

United States Court of Appeals  
for the Fifth Circuit

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No. 23-20065

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United States Court of Appeals  
Fifth Circuit

**FILED**

July 31, 2024

Lyle W. Cayce  
Clerk

LEWIS BRISBOIS BISGAARD & SMITH, L.L.P.,

*Plaintiff—Appellee,*

*versus*

SUSAN C. NORMAN; BRADLEY B. BEERS; MICHAEL JOSEPH  
BITGOOD, *also known as* MICHAEL EASTON,

*Defendants—Appellants.*

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Appeal from the United States District Court  
for the Southern District of Texas  
USDC No. 4:22-CV-3279

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Before SOUTHWICK, HAYNES, and GRAVES, *Circuit Judges.*

PER CURIAM:\*

This is an appeal from the district court’s order granting Lewis Brisbois Bisgaard & Smith, LLP’s (“LBBS”) motion for a preliminary injunction filed against Michael Joseph Bitgood a/k/a “Michael Easton,” Richard P. Jones, Susan C. Norman, Bradley B. Beers, and the Texas entity known as “Lewis Brisbois Bisgaard & Smith, LLP,” (collectively, “Federal

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\* This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

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Defendants”) for trademark infringement and unfair competition in violation of the Lanham Act. For the reasons set forth below, we AFFIRM.<sup>1</sup>

## I. Background

The alleged unlawful conduct started during the midst of Texas state court litigation. Bitgood, appearing pro se, and Jones, represented by Norman, filed suit in Texas state court against various individuals and an entity (“State Defendants”), who were represented by LBBS, related to a landlord-tenant dispute. After noticing that the Secretary of State’s website reflected that LBBS’s foreign limited liability partnership registration had lapsed, Bitgood and Norman registered a domestic limited liability partnership in Texas under the name “Lewis Brisbois Bisgaard & Smith, LLP” (“Bitgood Entity”). Bitgood and Norman, through attorney Brad Beers, also filed a subsequent assumed name certificate with the state, identifying the Bitgood Entity’s assumed name as “Lewis Brisbois Bisgaard & Smith.” They then amended the state court petition to include the Bitgood Entity as a party and then filed a Texas Rules of Civil Procedure Rule 12 Motion to Show Authority, requesting LBBS to show authority to represent State Defendants.

The state court eventually granted Norman and Bitgood’s Rule 12 Motion, concluding that LBBS “lacked the authority to appear in a Texas [c]ourt” on the date that it entered its appearance to represent the State Defendants. Shortly thereafter, LBBS’s general counsel sent a cease-and-desist letter to Bitgood and Norman. Bitgood responded to the cease-and-desist letter by sending an e-mail to LBBS, which attached a fake business

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<sup>1</sup> At the outset, we note that Norman and Beer’s conduct in this case is unbecoming of the profession and likely violates several Texas Disciplinary Rules of Professional Conduct, including Rule 5.04(b) and (d), and Rule 8.04(a)(3).

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card adorned with the name “Lewis and Bobo.” Bitgood and Norman also continued to use LBBS’s name in the state court litigation by filing pleadings on behalf of the Bitgood Entity on a letterhead titled “Lewis Brisbois Bisgaard & Smith, LLP.”

Soon after the state court ruled against it, LBBS filed suit in federal court against Bitgood, Jones, Norman, Beers, and the Bitgood Entity, asserting, inter alia, claims for trademark infringement in violation of 15 U.S.C. § 1114(1), trade name infringement in violation of 15 U.S.C. § 1125(a), and unfair competition in violation of the same. During the hearing on LBBS’s motion for a temporary restraining order, Bitgood told the court he created the Bitgood Entity because he thought it was “a good business investment” at the time. Norman also admitted that she joined in creating this new law firm “[f]or the same reason that Mr. Bitgood is stating” The district court granted the TRO. Shortly thereafter, Bitgood and Norman voluntarily dissolved the Bitgood Entity, and Bitgood submitted a sworn declaration promising never to use the name in the future.

After an evidentiary hearing on LBBS’s motion for a preliminary injunction, the district court granted it. Federal Defendants timely appealed.

## **II. Jurisdiction & Standard of Review**

We have jurisdiction under 28 U.S.C. § 1292(a)(1) from an order granting a preliminary injunction. *Ali v. Quatterman*, 607 F.3d 1046, 1048 (5th Cir. 2010) (“Orders which explicitly grant or deny injunctive relief are immediately appealable as of right; no additional finding of immediate, irreparable injury is required.” (quotation omitted)).

We review a district court’s grant of a preliminary injunction for an abuse of discretion. *Lake Charles Diesel, Inc. v. Gen. Motors Corp.*, 328 F.3d 192, 195 (5th Cir. 2003). “Factual findings are reviewed for clear error, while

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legal conclusions are reviewed de novo.” *Moore v. Brown*, 868 F.3d 398, 403 (5th Cir. 2017) (per curiam).

### III. Discussion

Federal Defendants raise four main issues on appeal: (1) whether the *Rooker-Feldman* doctrine applies; (2) whether the district court complied with Federal Rule of Civil Procedure 52(a)(2); (3) whether LBBS has shown a likelihood of success on the merits of its Lanham Act claims; and (4) whether Federal Defendants Beer and Norman are entitled to attorney immunity. None warrant reversal.

First, the *Rooker-Feldman*<sup>2</sup> doctrine does not preclude jurisdiction. At the time LBBS filed its federal lawsuit—September 23, 2022—its appeal of the state court judgment was still pending. Thus, there was not a final state court judgment at the time LBBS filed the instant lawsuit. Therefore, the *Rooker-Feldman* doctrine did not apply. *See Miller v. Dunn*, 35 F.4th 1007, 1012 (5th Cir. 2022) (holding that *Rooker-Feldman* does not deprive a district court of subject matter jurisdiction when the relevant state action is pending on appeal at the time the federal lawsuit is filed).

Second, even if we were to agree that the district court failed to comply with Rule 52(a)(2), the record is exceptionally clear such that the court can review the district court’s preliminary injunction decision. *See White v. Carlucci*, 862 F.2d 1209, 1210 n.1 (5th Cir. 1989).

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<sup>2</sup> “The *Rooker-Feldman* doctrine takes its name from the only two cases in which [the Supreme Court] has applied [the] rule” that “lower federal courts are precluded from exercising appellate jurisdiction over final state-court judgments” to “find that a [f]ederal [d]istrict court lacked jurisdiction.” *Lance v. Dennis*, 546 U.S. 459, 463 (2006) (per curiam) (citing *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 416 (1923) and *D.C. Ct. of Appeals v. Feldman*, 460 U.S. 462, 482 (1983)). To the extent Federal Defendants raise any other abstention arguments, they have abandoned them on appeal.

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Third, LBBS did show a likelihood of success on the merits, irreparable harm, and that the balance of equities weigh in favor of granting the preliminary injunction.<sup>3</sup> As it relates to a likelihood of success on the merits, the only real dispute between the parties is whether Federal Defendants alleged infringing uses of the trademarks—through formation of the Bitgood Entity, filing of the assumed named certificate, the litigation correspondence, state court pleadings, and fake business card—constituted “uses in commerce” that were “in connection with any services.”<sup>4</sup>

Common sense, clear concessions by Federal Defendants, and case law establish that their alleged infringing uses were “uses in commerce.” It is clear that the only reason Federal Defendants created the Bitgood Entity was to ride on the back of LBBS’s goodwill and reputation in the marketplace to obtain clients for themselves. Why else would Norman and Bitgood become members of the Bitgood Entity and even offer the same services as LBBS? The record all but confirms this as both Bitgood and Norman concede that they stole LBBS’s marks because it was a “good business investment.”<sup>5</sup>

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<sup>3</sup> There is no evidence in the record showing that Federal Defendants infringed on LBBS’s relevant registered trademarks, so we consider only LBBS’s claims under § 1125(a).

<sup>4</sup> To be clear, Federal Defendants do raise other arguments challenging whether LBBS has shown a likelihood of success on the merits and that the balance of equities favored granting the preliminary injunction. But these other arguments—like whether LBBS has shown secondary meaning and is the senior user of its unregistered mark—are meritless. Of course, LBBS—a national law firm that currently employs more than 1,600 lawyers across the United States in over 50 offices and that has used these marks for at least twenty years and continues to use them—has satisfied these requirements for purposes of the preliminary injunction.

<sup>5</sup> Norman suggests that their purpose in creating the Bitgood Entity was to alert the state court of the fact that LBBS was not authorized to engage in business in Texas and therefore could not represent the landlords in the underlying state action. While this may have been Federal Defendants initial purpose for their conduct, we need not definitively

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Moreover, the Ninth Circuit, under striking similar circumstances, held that conduct, like formation of a corporation and public communication, was sufficient. *See Committee for Idaho’s High Desert, Inc. v. Yost*, 92 F.3d 814, 823 (9th Cir. 1996) (concluding that the act of forming the corporation and publicly testifying in the corporation’s name were sufficient to hold the individual officers liable “for using in commerce, in connection with services, a name which is likely to confuse”). As such, we conclude Federal Defendants alleged infringing uses were “uses in commerce.”

Federal Defendants alleged infringing uses were also “in connection with” their services—litigation—because they used the marks as source identifiers. *Radiance Found., Inc. v. N.A.A.C.P.*, 786 F.3d 316, 323 (4th Cir. 2015) (explaining “if in the context of a sale, distribution, or advertisement, a mark is used as a source identifier, [the court] can confidently state that the use is ‘in connection with’ the activity”); *see also Jack Daniel’s Properties, Inc. v. VIP Prod. L.L.C.*, 599 U.S. 140, 159 (2023) (explaining that when the infringer uses the trademark as a source-identifier, the “likelihood of confusion inquiry does enough work to account for the interest in free expression”). For instance, Federal Defendants sent litigation correspondence to LBBS with the infringing letterhead, used the marks in state court pleadings, and also sent LBBS a fake business card in response to a cease-and-desist letter.<sup>6</sup> As such, we also conclude that Federal Defendants alleged infringing uses were “in connection with services.”

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resolve this issue because there is sufficient evidence that, later on, Federal Defendants’ intent was to take advantage of LBBS’s goodwill and reputation for themselves.

<sup>6</sup> Even if the fake business card could be considered expressive comment, it would still fall within the ambit of § 1125(a)(1)(A). *See Jack Daniel’s Props., Inc.*, 599 U.S. at 156 (explaining that even when a defendant is making an expressive comment, the defendant is still “mak[ing] trademark use of another’s mark” and “must meet [the] infringement claim on the usual battleground of likelihood of confusion” (first alteration in original)).

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There is also no real dispute that LBBS has shown irreparable harm. Because LBBS has shown a substantial likelihood of success on the merits, it is entitled to a “rebuttable presumption of irreparable harm.” *Whirlpool Corp. v. Shenzhen Sanlida Elec. Tech. Co.*, 80 F.4th 536, 546 (5th Cir. 2023) (quoting 15 U.S.C. § 1116), *cert. denied sub nom. Shenzen Sanlida Elec. Tech. Co., v. Whirlpool Corp.*, 144 S. Ct. 807 (2024) (mem.). Federal Defendants have not rebutted that presumption, even with dissolution of the Bitgood Entity and Mr. Bitgood’s sworn declaration that he will cease using the marks, because not all Federal Defendants have sworn to discontinue their conduct. Given this lack of certainty and that Federal Defendants are unlikely to be harmed by the injunction, *see Polo Fashions, Inc. v. Dick Bruhn, Inc.*, 793 F.2d 1132, 1135–36 (9th Cir. 1986) (“If the defendants sincerely intend not to infringe, the injunction harms them little; if they do, it gives [plaintiff] substantial protection of its trademark[s].”), we conclude that Federal Defendants have not rebutted the presumption of irreparable harm.<sup>7</sup>

Fourth, neither Beers nor Norman is entitled to attorney immunity for purposes of a preliminary injunction. Attorney immunity is a form of absolute immunity, and absolute immunity does not bar “claims for injunctive relief.” *See Ironshore Eur. DAC v. Schiff Hardin, L.L.P.*, 912 F.3d 759, 763 (5th Cir. 2019) (“[A]ttorney immunity is properly characterized as a true immunity from suit, not as a defense to liability.”); *Singleton v. Cannizzaro*, 956 F.3d 773, 778 n.3 (5th Cir. 2020).

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<sup>7</sup> Our decision in *Logan v. Burgers Ozark Country Cured Hams Inc.*, 263 F.3d 447 (5th Cir. 2001) does not require a different outcome. *Logan* was a pre-Trademark Modernization Act of 2020 case, *see Whirlpool Corp.*, 80 F.4th at 546, and we did not apply the rebuttable presumption. *Logan*, 263 F.3d at 465.

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**IV. Conclusion**

For the reasons set forth above, we AFFIRM.