from ‘artistic works’ to ‘newsgathering activities.’” *Id.*

Nevertheless, the court held that normal principles of trademark law required the dismissal of Plaintiff’s infringement claim. The court observed that Plaintiff “does not directly counter” the Courier Journal’s non-trademark use defense but instead “attempts to morph Defendant’s ‘nontrademark’ defense into a ‘Fair Use’ and ‘Nominative Use’ one” even though “Defendant never argues ‘Fair Use’ or ‘Nominative Use.’” *Id.*, Page ID # 179.

Turning to the defense the Courier Journal *did* raise, the court recognized that trademark cases typically proceed by analyzing the likelihood of consumer confusion under an eight-part test. However, it noted that under Sixth Circuit precedent, “the likelihood of confusion analysis also involves a preliminary question: whether the defendants are using the challenged mark in a way that identifies the source of their goods.” Mem. Op., R. 21, Page ID # 179 (quoting *Hensley Manufacturing*, 579 F.3d at 610). “If they are not, then the mark is being used in a non-trademark way and trademark infringement laws, along with the eight-factor analysis, do not even apply.” *Id.* (quotation marks and citations omitted). “Put differently,” the court stated, “the

‘inquiry focuses on whether a consumer is likely to notice [the plaintiff’s trademark] . . . and then think that the [defendant’s product] may be produced by the same company[.]’” *Id.*, Page ID # 180 (quoting *Oaklawn Jockey Club*, 687 Fed. App’x at 432).

Here, the court concluded that “the Complaint fails to plausibly establish that Defendant used Plaintiff’s Mark in any other way than a non-trademark one.” *Id.*, Page ID # 180. “In fact,” the Court noted, “Plaintiff’s skeletal Complaint fails to allege with specificity how there is a ‘likelihood of confusion.’” *Id.* Under this Court’s caselaw, that kind of “conclusory and ‘formulaic recitation’ of the elements of a trademark infringement cause of action is insufficient to survive a motion to dismiss.” *Id.* (quoting *Hensley Manufacturing*, 579 F.3d at 611).

The court similarly held that “[t]he Complaint has also not plausibly established that there is a risk of consumer confusion because both Articles explicitly and repeatedly identify the source of the product *as being other than* DERBY-PIE®.” Mem. Op., R. 21, Page ID # 180 (emphasis added). The court noted that Article 1 “identifies the source of the recipe as Captain’s Quarters, not DERBY-PIE®.” *Id.*, Page ID # 181. The court also explained that “the headline, ‘Bourbon makes this Derby pie a state original,’ uses ‘Derby’ to modify ‘pie,’ not to identify the source of the product as DERBY-PIE®.” *Id.* As the court explained, “[t]his is analogous to using “Derby” to modify “horse,” “hat,” or “party” and does not constitute an impermissible use of the Mark.” *Id.* (citing *Sazerac Brands, LLC v. Peristyle, LLC*, No.

3:15-CV-00076-GFVT, 2017 WL 4558022, at \*5 (E.D. Ky. July 14, 2017), *aff'd*, 892 F.3d 853 (6th Cir. 2018) (“[A] party does not violate trademark law solely by using words another entity has trademarked”). Finally, the court noted that “[b]ecause bourbon *is not* an ingredient in DERBY-PIE®, Defendant’s use of the word ‘Bourbon’ in the headline also indicates that this is not a recipe for DERBY-PIE®.” *Id.* Simply put, “[a] reader of Article 1 would not think that Defendant, a newspaper, produced DERBY-PIE®.” *Id.*

Likewise, the court found no trademark usage in Article 2, covering the opening of Derby City Macarons. “Next to a photograph of macarons, Defendant identifies three flavors sold by Derby City Macarons: ‘Derby Pie, Mint Julep and Peach Tea.’” Mem. Op., R. 21, Page ID # 182. As the court noted, “[a] DERBY-PIE® is a pie; a Derby Pie macaron is a ‘French almond flour pastry.’” *Id.* “Thus, because the Defendant visually and textually links ‘Derby Pie’ to a flavor of macaron sold by Derby City Macarons, a reader would not think that Defendant produced DERBY-PIE®.” *Id.* “Because Defendant used the Mark in a non-trademark way,” the court found that “trademark infringement laws do not apply.” *Id.* (citing *Hensley*, 579 F.3d at 610). It therefore dismissed Count I in its entirety. *Id.*<sup>1</sup>

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<sup>1</sup> Having rejected Plaintiff’s contention that the Challenged Articles constitute direct trademark infringement, the court held it need not consider whether the Courier Journal is “secondarily liable.” Mem. Op., R. 21, Page ID # 182 n.5. In any event, the court went on to note that none of the cases plaintiff cited came from the Sixth Circuit and that all were distinguishable because “unlike the defendants in those cases,

Finally, the court dismissed Plaintiff's common-law fraud claim (Count III). Mem. Op., R. 21, Page ID # 182-183. The court found it "unclear how Plaintiff's complaint satisfies any of the elements of fraud." *Id.* at Page ID # 183. The court also found that "because Plaintiff did not respond to Defendant's arguments about Count III," it would "decline[] to make his counter-arguments for him." *Id.*

Plaintiff now appeals the dismissal of his complaint.

### **SUMMARY OF ARGUMENT**

The district court correctly dismissed this case at the pleading stage after concluding that the Challenged Articles did not constitute "trademark use"—that is, they do not represent an attempt by the Courier Journal to imply that Plaintiff was the source of the Courier Journal's products. That holding makes perfect sense; after all, the Courier Journal is a newspaper and does not sell desserts at all. Moreover, and as the district court noted here, the Challenged Articles specifically stated that the desserts the newspaper profiled were offered by someone other than Plaintiff.

Under this Court's well-established precedents, that is the end of the case. There was no reason for the district court to undertake the eight-part "likelihood of confusion" analysis applicable in a typical trademark case; where the defendant does

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[the Courier Journal] does not operate a website where it sells products that infringe on Plaintiff's Mark." *Id.* Defendant's appellate brief does not renew this argument and has therefore waived any challenge to this holding by the district court. *See United States v. Johnson*, 440 F.3d 832, 845–46 (6th Cir. 2006).



not use a challenged mark to identify the source of *its* goods “then the analysis is over, because the mark is being used ‘in a non-trademark way,’ and trademark infringement laws do not apply.” *Kassa*, 672 Fed. App’x at 576.

In reality, the court never needed to reach even that threshold issue. The case could and should have been dismissed based on an even more fundamental principle: the First Amendment does not permit trademark infringement claims attacking protected First Amendment activity unless the use of trademarked material “has no artistic relevance to the underlying work whatsoever, or, if it has some artistic relevance, unless the [Challenged Article] explicitly misleads as to the source or content of the work.” *ETW Corp.*, 332 F.3d at 927. Although it acknowledged that this Court has adopted the First Amendment defense to Lanham Act claims, the district court paradoxically declined to apply it here because it apparently believed this Court would not extend that defense from artistic works (where it has applied the defense) to newsgathering activities. That holding is curious, given that courts have applied the defense in a wide variety of contexts, and newsgathering is expressly protected by the text of the First Amendment itself. Thus, even if this Court believed there had been a “trademark use” of Plaintiff’s Mark, it should still affirm dismissal on the alternate ground that the First Amendment prohibits this suit seeking up to \$1,500,000 in damages stemming from two news stories discussing others companies’ products.

## STANDARD OF REVIEW

This Court reviews the district court’s dismissal of the complaint *de novo*. *Hensley Manufacturing*, 579 F.3d at 609. The Court “may affirm the district court’s dismissal of a plaintiff’s claims on any grounds, including grounds not relied upon by the district court.” *Id.* (citing *Zaluski v. United Am. Healthcare Corp.*, 527 F.3d 564, 570 (6th Cir. 2008)).

## ARGUMENT

Although it started out as a three-count complaint, the case has been winnowed down to a single issue. Plaintiff has conceded away all but one claim: trademark infringement. He expressly abandoned his trademark dilution claim in district court after the *Courier Journal* pointed out that Congress has expressly forbidden dilution claims to be brought against newspapers. *See* MTD Opp., R. 17, Page ID # 91. And he has now abandoned his fraud claim by failing to even mention it in his brief on appeal. *See United States v. Johnson*, 440 F.3d 832, 845–46 (6th Cir. 2006) (“[A]n appellant abandons all issues not raised and argued in its initial brief on appeal.” (quotation marks and citation omitted)).

All that remains, then, is an infringement claim that failed to get out of the starting gate. As the district court correctly found, neither of the Challenged Articles constitutes “trademark use,” and therefore the Lanham Act does not apply at all. But

even if it did, affirmance also is warranted because Plaintiff's infringement claim is barred by the First Amendment defense this Court has already adopted.

**I. The District Court Correctly Held that Plaintiff Had Not Alleged Actionable "Trademark Use."**

This Court has repeatedly held that "[i]f defendants are only using [a] trademark in a 'non-trademark' way—that is, in a way that does not identify the source of a product—then trademark infringement and false designation of origin laws do not apply." *Interactive Prod. Corp. v. a2z Mobile Office Sols., Inc.*, 326 F.3d 687, 695 (6th Cir. 2003) (citing *New Kids on the Block v. News America Publishing, Inc.*, 971 F.2d 302, 307 (9th Cir. 1992)); *see also Oaklawn Jockey Club, Inc. v. Kentucky Downs, LLC*, 687 Fed. App'x 429, 432 (6th Cir. 2017) (same); *Hensley Manufacturing v. ProPride, Inc.*, 579 F.3d 603, 611 (6th Cir. 2009) (same). After all, "[w]hen the mark is used in a way that does not deceive the public we see no such sanctity in the word as to prevent its being used to tell the truth." *Oaklawn Jockey Club, Inc.*, 687 F. App'x at 431 (quoting *Prestonettes, Inc. v. Coty*, 264 U.S. 359, 368 (1924)). In such circumstances, courts need not even apply the eight-factor "likelihood of confusion" test that otherwise applies in trademark infringement cases. *See Interactive Prod. Corp.*, 326 F.3d at 695.

This Court first applied the non-trademark use test in *Interactive Prod. Corp. v. a2z Mobile Office Sols., Inc.*, 326 F.3d 687, 695 (6th Cir. 2003). There, the plaintiff, who manufactured a mobile desk product called the "Lap Traveler," challenged the defendant's use of its trademark in a post-domain path in its website address

“a2zsolutions.com/desks/floor/laptraveler/dkfl-lt.htm”). The district court granted summary judgment to the defendant after balancing the eight factors from the likelihood of confusion test. See *Interactive Prod. Corp. v. a2z Mobile Office Sols., Inc.*, 195 F. Supp. 2d 1024, 1026 (S.D. Ohio 2001). This Court affirmed the judgment but on a different ground: that balancing test was not necessary where the defendant was not using the mark in a way that suggested the plaintiff was the source of its products. “[B]ecause there is not any evidence that the post-domain path of a2z’s portable-computer-stand web page *signifies source*, it was unnecessary for the district court to examine the eight factors traditionally used to determine likelihood of confusion between two source-signifying marks.” *Interactive Prod. Corp.*, 326 F.3d at 698 (emphasis added).

This Court applied that same rationale to affirm dismissal of a trademark infringement claim in *Hensley Manufacturing v. ProPride, Inc.* There, the court considered whether the Hensley manufacturing company could sue a competitor, ProPride, for marketing new trailer hitches designed by Jim Hensley, the founder of the plaintiff company who had since left and began designing products for the defendant. This Court once again held that where a defendant is not using a trademark to identify *its own* goods, “trademark infringement laws, along with the eight-factor analysis, do not even apply.” *Hensley*, 579 F.3d at 610. The Court found it particularly significant that the allegedly infringing advertising material “clearly identifies ProPride as the source of the [product].” *Id.* at 611. And it expressly rejected the argument—made by

Plaintiff here—that the non-trademark use argument cannot be resolved at the motion to dismiss stage. On the contrary, “[t]here is no reason not to grant a motion to dismiss where the undisputed facts conclusively establish an affirmative defense as a matter of law.” *Id.* at 613 (emphasis added).

This Court next applied the non-trademark use defense to affirm dismissal of an infringement claim in *Kassa v. Detroit Metro Convention & Visitors Bureau*, 672 Fed. App’x 575 (6th Cir. 2017). There, the Court again stressed that if a defendant does not use a challenged mark to identify the source of *its* goods, “then the analysis is over, because the mark is being used ‘in a non-trademark way,’ and trademark infringement laws do not apply.” *Id.* at 576 (quoting *Hensley*, 579 F.3d at 610)). That case was brought by a musician and entrepreneur who had trademarked the phrase “Welcome to the D” for use on clothing, in live musical performances, and in connection with other entertainment programming.” *Id.* at 575. After the City of Detroit began using the phrase “Welcome to the D” on “banners and signs hung around Detroit ‘to promote’ the 2012 World Series and again for the 2015 Volleyball Open National Championships,” plaintiff sued for trademark infringement. This Court affirmed dismissal of that claim because the City’s banners “[did] not advertise any goods or services, [did] not identify Kassa as the source of the World Series or the volleyball championship, and [did] not suggest any association between those events and Kassa.” *Id.* at 576. And, as in previous non-trademark use cases, this Court once again

rejected the argument that such a claim cannot be resolved on a Fed. R. Civ. P.

12(b)(6) motion. *Id.* at 577.

Most recently, this Court applied the non-trademark use defense to affirm dismissal of the complaint in *Oaklawn Jockey Club, Inc. v. Kentucky Downs, LLC*, 687 F. App'x 429, 431 (6th Cir. 2017). There, the owners of various horseracing tracks sued a company that produced a “historical” horseracing betting platform that briefly identified the location and date of the historical race being simulated, so that users could have confidence in the accuracy of the system’s results. This Court found that “[t]hese depictions are sufficiently different from the Track Owners’ product—live horse racing at their venues—that the minimal use of the trademarks, preceded by the word ‘Location,’ would not confuse consumers into believing the videos were provided by Plaintiffs.” *Id.* at 432–33. Once again, this Court found it unnecessary to consider the eight-factor likelihood of confusion test. *Id.* at 433 (“[A] conclusory and ‘formulaic recitation’ of the elements of a trademark infringement cause of action is insufficient to survive a motion to dismiss, and thus the claim was properly resolved on Defendants’ motion to dismiss.” (internal quotation marks and citations omitted)).

Other Circuits have applied the non-trademark use test as well. Of particular relevance, the Seventh Circuit applied it in *Packman v. Chicago Tribune Co.*, 267 F.3d 628 (7th Cir. 2001), to affirm judgment for a newspaper on a trademark infringement claim. There, the plaintiff had trademarked the phrase “The joy of six.” When the Chicago Tribune used that same phrase as a headline to commemorate the Chicago

Bulls' sixth NBA championship, and began selling commemorative products bearing that headline and the paper's masthead, the plaintiff sued. The Seventh Circuit affirmed the district court's ruling because the Tribune did not use the mark "to identify [plaintiff] as the source of the newspaper or the championship memorabilia." *Id.* at 639. "Rather, the Tribune's distinctive masthead, which appears prominently on the front page and on each piece of memorabilia containing the phrase, identifies the source of the products." *Id.*

In light of this precedent, the district court was correct to hold that the Challenged Articles' juxtapositions of the words "Derby" and "pie" do not constitute a "trademark use." The Articles "[do] not advertise any goods or services, [do] not identify [Plaintiff] as the source of the [desserts described in the Courier Journal], and [do] not suggest any association between those [desserts] and [Plaintiff]." *Kassa*, 672 Fed. App'x at 576. Rather, the articles simply provide news coverage of local restaurants, including as part of the Courier Journal's annual coverage of all things related to the Kentucky Derby. A reader of the Challenged Articles "would not think that Defendant, a newspaper, produced DERBY-PIE®." Mem. Op., R. 21, Page ID # 181. *See, also, e.g., Packman*, 267 F.3d at 639 ("The Tribune's distinctive masthead, which appears prominently on the front page and on each piece of memorabilia containing the phrase, identifies the source of the products.").

Moreover, "viewing the [Challenged Articles] in their entirety only strengthens this conclusion." *Kassa*, 672 F. App'x at 576. Both Articles identify the source of the

products depicted as someone other than Plaintiff. Article 1 “identifies the source of the recipe as Captain’s Quarters, not DERBY-PIE®.” *Id.*, Page ID # 181. And Article 2 “visually and textually links ‘Derby Pie’ to a flavor of macaron sold by Derby City Macarons.” *Id.* at Page ID # 182. This sort of express acknowledgment of the source of a product eliminates Plaintiff’s ability to suggest the Courier Journal was trying to pass off Plaintiff’s product as its own (or someone else’s). *See, e.g., Hensley Manufacturing*, 579 F.3d at 611 (infringement claim failed as a matter of law where the challenged advertisements specified that the product was made by someone other than the plaintiff).

In addition, Article 1’s headline—“Bourbon makes this Derby pie a state original”—further confirms that the featured dessert was made by someone other than Plaintiff. As the district court correctly noted, “bourbon *is not* an ingredient in DERBY-PIE®.” Mem. Op., R. 21, Page ID # 181 (emphasis added). This headline was therefore not an attempt to pass off Plaintiff’s products as the Courier Journal’s own; it simply “uses ‘Derby’ to modify ‘pie,’ not to identify the source of the product as DERBY-PIE®.” *Id.* “This is analogous to using ‘Derby’ to modify ‘horse,’ ‘hat,’ or ‘party’ and does not constitute an impermissible use of the Mark.” *Id.* (citing *Sazerac Brands, LLC v. Peristyle, LLC*, No. 3:15-CV-00076-GFVT, 2017 WL 4558022, at \*5 (E.D. Ky. July 14, 2017), *aff’d*, 892 F.3d 853 (6th Cir. 2018) (“[A] party does not violate trademark law solely by using words another entity has trademarked”).



Plaintiff's contrary argument boils down to the contention that anyone who markets a pie or other dessert that includes the word "Derby"—which is not his trademark—somehow infringes on his Mark. *See, e.g.,* Appellant Br., p. 24 ("Mr. Rupp does not have to establish that a product which bears the DERBY-PIE name also contains the same ingredients nor does the product have to be a pie."). But that is not the law. As the district court correctly pointed out, a "party does not violate trademark law solely by using words another entity has trademarked." Mem. Op., R. 21, Page ID # 181 (quoting *Sazerac Brands, LLC v. Peristyle, LLC*, 2017 WL 4558022, at \*5 (E.D. Ky. July 14, 2017), *aff'd*, 892 F.3d 853 (6th Cir. 2018)). Here, there is no question that the Courier Journal clearly identified the source of the desserts it profiled—but did not market—and thus no trademark use occurred at all.

Simply put, the Courier Journal does not sell pies—its own or others. There is no conceivable way that its news coverage of Derby- and food-related news could be seen as an attempt to confuse readers into thinking that *Plaintiff* was the source of the Courier Journal's products. The Lanham Act has no application at all on these facts, and dismissal was warranted.

## **II. The First Amendment Would Bar Plaintiff's Infringement Claim Even if it Were A "Trademark Use."**

Even if this Court believed the Challenged Articles do constitute "trademark use," it should still affirm dismissal on the alternate ground that the Courier Journal's news articles are protected by the First Amendment. *See, e.g., Hensley Manufacturing,*

579 F.3d at 609 (this Court “may affirm the district court’s dismissal of a plaintiff’s claims on any grounds, including grounds not relied upon by the district court”).

Count I of Mr. Rupp’s Complaint asserts claims of trademark infringement and false designation under the Lanham Act, 15 U.S.C. §§ 1114 and 1125(a), which provide federal law protection to registered and unregistered trademarks. This statute restrains speech. Nonetheless, it “is constitutional because it only regulates *commercial* speech, which is entitled to reduced protections under the First Amendment.” *Taubman Co. v. Webfeats*, 319 F.3d 770, 774-75 (6th Cir. 2003).

In order to ensure that protection for a trademark owner’s quasi-property rights does not override others’ rights to engage in protected speech, a number of appellate courts—including this Circuit—have adopted the First Amendment trademark defense recognized by the Second Circuit in *Rogers v. Grimaldi*, 875 F.2d 994 (2d. Cir. 1989). *See, e.g., ETW Corp. v. Jireh Pub., Inc.*, 332 F.3d 915, 924-25 (6th Cir. 2003); *Parks v. LaFace Records*, 329 F.3d 437, 450 (6th Cir. 2003). As applied to protected expression (like news reporting), the *Rogers* test holds that the Lanham Act must give way to the First Amendment unless the use of trademarked material “has no artistic relevance to the underlying work whatsoever, or, if it has some artistic relevance, unless the [Challenged Article] explicitly misleads as to the source or content of the work.” *ETW Corp.*, 332 F.3d at 927 (quoting *Rogers*, 875 F.2d at 999).

This First Amendment defense has been applied to a wide variety of protected speech. Courts have applied the test in trademark suits involving “parody,” *Cliffs*

*Notes, Inc. v. Bantam Doubleday Dell Pub. Grp., Inc.*, 886 F.2d 490, 495 (2d Cir. 1989); “noncommercial parody,” *L.L. Bean, Inc. v. Drake Publishers, Inc.*, 811 F.2d 26, 30 (1st Cir. 1987); “film title[s],” *DeClemente v. Columbia Pictures Indus., Inc.*, 860 F. Supp. 30, 51 (E.D.N.Y. 1994); and “joke[s],” *Yankee Pub. Inc. v. News Am. Pub. Inc.*, 809 F. Supp. 267, 278 (S.D.N.Y. 1992). And, with particular relevance here, it also has been applied to “news gathering.” See *New Kids On The Block v. News Am. Pub., Inc.*, 745 F. Supp. 1540, 1544 (C.D. Cal. 1990), *aff’d*, 971 F.2d 302 (9th Cir. 1992).

Simply put, where the allegedly “unauthorized use of a trademark is for expressive purposes of comedy, parody, allusion, criticism, news reporting, and commentary, the law requires a balancing of the rights of the trademark owner against the interests of free speech.” *Yankee Pub. Inc.*, 809 F. Supp. at 276; see also *Nichols v. Moore*, 334 F. Supp. 2d 944, 956 (E.D. Mich. 2004) (“Accordingly, courts have been consistently unwilling to recognize the right of publicity cause of action where the plaintiff’s name or picture was used in connection with a matter of public interest, be it *news or entertainment*.” (emphasis added)). And, as applied in the context of trademark claims challenging news reporting, “the First Amendment provides immunity unless [the defendant’s] use of the plaintiffs’ trademark was wholly unrelated to news gathering and dissemination, misleading as to content, or falsely and explicitly denoted authorship, sponsorship, or endorsement . . .” *NKOTB I*, 745 F. Supp. at 1541.

Despite this precedent, the district court declined to apply the First Amendment defense to this trademark claim. It observed that no court of appeals had

yet applied the *Rogers* test specifically to newsgathering and that this Court “has yet to extend it from ‘artistic works’ to ‘newsgathering activities.’” Mem. Op., R. 21, Page ID # 178. But that observation does not provide a *reasoned* basis to refuse to apply an important constitutional defense in this case.

After all, there is no dispute that this Circuit does apply the First Amendment defense in trademark cases. Nor is there any question about whether newsgathering and reporting activities qualify for First Amendment protection: they do. *See, e.g., Branzburg v. Hayes*, 408 U.S. 665, 681 (1972) (“We do not question the significance of free speech, press, or assembly to the country’s welfare. Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated.”). That is true notwithstanding the fact newspapers are sold for profit. *See Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) (“[t]hat books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment”); *ETW Corp.*, 332 F.3d at 924-25 (same). Thus, there was no basis for the district court to refuse to apply the already recognized First Amendment defense to safeguard rights actually referenced in the First Amendment. *See* U.S. Const., Amend. 1. (“Congress shall make no law . . . abridging the freedom . . . of the press.”).

As applied to these facts, that defense plainly required dismissal. Plaintiff cannot satisfy either prong of the *Rogers* test. “The first prong of the *Rogers* test, artistic

relevance, ‘establishes a purposely low threshold which is satisfied unless the use ‘has no artistic relevance to the underlying work whatsoever.’” *Sporting Times, LLC v. Orion Pictures, Corp.*, 291 F. Supp. 3d 817, 825 (W.D. Ky. 2017). It follows, then, that, in the context of “news gathering and dissemination,” “[n]ews worthiness is broadly defined.” *NKOTB I*, 745 F. Supp at 1545. And courts have long recognized that newsworthiness extends beyond hard-hitting investigative journalism. *See, e.g., Time, Inc. v. Hill*, 385 U.S. 374 (1967) (description of a play); *Curtis Pub. Co. v. Butts*, 388 U.S. 130 (1967) (article about a college football game). There is no question that the Courier Journal’s news coverage of Derby-themed offerings from local restaurants easily merits protection under the first prong of *Rogers*.

Plaintiff’s claims similarly fail under the second prong of the *Rogers* test, which “examines whether Defendants’ use ‘explicitly misleads as to the source or content of the work.’” *Sporting Times*, 291 F. Supp. 3d at 826 (quoting *Rogers*, 875 F.2d at 999). Under that prong, even where there is actual confusion by the public, “such confusion is not actionable unless there has been an ‘overt misrepresentation.’” *Id.* (quoting *ETW*, 332 F.3d at 927, and *Rogers*, 875 F.2d at 1000). An “implicit endorsement” theory is simply insufficient to overcome the First Amendment defense. *NKOTB I*, 745 F. Supp. at 1545. (“The risk that some people might think that the New Kids implicitly endorsed or sponsored the Star Magazine’s and USA Today’s 900 number services is outweighed by the danger of restricting news gathering and

dissemination.”).<sup>2</sup> The Challenged Articles easily qualify for First Amendment protection under this standard. They clearly and accurately identify the source of the products involving the words “Derby” and “pie”—Captain’s Quarters and Derby City Macarons. There is nothing remotely resembling the kind of “overt” misrepresentation necessary to render the Courier Journal liable for its otherwise protected newsgathering activities.

The Challenged Articles constitute protected speech under both prongs of the *Rogers* test. This is a complete defense to trademark liability and requires dismissal of all claims raised in the Complaint.

### **III. Plaintiff’s Other Attacks on the Timing and Reasoning of the District Court’s Dismissal Lack Merit.**

On appeal, Plaintiff’s primary argument is that the trial court was not permitted to resolve his trademark infringement claim on a Rule 12(b)(6) motion to dismiss for failure to state a claim. *See, e.g.*, Appellant Br. pp. 11-15. Plaintiff contends dismissal was inappropriate because “[g]enerally, ‘dismissal for failure to state a claim upon which relief can be granted is appropriate in only the most extreme trademark infringement cases, such as where goods are unrelated as a matter of law, since the likelihood of confusion is generally a question of fact.’” Appellant Br., p. 12 (quoting

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<sup>2</sup> These same standards apply to Plaintiff’s common law trademark claims under state law raised in Count I of the Complaint. *See Sporting Times*, 291 F. Supp. 3d at 827-28.

*Hensley Manufacturing*, 579 F.3d at 613). But *the very next sentence* of the case Plaintiff cites goes on to explain why this rule is no barrier to pleading-stage dismissals on non-trademark use grounds: “there is *no reason not to grant a motion to dismiss* where the undisputed facts conclusively establish an affirmative defense as a matter of law.” *Hensley Manufacturing*, 579 F.3d at 613 (emphasis added).

Following *Hensley Manufacturing*'s lead, numerous cases from and within this Circuit have resolved non-trademark use on motions to dismiss. *See, e.g., Oaklawn Jockey Club, Inc.*, 687 Fed. App'x at 432 (affirming order dismissing on non-trademark use grounds); *Kassa*, 672 Fed. App'x at 577 (same); *Morris v. Wise*, No. 1:19 CV 2467, 2020 WL 1000010, at \*6 (N.D. Ohio Mar. 2, 2020) (dismissing trademark claim on non-trademark use grounds); *Sporting Times*, 291 F. Supp. 3d at 825 (same); *see also Interactive Products Corp.*, 326 F.3d at 698 (affirming summary judgment on alternate ground that eight-part likelihood of confusion analysis is not required at all where there is no evidence that the allegedly infringing use “signifies source”). Plaintiff's contrary argument flies in the face of binding circuit precedent and should be summarily rejected.

Plaintiff also errs by arguing that dismissal was inappropriate because his complaint included conclusory legal allegations tracking the elements of a trademark infringement claim. *See, e.g., Appellant Br.*, p. 13. This Court has repeatedly refused to allow plaintiffs to escape dismissal simply by parroting the elements of a trademark infringement claim without including detailed factual allegations that actually

demonstrate trademark usage. *See, e.g., Kassa*, 672 Fed. App'x at 576 (“Kassa’s allegation that the ‘goods and services being offered . . . bear an identical name as Plaintiff’s and also constitute a reproduction or imitation thereof which causes confusion to customers,’ has no factual support and therefore is a mere conclusion to which we do not assign any assumption of truth.”); *Oaklawn Jockey Club*, 687 F. App'x at 433 (“[A] conclusory and ‘formulaic recitation’ of the elements of a trademark infringement cause of action is insufficient to survive a motion to dismiss, and thus the claim was properly resolved on Defendants’ motion to dismiss.” (quotation marks and citations omitted)); *Hensley*, 579 F.3d at 611 (“Although Hensley Manufacturing alleges that this creates ‘a strong likelihood of confusion in the marketplace as to the source of origin and sponsorship of the goods of the Plaintiff and the Defendant,’ such a conclusory and ‘formulaic recitation’ of the elements of a trademark infringement cause of action is insufficient to survive a motion to dismiss.”).

Equally irrelevant is Plaintiff’s reliance on series of agreed final orders with other parties who elected not to fight Plaintiff’s litigation tactics and settled with Plaintiff for little or no money. *See, e.g., Exhibits to MSJ Opp.*, R. 17-7. Plaintiff relies in particular on a decades-old agreed order from *Kern’s Kitchen v. Chapters Publishing Ltd.*, No. 3:96-cv-809 (W.D. Ky. May 28, 1997), which he describes as a case where “the same District Court recognized the existence of the trademark infringement when a publisher printed a recipe for a Derby Pecan Pie that included whiskey as an ingredient.” Appellant Br., p. 18. But it did no such thing. *Chapters Publishing* was an



*agreed judgement* between the parties in which the defendant specifically denied liability but agreed not to publish a particular recipe and to pay plaintiff \$5,000. *See Chapters Publishing, Ltd.*, R. 17-7, Page ID # 143-144. By signing that agreed order—which is best described as a nuisance settlement—the district court did not somehow bless Plaintiff’s expansive theory of trademark liability or tie the hands of future defendants who elect to resist Plaintiff’s well-known litigiousness.<sup>3</sup> Moreover, that case, like the other orders attached to Plaintiff’s complaint, predated this Court’s adoption of the “trademark use” test and thus in no way dictate the outcome of that analysis.

Similarly irrelevant is Plaintiff’s reliance on other articles published by the Courier Journal referencing the Mark. *See Appellant Br.*, pp. 12-13. Those prior articles do nothing to show that the Challenged Articles, which came decades later and specifically identify someone other than Plaintiff as the source of the products shown, infringe the Mark. The Courier Journal never denied that it was aware of the Mark; it simply denied that its news coverage of others’ products infringed it in any

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<sup>3</sup> Indeed, Plaintiff’s website advertises its trademark litigation efforts. *See, e.g.*, <https://derbypie.com/pages/trademarks> (“Protecting our trademark means protecting our reputation and the integrity of our product. So although we prefer to settle differences amicably, we will resort to litigation if necessary.”).

Moreover, and contrary to Plaintiff’s suggestion, his trademark is by no means “uncontestable.” *Appellant Br.*, p. 21. In fact, that mark was previously invalidated by a district court whose decision was later reversed on procedural grounds. *See Kern’s Kitchen, Inc. v. Bon Appetit*, 669 F. Supp. 786 (W.D. Ky. 1987), *remanded for trial*, 850 F.2d 692 (6th Cir. 1988). The case then settled. Should Plaintiff’s claim survive dismissal, Defendant reserves the right to argue that the Mark itself is invalid under applicable trademark principles.

way. The trial court cannot be faulted for failing to discuss these articles, which were simply irrelevant to the non-trademark use question.

Finally, Plaintiff's repeated references to one of the articles being published on Kentucky Derby day (Appellant Br., pp. 2, 5, 18, 19, 23) do nothing to advance his cause. Indeed, it is not clear why Plaintiff thinks this argument helps him, as it merely highlights that *Plaintiff* is the one trading on the cache a far more famous mark he does not own—the Kentucky Derby's. The Courier Journal is free to (and regularly does) cover numerous events related to the Derby and its surrounding festivities, without violating anyone's trademarks. The timing of Article 1 only highlights that it was part of the Courier Journal's coverage of all things Derby-related and not an attempt to deceive readers into believing that the Courier Journal sold Plaintiff's pies.

### CONCLUSION

For the foregoing reasons, this Court should affirm the district court's dismissal of Plaintiff's complaint.

Respectfully Submitted,

s/ Michael P. Abate

Jon L. Fleischaker

Michael P. Abate

Kaplan Johnson Abate & Bird LLP

710 West Main Street, Fourth Floor

Louisville, Kentucky 40202

[jfleischaker@kaplanjohnsonlaw.com](mailto:jfleischaker@kaplanjohnsonlaw.com)

[mabate@kaplanjohnsonlaw.com](mailto:mabate@kaplanjohnsonlaw.com)

*Counsel for Appellee Courier Journal, Inc.*

**CERTIFICATE OF COMPLIANCE**

I certify that the foregoing document complies with Fed. R. App. P. 32(a)(5) and 32(a)(7)(B) because it was prepared using Garamond 14-point type and contains 6,982 words.

s/ Michael P. Abate \_\_\_\_\_  
*Counsel for Appellee*

### **CERTIFICATE OF SERVICE**

I hereby certify that on July 29, 2020, I filed a copy of the foregoing brief and served it on all parties by filing it through the Court's CM/ECF System. Counsel for all parties are registered ECF users.

s/ Michael P. Abate  
\_\_\_\_\_  
*Counsel for Appellee*

**ADDENDUM**

The following are hereby designated as relevant documents from the lower court record:

Record No.	Description	Page ID
R. 1	Complaint	2
R. 1-2	Complaint - Exhibit B, Article 1	10
R. 1-3	Complaint - Exhibit C, Article 2	12
R. 12-1	Memorandum in Support of Motion to Dismiss	55-73
R. 17	Opposition to Motion to Dismiss	91
R. 17-7	Opposition to Motion to Dismiss - Exhibit G, <i>Kern's Kitchen v. Chapters Publishing Ltd.</i> agreed order	143-144
R. 21	Memorandum Opinion and Order	174-183
R. 22	Signed Judgment	184
R. 23	Notice of Appeal	185-186