02-14953-GG

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ALLEGIANCE HEALTHCARE CORPORATION

Plaintiff-Appellant/Cross-Appellee,

v.

LONDON INT'L GROUP, LTD., SSL AMERICAS, INC.
AND LRC NORTH AMERICA, INC.

Defendants-Appellees/Cross-Appellants.

On Appeal From The United States District Court
For The Northern District Of Georgia, Atlanta Division

REPLY BRIEF OF APPELLEES/CROSS-APPELLANTS
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AND LRC NORTH AMERICA, INC.

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This is an exceptional Lanham Act case. Allegiance brought and litigated this lawsuit in a willful and malicious effort to damage a competitor. It filed its complaint without any evidence that Regent's product claims were false or misleading. It lost two motions for partial summary judgment that dismissed portions of its Lanham Act claims. It presented no scientific evidence of its own at trial. It lost on every Lanham Act issue in this case and had judgment entered against it on all of its Lanham Act claims. It also lost on Regent's Lanham Act counterclaim and had a permanent injunction entered against it.

The jury found, based on substantial evidence at trial, that the prosecution of Allegiance's Lanham Act case against Regent was malicious, fraudulent, deliberate, willful or in bad faith, and that Allegiance's own Lanham Act violation was malicious, fraudulent, deliberate, willful or in bad faith. The district court erred as a matter of law when it denied Regent its attorneys' fees under the Lanham Act on the basis of other, legally irrelevant, state law claims in this case.

The district court also erred by entering judgment in favor of Allegiance on its Georgia Unfair Deceptive Trade Practices Act ("GUDTPA") claim. Allegiance erroneously argues that the district court found that Regent violated the Lanham Act by disseminating Margaret Fay's false credentials. It did not. The court

entered judgment in Regent's favor on all Lanham Act counts. For that reason, it should have been granted judgment on the GUDTPA claim as a matter of law.

As discussed in Regent's opening brief, these portions of the judgment should be reversed, and Regent should be awarded its attorneys' fees under 15 U.S.C. § 1117(a).

I. THE COURT ERRED AS A MATTER OF LAW IN NOT ENTERING JUDGMENT FOR REGENT ON ALLEGIANCE'S CLAIMS UNDER THE GEORGIA UNFAIR DECEPTIVE TRADE PRACTICES ACT (Responsive to Allegiance's Reply Brief, pp. 40-41).

The parties and the district court all agreed that "claims under GUDTPA 'involve the same dispositive questions' as claims under the Lanham Act" (RE12:7, R450, Tr:2668-69).[1] This Court has consistently affirmed the application of this principle. *See, e.g.*, *Camp Creek Hospitality Inns, Inc. v. Sheraton Franchise Corp.*, 139 F.3d 1396, 1413 (11th Cir. 1998); *Debs v. Meliopoulos*, 986 F.2d 507 (11th Cir. 1993), *aff'g*, 1993 WL 566011, 1991 U.S. Dist. LEXIS 19864 (N.D. Ga. Dec. 18, 1991) (Addenda B-1, *infra*) ("for the precise reasons the court finds that [plaintiff] Dr. Debs' Lanham Act claim fails, the court finds that his

[1] In its proposed jury instruction on the GUDTPA, Allegiance conceded that "whether Regent's actions violated this [Georgia] statute involves the *same analysis* as the question of whether these acts violated Section 43(a) of the Lanham Act, except that this statute does not require that the violations take place in interstate commerce" (R387:53) (emphasis added). The "interstate commerce" distinction between the two laws is not at issue on appeal.

claim under the Georgia Uniform Deceptive Trade Practices Act similarly fails); *Jellibeans, Inc. v. Skating Clubs of Georgia, Inc.*, 716 F.2d 833, 839 (11th Cir. 1983).

Despite its recognition that this is the law, Allegiance contends that the district court's judgment against Regent was correct. However, Allegiance fails to cite a single case in which a defendant did not violate the Lanham Act yet violated the GUDTPA - or even one that suggests the propriety of that result.

Allegiance's primary argument is that Margaret Fay's false credentials violated the Lanham Act, thus justifying the court finding that Regent violated the GUDTPA. This is simply wrong. Regent did not violate the Lanham Act, which is why the court entered judgment in Regent's favor on Allegiance's claims (RE11; RE13). Allegiance made the exact same argument below and was soundly rejected by the court:

> While Allegiance claims that Regent violated the Lanham Act, the jury specifically found that Regent did not.
>
> . . . [t]he use of Ms. Fay's false credentials is not a violation of the Lanham Act

(RE12:20-21).

Allegiance also misunderstands the nature of the GUDTPA. Allegiance's incomplete quotation from O.C.G.A. § 10-1-373(a) merely states what specific types of proof are "not required." It does not mean that Regent's unknowing use

of Ms. Fay's false credentials constitutes a *per se* violation of the law. The GUDTPA also requires the plaintiff to be "likely to be damaged." As the district court correctly noted, the jury's verdict established that "Regent's use of these credentials . . . did not actually nor were they likely to injure Allegiance" (RE12:20).

The legal error committed in this case is that, despite recognizing that "if they [the jury] return a defendant's verdict, that takes care of the Georgia Deceptive Trade Practice Act" (R450, Tr:2669), the district court ruled on Allegiance's GUDTPA claim without due regard to the disposition of Allegiance's Lanham Act claims in Regent's favor. This is contrary to established law that the outcome under both statutes should be the same. *See Kason Indus., Inc. v. Component Hardware Group, Inc.*, 120 F.3d 1199, 1203 (11th Cir. 1997) (the statutes "provide analogous causes of action governed by the same standard"); *NBA Props., Inc. v. Dahlonega Mint, Inc.*, 41 F. Supp. 2d 1341, 1349 (N.D. Ga. 1998) (plaintiff's claims under the GUDTPA were "contingent upon" a violation the Lanham Act by defendants); *Meadowcraft, Inc. v. Bland*, 1997 U.S. Dist. LEXIS 22923, at *36 n. 14 (N.D. Ga. Apr. 18, 1997) (Addenda B-2, *infra*) (GUDTPA "is co-extensive with the Lanham Act analysis"); *Scientific-Atlanta Inc. v. Fenley*, 1997 U.S. Dist. LEXIS 22700, at *22 (N.D. Ga. Jan. 14, 1997) (Addenda B-3, *infra*) (denying summary judgment on GUDTPA claim because plaintiff was not entitled to

summary judgment on Lanham Act); *SunAmerica Corp. v. Sun Life Assurance Co.*, 890 F. Supp. 1559, 1582 (N.D. Ga. 1994) ("[h]aving concluded that [plaintiff] SLA cannot prevail on its Lanham Act claims, the Court rejects SLA's state [GUDPTA] and common law claims as well"); *Syntex (U.S.A.), Inc. v. Interpharm, Inc.*, 1993 WL 643372, at *5, 1993 U.S. Dist. LEXIS 10761, at *20 (N.D. Ga. Mar. 18, 1993) (Addenda B-4, *infra*) ("the court's analysis above with respect to plaintiffs' Lanham Act claim likewise resolves plaintiffs' similar state [GUDTPA] claim"). The fact that the GUDTPA is equitable in nature does not, as Allegiance contends, mean that the controlling authority does not apply to this case, or that the district court can rule in a manner inconsistent with the jury's verdict. *See Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 472 (1962) (issues tried by jury cannot be lost by court's determination of equitable claims).

Further, up until the moment the jury found against it, Allegiance unwaveringly maintained that its GUDTPA claim would be determined by the outcome of its Lanham Act claims (Tr:2668-69). The very day before the jury began its deliberations, Allegiance specifically told the court:

> [I]f the jury finds no Lanham Act violation, we think the only other -- we think the *only issue* you would be looking at is a violation of the California Health and Safety Code.[2]

[2] The district court found that Regent did not violate the California Health and Safety Code (RE12:21-23).

(Tr:2669) (emphasis added). Allegiance's present arguments to the contrary should not now be heard.

Reviewing this issue of law *de novo*, this Court should reverse and render judgment for Regent on Count V of the amended complaint.[3] *See Walker v. Mortham*, 158 F.3d 1177, 1179-80 (11th Cir. 1998); *Mini Maid Servs. Co. v. Maid Brigade Sys., Inc.*, 967 F.2d 1516, 1517 (11th Cir. 1992).

II. THE DISTRICT COURT INCORRECTLY ANALYZED THE ISSUE OF ATTORNEYS' FEES UNDER THE LANHAM ACT AS A MATTER OF LAW, AND THUS ABUSED ITS DISCRETION IN DENYING REGENT'S REQUEST FOR ATTORNEYS' FEES (Responsive to Allegiance's Reply Br. pp. 23-40).

In this lawsuit, Allegiance wrongly forced Regent to defend baseless Lanham Act product misrepresentation claims that Allegiance lost at every turn. After a four-week trial, the jury found that Allegiance acted with malice both in filing this lawsuit and in committing its own Lanham Act violations. The record fully supports the jury's findings. Accordingly, this is an "exceptional" case under the law and Regent should be awarded its attorneys' fees.

[3] Regent expressly preserves its right to seek its attorneys' fees as provided by O.C.G.A. § 10-1-373(b)(2) upon a reversal by this Court. The district court's sole ground for denying Regents its fees under the GUDTPA was that judgment was entered for Allegiance on this claim (Regent RE1:6).

The district court erred in denying Regent any of its fees on grounds that are legally irrelevant to the statutory inquiry. Those legal errors form the basis of Regent's appeal. Allegiance seeks to avoid assessment of Regent's legal fees by asking this Court to ignore the established record of Allegiance's misconduct. None of the cases cited by Allegiance support that result. In fact, this case presents a factually stronger and more compelling case for awarding Regent its attorneys' fees than any cited by Allegiance.

A. The District Court Abused its Discretion in Considering Irrelevant State Law Claims.

A district court abuses its discretion if its decision on an award of attorneys' fees is based on an incorrect legal standard or if it misapplies the controlling law. *Johnson v. Breeden*, 280 F.3d 1308, 1326-27 (11th Cir. 2002) (failure to apply proper legal standard or follow proper procedures is abuse of discretion); *Lipscher* v. *LRP Publ'ns, Inc*., 266 F.3d 1305, 1319-20 (11th Cir. 2001); *see also Montgomery* v. *Noga*, 168 F.3d 1282, 1303 (11th Cir. 1999) (no deference to the trial court when decision is not based on the proper factors). This Court reviews the lower court's legal analysis without deference under the *de novo* standard of review. *See Loggerhead Turtle v. County Council*, 307 F.3d 1318, 1322 (11th Cir. 2002).

In this case, the district court improperly analyzed Regent's request for attorneys' fees by basing its decision on state law claims[4] and other matters that are irrelevant to the inquiry. The proper and only focus should have been on Allegiance's Lanham Act claims and Allegiance's conduct in bringing and prosecuting them, including its litigation tactics and discovery abuses. *See Lone Star Steakhouse & Saloon, Inc. v. Longhorn Steaks, Inc.*, 106 F.3d 355, 364 (11th Cir. 1997) (remanding for determination of fees under Lanham Act even though party did not prevail on Georgia state law claims); *Montgomery*, 168 F.3d at 1304-05 (analyzing copyright and Lanham Act claims separately); *Neva, Inc. v. Christian Duplications Int'l, Inc.*, 743 F. Supp. 1533, 1543 (M.D. Fla. 1990) (awarding fees under Lanham Act even though the Lanham Act prevailing party lost on other non-Lanham Act claims). Allegiance's Lanham Act claims were partially dismissed on summary judgment (R243 (March 26, 2001 order)). *See Tire Kingdom, Inc. v. Morgan Tire & Auto, Inc.*, 253 F.3d 1332, 1334 (11th Cir. 2001) (awarding fees to defendant who prevailed on summary judgment). Regent then prevailed at trial both as defendant on the remainder of Allegiance's Lanham Act claims and as plaintiff on its own Lanham Act counterclaim. These outcomes,

[4] Although the state law claims are wholly irrelevant, Regent did prevail on two of Allegiance's four state counts, which the court apparently did not consider. Count IV of Allegiance's amended complaint was fully dismissed on summary judgment, and Count VI was not actionable as a matter of law (RE11; RE13).

and the fact that Allegiance acted maliciously, fraudulently and in bad faith with regard to the Lanham Act (RE9), are what is relevant — not the state claims. *See Lone Star Steakhouse & Saloon*, 106 F.3d at 364; *Yankee Candle Co. v. Bridgewater Candle Co.*, *LLC*, 140 F. Supp. 2d 111, 121 (D. Mass. 2001); *Neva*, 743 F. Supp. at 1543.

Allegiance cites not a single case in which a party who prevailed on the Lanham Act claims was denied its attorneys' fees in their entirety because it did not prevail on other claims.[5] In fact, the *Yankee Candle* case upon which Allegiance relies contradicts its position. That case involved Lanham Act, copyright, and state law claims. The court awarded fees to the prevailing defendant under § 1117(a) because the plaintiff's "claims *under the Lanham Act* were unfounded." *Yankee Candle*, 140 F. Supp. 2d at 121 (emphasis added). Properly, the non-Lanham Act claims in the case did not enter into the court's § 1117(a) analysis. *Id*.

Where the *Yankee Candle* court did consider the state claims was in determining the amount of fees. *Id.* at 122-23. Regent agrees that the time spent

[5] Even on the state claims, Allegiance prevailed on only a minuscule portion of the case that was never contested - Margaret Fay's credentials. It would be inherently wrong and contradict the very purpose of the Lanham Act's attorneys' fees provision to allow this Pyrrhic victory to absolve Allegiance from maliciously forcing Regent to spend millions of dollars defending baseless accusations against Regent's product claims.

and fees incurred on the state claims or other issues *might* properly affect the *amount* of fees awarded, *Hensley v. Eckerhart*, 461 U.S. 424, 435-37, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983), but they should not preclude an award of fees for Regent's defense of the wrongly brought Lanham Act claims and its successful prosecution of a Lanham Act counterclaim.[6] *See Yankee Candle*, 140 F. Supp. 2d at 121; *Neva*, 743 F. Supp. at 1543 (award of attorneys' fees to plaintiffs under the Lanham Act was not precluded by the judgment against plaintiff on several other claims, because plaintiff had prevailed on its Lanham Act claim and was entitled to its fees incurred prosecuting that claim.).

Nor does Regent contend that the court is not entitled to look at the party's conduct throughout the case, as Allegiance asserts. To the contrary, it should do so. Regent's point is simply that while viewing all of Allegiance's conduct throughout the case, the controlling statutory scheme is the Lanham Act.

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[6] Regent submits that because the Lanham Act and state claims are legally and factually intertwined, Regent should be awarded the full amount of the fees it expended. *See Hensley*, 461 U.S. at 435 (no adjustment when claims involve a "common core of facts" or are based on "related legal theories"); *Microsoft Corp. v. Software Wholesale Club, Inc.*, 129 F. Supp. 2d 995, 1011 (S.D. Tex. 2000) (in cases in which attorneys' fees are awarded as to some claims and denied as to others, apportionment may be proper (*citing Gracie v. Gracie*, 217 F.3d 1060, 1069-1070 (9th Cir. 2000) (no apportionment when factual and legal bases for Lanham Act and non-Lanham Act claims are substantially identical))). Where, as here, the Lanham Act claims are legally dispositive of the Georgia state law claims, s*upra*, Argument I., the claims are inextricably intertwined. *See id.*

By not only considering the state law claims, but also using them to deny Regent its fees, the court misapplied the law and thus abused its discretion. The judgment denying fees should be reversed. Even if this Court views the district court's order merely as unclear as to whether or to what extent the irrelevant state claims affected its decision, reversal and remand on the attorneys' fees issue is still required. *See FASA Corp. v. Playmates Toys, Inc.*, 108 F.3d 140, 144 (7th Cir. 1997) (reversing denial of a fee award and remanding because it was unclear whether the district court was applying the correct legal standard).

B. The Jury's Fact-Findings Are Supported by the Record And Are Central to a Fee Determination.

The parties agree that an exceptional Lanham Act case is one in which a party "acts in a 'malicious,' 'fraudulent,' 'deliberate,' or 'willful' manner."[7] *Tire Kingdom,* 253 F.3d at 1334; *Burger King Corp. v. Pilgrim's Pride Corp.,* 15 F.3d

[7] The Courts of Appeals are split regarding the circumstances under which a prevailing defendant may be awarded its attorneys' fees, including whether bad faith is required on the part of the plaintiff or "something less than bad faith." *See National Ass'n of Prof'l Baseball Leagues, Inc. v. Very Minor Leagues, Inc.,* 223 F.3d 1143, 1147-49 (10th Cir. 2000) (discussing the split and varying standards; holding that when evaluating an award of attorneys' fees "the court looks to the plaintiff's conduct *in bringing the lawsuit and the manner in which it is prosecuted"*). In *Lipscher*, this Court recognized the split, but did not decide whether the "something less than bad faith" standard should apply. 266 F.2d at 1320 (citing *Safeway Stores, Inc. v. Safeway Discount Drugs, Inc.*, 675 F.2d 1160 (11th Cir. 1982)). Regardless of the standard applied here, Allegiance's conduct meets or exceeds it, as found by the jury.

166, 168 (11th Cir. 1994). That is exactly what the jury found (RE9:8-10, RE10:20). Although the ultimate decision to award fees is for the court, *Burger King*, 15 F.3d at 168, the trial court discounted, and Allegiance asks this Court to disregard, this jury finding.

The jury's fact-findings on the predicate questions of malice, bad faith, and fraud are supported by the trial record and should be accepted. *Seatrax, Inc. v. Sonbeck Int'l, Inc.*, 200 F.3d 358, 372-73 (5th Cir. 2000) (refusing to disturb the jury's factual findings). This Court has previously considered the jury's findings as being highly relevant to the trial court's decision. *See Montgomery*, 168 F.3d at 1303 (court granted fees in light of jury's "exceptional" finding). Yet the district court's opinion makes clear that it disregarded the jury's verdict and for the wrong reasons (Regent RE1:3-5). This was an error of law, and thus, the district court abused its discretion. *See Johnson*, 280 F.3d at 1326-27 (abuse of discretion occurs in award of fees if judge fails to apply proper legal standard or to follow proper procedures in making fee determination).

This is especially true in view of the fact that the court came to its conclusion by considering irrelevant state law claims and speculating what the jury might have found if it had known of the state law claims (Regent RE1, 4). It would have been improper for the jury to consider the state claims because they are irrelevant to the Lanham Act fee inquiry. *See Lone Star Steakhouse*, 106 F.3d at

364; *Neva,* 743 F. Supp. at 1543. Further, the court's speculation was exactly that. The district court should not have disregarded the jury's findings because of what the jury might possibly have found, but should have focused on what the jury did find.

Regent did not, as Allegiance contends, waive its right to a jury on the pertinent factual questions. At trial, counsel for Regent agreed that the ultimate decision to award fees was for the court, but expressly stated that Regent had pled for its fees, would be asking for fees, and "did not want anything in the jury process to waive that" (R442, Tr:1462-63). The jury was to decide the predicate factual questions underpinning the determination of an "exceptional" case (R449, Tr:2648, 2651).

Accordingly, the jury did decide the factual questions and found in favor of Regent. Allegiance may be displeased with the result, but that does not change the fact that the district court abused its discretion in disregarding the jury and misapplying the law.

C. Regent Was Entitled to Consideration of An Award of Its Fees On Its Successful Counterclaim, Independently of Its Fees For Successfully Defending Allegiance's Wrongful Claims.

Allegiance's own willful false advertising, which the jury found to be malicious or in bad faith (RE9), independently warranted an award of attorneys' fees to Regent. *See Allergy Asthma Tech., Ltd. v. I Can Breathe, Inc.*, 195 F. Supp.

2d 1059, 1072, 1074 (N.D. Ill. 2002) (awarding fees for Lanham Act false advertising counterclaim). Although the court's order recited the procedural facts that Regent prevailed on both its defense of the Lanham Act claims and its Lanham Act counterclaim against Allegiance, the district court made no findings under Rule 52, Fed. R. Civ. P., with respect to the counterclaim and Regent's consequent entitlement to attorneys' fees. There is no indication that the court even considered the counterclaim or jury's finding on this issue — much less an explanation of why it denied Regent its fees. The Court's failure to explain or discuss its denial of attorneys' fees on the counterclaim as required by Fed. R. Civ. P. 52 requires a remand. *See Frankenmuth Mut. Ins. Co. v. Escambia County, Fla.*, 289 F.3d 723, 733-34 (11th Cir. 2002) (vacating and remanding because court could not discern basis for denial of fees); *FASA Corp*., 108 F.3d at 141-44; *Keefe v. Bahama Cruise Line, Inc.,* 867 F.2d 1318, 1323 (11th Cir. 1989). On remand, the district court should find that Allegiance's own bad faith advertising makes this the "exceptional" case warranting an award of fees to Regent.

D. This Is An Exceptional Case Because Of Allegiance's Relentless, Offensive And Egregious Conduct.

The evidence established, and the jury found, that Allegiance brought suit against Regent for anticompetitive reasons -- attempting to financially harm Regent, reduce its market share, and damage its business. Where, as here, a

competitor's conduct is intentionally designed to reduce sales and damage the competition, the case is "exceptional" and the reversal of a denial of fees is warranted. *NuPulse, Inc. v. Schlueter Co.*, 853 F.2d 545, 547, 551 (7th Cir. 1988) (reversing denial of fees because of legal error in applying Lanham Act fee provision).

Allegiance brought this suit because it could not compete in a market that had changed. As use of NRL gloves increased during the 1990's, so did concerns about latex allergy (DX-1282; R445, Tr:1960-62). Medical literature independent of Regent made clear the benefit of low-protein, powder-free gloves, as opposed to the high-protein, powdered glove that was Allegiance's flagship brand. By 1997, leading, relevant medical organizations and government agencies were unanimously recommending the use of low-protein, powder-free gloves, and many major medical institutions had adopted "powder-free" policies (DX-580, 588, 784; Tr:1539-40).

Regent's low-protein, powder-free BIOGEL® glove was the natural beneficiary of these evolving market conditions. Baxter and Allegiance attempted to meet this new demand, but their powder-free glove failed (Tr:591-93; 792-800, 1004-05; DX-393). Baxter spent two years talking with Regent about a joint venture that would give Baxter access to Regent's BIOGEL® technology (R439, Tr:955), but this effort failed also.

Having failed to purchase or to gain access to a product that it recognized as superior and successful (see, e.g., DX-553), Allegiance decided to attack the company that produced it. Allegiance filed this suit with no scientific, factual evidence that any Regent product claim was false.[8] It put on a four-week jury trial without introducing any scientific tests, studies or expert testimony of its own on any liability issue. Its case against Regent's product claims was based solely upon strained readings (rejected by the jury) of documents and deposition testimony obtained *after* the complaint was filed.

This is telling evidence that it had no evidence *before* the complaint was filed. Had any of Regent's product claims actually been false (which they were not), the means to disprove them was well within the ability of Allegiance, a company with "a significant number of technical individuals and scientists" (R438, Tr:708). The only other possible conclusion is that Allegiance did conduct a pre-filing investigation and knew that Regent's product claims were true. Either way, this is precisely the sort of malicious, anti-competitive "exceptional" case that warrants an award of attorneys' fees.

Compounding its bad faith in its initial filing, Allegiance adopted a strategy of delay and harassment. On five separate occasions, Allegiance did not produce

[8] The only claim on which Allegiance prevailed at trial, the false credentials of Margaret Fay, was never contested by Regent and did not pertain to advertising claims about the BIOGEL® glove.

documents or witnesses until Regent moved to compel (R181:1-2, 8-9; R243:2-3; R301). It was held in contempt once (R181, p.5), sanctioned twice (R181:8-9; R213:10), and was found to have failed to comply with a court order yet another time (R351). It unjustifiably withheld production of a significant document (DX-606 - the Rood Report) until a few weeks before trial and nearly evaded its disclosure.

Allegiance also filed separate lawsuits attempting to intimidate Regent and scientists who agreed with Regent. It unreasonably forced Regent to defend against and move to dismiss claims regarding Dr. Donald Beezhold, an independent scientist, that had already been rejected by another court (Tr:743; s*ee* R243). It named Margaret Fay as a defendant in the Beezhold suit; the claims against her were dismissed as well (Tr:743). Allegiance also harassed an independent scientist from Canada, Dr. Gordon Sussman, with a subpoena for a fact deposition in this case. *See Allegiance Healthcare Corp. v. London Int'l Group PLC*, 2000 U.S. App. LEXIS 33564, at *2 (11th Cir. Aug. 28, 2000) (Addendum A-3 to Regent's opening brief).

E. The Cases Allegiance Relies Upon Are Inapposite.

The cases upon which Allegiance relies in an attempt to show that this case is not exceptional are unavailing. Unlike here, those cases did not have fact-findings of fraud, malice or bad faith. *See, e.g.*, *Sovereign Order of Saint John v.*

Grady, 119 F.3d 1236, 1286 (6th Cir. 1997) (jury found that defendants had intentionally infringed trademark, but there was no finding or evidence of malice, fraud or bad faith); *Braun, Inc. v. Dynamics Corp. of Am.*, 975 F.2d 815, 829 (Fed. Cir. 1992) (patent infringement was not willful, and attorneys' fees were not warranted. The conduct reflected due care and good faith to avoid infringement, and there was a fact-finding that it did not defend in bad faith); *Texas Pig Stands, Inc. v. Hard Rock Café Int'l, Inc.*, 951 F.2d 684, 696-97 (5th Cir. 1992) (trial court found only "simple disregard" — no fact-findings of malice or fraud; no "deliberate pirating," or "egregious conduct."); *Jellibeans,* 716 F.2d at 846-47 (no jury findings of malice, fraud or bad faith); *Lipscher*, 266 F.2d at 1319-20 (no jury findings of malice, fraud, or bad faith). Here, the jury's fact-findings of Allegiance's bad faith both in bringing this lawsuit and in committing its own Lanham Act violations make this case significantly stronger than any case on which Allegiance relies to urge the denial of fees.

Allegiance's conduct here was actually far more egregious than that found in other cases in which attorney's fees were awarded, and the jury's fact-findings of malice, fraud and bad faith reflect that. The more legally factually relevant cases support an award of fees. For example in *Tire Kingdom*, this Court affirmed an attorney's fee award to the defendant in a Lanham Act case, finding it "exceptional" because (1) the plaintiff's claims were meritless, and (2) the plaintiff

acted in bad faith and with improper motives. 253 F.3d at 1336. There, as here, the plaintiff had in its possession, but failed to disclose until one month before trial, research and survey information that refuted its Lanham Act claims against the defendant. *Id.*

In *S Indus., Inc. v. Centra 2000, Inc.,* 249 F.3d 625, 627-28 (7th Cir. 2001), a case much like this, the court affirmed a Lanham Act fee award to the defendant based on the plaintiff's pattern of abuse and improper litigation. The plaintiff filed unfounded Lanham Act claims and engaged in litigation gamesmanship that multiplied the defendant's cost of litigation. *Id*. Over the four-year legal proceeding, the plaintiff failed to produce evidence, failed to respond to discovery requests, failed to follow court rules, increased the cost of litigation, and generally refused to cooperate, instead delaying and harassing the defendant. *Id*. The court also noted that plaintiff filed other lawsuits designed to harass, and had a pattern of using litigation as a tactic. *Id*. at n.1. The court readily affirmed the district court's award of fees. *Id*. at 627.

Such abuse of litigation to gain business advantage is precisely the kind of conduct the Lanham Act fee provision was enacted to deter. *See SecuraComm Consulting, Inc. v. Securacom, Inc.*, 224 F.3d 273, 275, 281-83 (3d Cir. 2000) (affirming fees where the defendant filed meritless counterclaims, tried to strong-arm the plaintiff, filed separate suits to harass, and even threatened to "bury" the

plaintiff financially). In *SecuraComm*, as here, the party sanctioned with fees embarked on a deliberate effort to bury its competitor by filing multiple suits and litigating unfairly. *Id*. at 282. These are the same tactics Allegiance attempted in this case after it was unable to obtain Regent's technology, develop its own, or increase its own market share legitimately. For the same reasons, Regent should be awarded its fees. *NuPulse, Inc*., 853 F.2d at 547 (reversing denial of fees in exceptional case where competitor sought to damage the competition).

In its brief, Allegiance's attempts to avoid responsibility for its actions by ignoring the extraordinary facts of its culpability, bad faith and malice in bringing this lawsuit and in committing its own Lanham Act violations, and attempts to distract the court by blaming Regent for this lawsuit. Allegiance contends that this suit was justified because Regent did not respond to Allegiance's demands for "substantiation" of its advertising claims[9] (Alleg. Rep. Br. 23). At trial, the head of Allegiance's glove business complained that he felt he had been "blown off" by Regent and that he authorized this suit as another "means to get answers to [his] questions" (R440:1126-28).

[9] Most of the advertisements about which Allegiance complained expressly listed the scientific evidence relied upon by Regent in the ad, including, *e.g.,* peer-reviewed articles in scientific journals, refuting Allegiance's claimed need for substantiation. *See, e.g.,* PX67, 68, 381, 423, 539, 564, 575, 579, 580.

There is no provision in the Federal Rules or jurisprudence allowing a plaintiff to sue because a competitor did not respond to demands for information. Instead, the Lanham Act and the case law put the burden on the plaintiff to prove that the defendant's ads were either literally false or misleading to the persons seeing the ads. *Hyman v. Nationwide Mut. Fire Ins. Co.*, 304 F.3d 1179, 1195-96, n. 13 (11th Cir. 2002). The defendant need not prove that any claims are true, and the defendant is not required to disclose information used to substantiate an advertisement merely because an angry or frustrated competitor, whose market share is legitimately diminishing, demands it. More importantly, the jury heard Allegiance's justifications and squarely rejected them.

Thus, this case is sharply distinguished from the cases cited by Allegiance, and its attempts to analogize this lawsuit to them are misplaced. None concerned the defendant's conduct. In *Simon Prop. Group, L.P. v. mySimon, Inc.,* 2001 U.S. Dist. LEXIS 852 (S.D. Ind. 2001), *appeal dismissed*, 282 F.3d 986 (7th Cir. 2002), the plaintiff, despite clear knowledge of a threat to its trademark, did nothing to protect it, ignoring unequivocal business advice from one of its executives. Even more significantly, plaintiff perceived defendant as a profit opportunity, which it was. Plaintiff's business and profits actually *increased* during the period of infringement, while defendant lost millions. Similarly, in *Gidatex S.r.L. v. Campaniello Imps., Ltd.*, 82 F. Supp. 2d 136, 148-50 (S.D.N.Y. 2000), the court

denied attorneys' fees to the prevailing plaintiff because it had engaged in "inexcusable delay" and was more concerned with suppressing a competitor than with its trademark rights.

In contrast to these cases, Regent did nothing more than refuse to capitulate to a competitor's unreasonable demand for proprietary information. Regent did not instigate this suit and was not responsible for it. Rather, Regent was forced to incur substantial fees to defend against unsubstantiated claims,[10] and the jury found Allegiance guilty of bad faith in the litigation and in its own Lanham Act violations. Regent was the victim of Allegiance's legal assault, not its perpetrator.

CONCLUSION

For these reasons and those stated in Regent's opening brief, the judgment should be affirmed in all respects, except that the district court's judgment for Allegiance on its GUDTPA claim and the court's denial of attorneys' fees to Regent should be reversed. The matter should be remanded to the district court for determination of the amount of attorneys' fees to be awarded Regent, both in the court below and on appeal. Regent should be awarded its fees attributable to the Lanham Act litigation and all claims and issues inextricably intertwined with it.

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[10] Regent properly detailed and substantiated its attorneys' fee claim of approximately $9 million in the court below pursuant to Fed. R. Civ. P. 54(d); *see Gordon v. Heimann*, 715 F.2d 531, 534 (11th Cir. 1983) (R462, R465, R487, R501).

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this reply brief complies with the type-volume limitation set forth in Fed. R. App. P. 32(a)(7)(B). This brief contains 4811 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it was prepared in Microsoft Word, version 2002. The print is Times New Roman in 14 point, proportional space.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Reply Brief of Appellees/Cross-Appellants is being served upon counsel to the parties by first class mail:

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