No. 25-

IN THE

Supreme Court of the United States

ZIONESS MOVEMENT, INC.,

Petitioner,

v.

THE LAWFARE PROJECT, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner Zioness Movement, Inc. is a nonprofit entity that is the registered owner of the Zioness word mark. Amanda Berman, the founder of Zioness Movement, Inc., began using the Zioness mark while she was still employed at a separate nonprofit entity, Respondent The Lawfare Project, Inc. After the mark was registered to Zioness Movement, The Lawfare Project sought to cancel Zioness Movement's registered mark with the U.S. Patent and Trademark Office. Zioness Movement sought a declaration of ownership in the district court and The Lawfare Project counterclaimed seeking a declaration of ownership. The district court determined that both Zioness Movement and The Lawfare Project co-owned the mark—an outcome never contemplated in the litigation or argued for by either party during trial. The court of appeals, in a summary order, affirmed the district court on this issue, finding that Zioness Movement "cannot establish the 'fundamental error' required to reverse after its waiver of any objection to the verdict form permitting a finding of co-ownership." The questions presented are:

1. Whether, under the Lanham Act, a court or jury may find joint ownership of a trademark between competing entities—neither of which pleaded or proved co-ownership—without violating the fundamental principle that a trademark must indicate a single source of goods or services to consumers.

2. Whether a party that does not object to a verdict sheet that includes "both" as a potential response to the question of ownership has waived the legal argument that joint ownership of a trademark by two entities that compete in the same market, without any guardrails to protect against consumer confusion, violates the Lanham Act.

3. Whether the district court was required to instruct the jury to consider which entity used the trademark in a source-identifying way, and whether the district court erred by instructing the jury to consider the scope of Amanda Berman's employment but failing to instruct the jury that a purported transfer of trademark rights via a naked or oral license effects an abandonment.

PARTIES TO THE PROCEEDING

Petitioner is Zioness Movement, Inc., which was the plaintiff and counter-defendant in the district court, and appellant at the court of appeals. Respondent is The Lawfare Project, Inc., which was the defendant, counter-plaintiff, and third-party plaintiff in the district court, and appellee in the court of appeals. Amanda Berman was a third-party defendant in the district court and appellant in the court of appeals but is not a petitioner or respondent here.

CORPORATE DISCLOSURE STATEMENT

Zioness Movement, Inc. is a not-for-profit corporation with no parent corporation, no shareholders, and no stock.

RELATED PROCEEDINGS

Zioness Movement, Inc. v. The Lawfare Project, Inc. v. Amanda Berman, No. 21-cv-7429, U.S. District Court for the Southern District of New York. Judgment entered August 22, 2024.

Zioness Movement, Inc. v. The Lawfare Project, Inc. v. Amanda Berman, No. 24-974, U.S. Court of Appeal for the Second Circuit. Judgment entered August 13, 2025. Petition for rehearing and rehearing *en banc* denied September 22, 2025.

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On Petition for a writ of certiorari to the
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PETITION FOR A WRIT OF CERTIORARI

Zioness Movement, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The order of the court of appeals summarily affirming the district court's decision on the trademark and discovery sanctions issue and vacating and remanding the district court's decision denying attorneys' fees under Section 505 of the Copyright Act is unreported and available at 2025 WL 2327522 (2d Cir. Aug. 13, 2025). Pet. App. 1a-15a. The orders of the court of appeals denying Zioness Movement's petition for rehearing and for rehearing en banc are unreported and not available. Pet. App. 57a-58a. The opinion of the district court denying Zioness Movement judgment as a matter of law, a new trial, and an amended

judgment is reported at 746 F.Supp.3d 125 (S.D.N.Y. Aug. 22, 2024). Pet. App. 34a-59a.

JURISDICTION

The judgment of the court of appeals was entered on August 13, 2025. The court of appeals denied a timely petition for rehearing and rehearing en banc on September 22, 2025. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

15 U.S.C. § 1052 (d) (Section 2 of the Lanham Act), provides:

> No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it—
>
> **(d)** Consists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive: *Provided,* That if the Director determines that confusion, mistake, or deception is not likely to result from the continued use by more than one person of the same or similar marks under conditions and

> limitations as to the mode or place of use of the marks or the goods on or in connection with which such marks are used, concurrent registrations may be issued to such persons when they have become entitled to use such marks as a result of their concurrent lawful use in commerce prior to (1) the earliest of the filing dates of the applications pending or of any registration issued under this chapter; (2) July 5, 1947, in the case of registrations previously issued under the Act of March 3, 1881, or February 20, 1905, and continuing in full force and effect on that date; or (3) July 5, 1947, in the case of applications filed under the Act of February 20, 1905, and registered after July 5, 1947. Use prior to the filing date of any pending application or a registration shall not be required when the owner of such application or registration consents to the grant of a concurrent registration to the applicant. Concurrent registrations may also be issued by the Director when a court of competent jurisdiction has finally determined that more than one person is entitled to use the same or similar marks in commerce. In issuing concurrent registrations, the Director shall prescribe conditions and limitations as to the mode or place of use of the mark or the goods on or in connection with which such mark is registered to the respective persons.

The text of 15 U.S.C. § 1052(d) is set forth in the Appendix. Pet. App. 59a-62a.

15 U.S.C. § 1054 (Cancellation of registration)

> A petition to cancel a registration of a mark, stating the grounds relied upon, may, upon payment of the prescribed fee, be filed as follows by any person who believes that he is or will be damaged, including as a result of a likelihood of dilution by blurring or dilution by tarnishment under section 1125(c) of this title, by the registration of a mark on the principal register established by this chapter, or under the Act of March 3, 1881, or the Act of February 20, 1905:
>
> **(5)** At any time in the case of a certification mark on the ground that the registrant (A) does not control, or is not able legitimately to exercise control over, the use of such mark, or (B) engages in the production or marketing of any goods or services to which the certification mark is applied, or (C) permits the use of the certification mark for purposes other than to certify, or (D) discriminately refuses to certify or to continue to certify the goods or services of any person who maintains the standards or conditions which such mark certifies.

The text of 15 U.S.C. § 1054 is set forth in the Appendix. Pet. App. 63a.

STATEMENT

A. Legal Background

This Court recently reaffirmed "what a trademark is and does," confirming that a trademark is "any word,

name, symbol, or device, or any combination thereof" that is used "to identify and distinguish" and "to indicate the source." *Jack Daniel's Props., Inc. v. VIP Prods. LLC*, 599 U.S. 140, 145 (2023); 15 U.S.C. § 1127.

Where, as here, two entities using the same mark seek declaration of exclusive ownership of the same mark, the parties effectively concede that use of the mark by both entities is likely to cause consumer confusion. *See Tuccillo v. Geisha NYC, LLC*, 635 F. Supp. 2d 227, 244–45 (E.D.N.Y. 2009).

Concurrent registrations of identical marks may be permitted under certain limited situations, where conditions or limitations as to mode or place of use are required, so that the concurrent use does not cause consumer confusion as to source. 15 U.S.C. § 1052(d).

Joint ownership is disfavored in the trademark context because it leads to consumer confusion. 2 McCarthy on Trademarks & Unfair Competition § 16:40 (4th ed.); *see Yellowbook Inc. v. Brandeberry*, 708 F.3d 837, 845 (6th Cir. 2013) (noting that "trademarks derive their value from exclusively identifying a particular business"). The public is not served by any decision—jury verdict or judicial decree—that permits competitors to co-own a trademark. *See Bell v. Streetwise Recs., Ltd.*, 761 F.2d 67, 76 (1st Cir. 1985) (concurrence), citing 1 J. McCarthy, Trademarks and Unfair Competition § 16:14 at 752–54 (1984).

A party does not waive any legal arguments by failing to object to the verdict sheet where that party has objected to the jury instructions. *See Denny v. Ford Motor Co.*, 42 F.3d 106, 111 (2d Cir. 1994) (holding that a "party who has timely objected to jury instructions

is not obliged to renew its objection after the jury has rendered a verdict consistent with those instructions"); *see Rodick v. City of Schenectady*, 1 F.3d 1341, 1348 (2d Cir. 1993) (rejecting argument that appellant had waived its right to challenge the verdict and judgment where the "the verdict is so contrary to basic concepts of respondeat superior that it would be a miscarriage of justice to let it stand, and because the judgment entered on the verdict was inconsistent with New York state law of joint and several liability").

B. Factual Background and Proceedings Below

This case presents an important question under the Lanham Act: under what conditions can two competing entities both use the same trademark in the same market? Petitioner Zioness Movement is the registered owner of the word mark Zioness® and has continuously used the mark in commerce since its founder began to use the mark in August 2017. The Lawfare Project claims ownership over the mark on the basis that Amanda Berman, the predecessor in interest to and founder of Zioness Movement, began to use the word Zioness while still employed by The Lawfare Project. The decision below—splitting the proverbial baby between the two entities and awarding ownership of the Zioness trademark to both entities—ignores what this Court has called the "bête noire of trademark law": confusion as to source.[1]

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1. *Jack Daniel's Props., Inc. v. VIP Prods. LLC*, 599 U.S. 140, 147 (2023) ("Confusion as to source is the bête noire of trademark law—the thing that stands directly opposed to the law's twin goals of facilitating consumers' choice and protecting producers' good will.").

In August 2017, Ms. Berman worked as the Director of Legal Affairs at The Lawfare Project, Inc. pursuant to a written agreement that allowed her to take on outside work. During that month, Ms. Berman and Brooke Goldstein, the Executive Director and Founder of The Lawfare Project, attended a march in Chicago, labelling themselves and their supporters "Zioness." After the march, Ms. Berman continued to grow the "Zioness" movement. Despite having loaned Ms. Berman limited initial startup costs, Ms. Goldstein made it clear to Ms. Berman that The Lawfare Project would not support the Zioness movement financially and Ms. Berman would need to establish a separate nonprofit dedicated to it and raise separate funds to support it if Ms. Berman intended to continue to grow the movement. Ms. Berman did so, founding Zioness Movement, Inc. in February 2018, establishing a separate bank account, a separate board of directors, a separate strategic plan, and separate bylaws and incorporation documents. Soon thereafter, Ms. Berman, together with the Zioness Movement's board of directors, arranged for Zioness Movement, Inc. to register for trademark protection of the name Zioness.

By the end of 2018, Ms. Berman gave notice that she was leaving The Lawfare Project to work on Zioness Movement full time. Ms. Goldstein took her out to dinner to celebrate. But later, after the Zioness trademark was registered to Zioness Movement, the Lawfare Project filed a petition to cancel the Zioness trademark with the USPTO by filing a claim with the U.S. Trademark Trial and Appeal Board, claiming ownership and fraud on the U.S. Patent & Trademark Office ("USPTO"). Zioness Movement subsequently filed a civil court action seeking, among other things, a declaratory judgment of ownership.

The Lawfare Project counterclaimed, also asserting ownership, and contending that Ms. Berman committed fraud on the USPTO by claiming first use in August 2017.

The district court instructed the jury that Ms. Berman's use of the Zioness mark while she was an employee of The Lawfare Project could be considered use by The Lawfare Project. The district court refused requests by Zioness Movement, Inc. at trial to instruct the jury that, to find that one of the parties was the owner of the Zioness mark, the mark must be used as a source identifier of that party, that party's use of the mark must be continuous, and a licensor can only retain ownership of the mark if the license contains enforceable restrictions.

The district court presented the parties with its own verdict sheet that included the options for ownership of the trademark as Zioness Movement, The Lawfare Project, or both. The verdict sheet also asked whether Amanda Berman committed fraud on the USPTO.

The jury determined that both Zioness Movement and The Lawfare Project owned the trademark and that Amanda Berman had not committed fraud on the USPTO.

The court of appeals affirmed the district court on this issue, ruling that co-ownership of the Zioness trademark is permissible under the Lanham Act, refusing to address the issue of the likelihood of consumer confusion, and deciding that Zioness Movement had waived its right to contest joint ownership by not objecting to the verdict sheet.

The court of appeals denied rehearing and rehearing en banc without noted dissent. Pet. App. 57a.

REASONS FOR GRANTING THE PETITION

A. The questions presented are recurring, important, and squarely presented.

1. Federal courts are often tasked with determining "joint ownership" issues and the statutory framework provides conflicting guidance.

Joint ownership is not specifically provided for in the Lanham Act. The Lanham Act provides under what conditions the Director may permit concurrent registration, which is strictly limited, but also provides for "concurrent registration" when a court of competent jurisdiction determines that more than one person or entity is entitled to use the mark. 15 U.S.C. § 1052(d).

The leading treatise in this area explains why joint ownership of trademarks is disfavored under the law and why trademark rights differ from other property rights. *See* 2 McCarthy on Trademarks and Unfair Competition § 16:40, *Difficulties in joint ownership of a trademark*, (5th ed.) ("When there is a dispute over who owns a trademark, the worst possible solution is to allow mark ownership to be shared among the warring parties. Fragmentation of ownership is to be avoided, both by contract and by judicial fiat.").

Most of the cases addressing when more than one person or entity is entitled to use a mark involve fact

patterns where the mark was originally used as part of a shared enterprise—such as a musical group—and disputes later arise as to who can continue to use the mark when the joint users no longer want to use the mark together. *See e.g.*, *Reed v. Marshall*, 699 F. Supp. 3d 563, 577 (S.D. Tex. 2023) (collecting cases and holding that the co-owner of a musical group's mark cannot maintain a claim against a third-party brought in by the other members of the group to perform under the mark). Because of this context, those cases generally fail to squarely address what this Court has deemed the "bête noire" of trademark law: confusion as to source.

Joint ownership of trademarks is an important area where the Court can and should provide clear guidance to the lower courts and consumers. For example, can more than one person, who admits that its uses of the same mark confuses consumers, co-own that mark, and if so, under what circumstances?

This case squarely presents the opportunity to address this issue, where two competing entities, that have essentially admitted that their uses of the Zioness mark confuse consumers, have been awarded co-ownership of the mark by the lower courts. The Court should address under what conditions a district court may effectively impose an outcome that was not sought by either party. The Court should delineate clear parameters to determine how and when joint ownership of a trademark outside of that specific context can be created, what conduct constitutes continuous use to maintain joint ownership of a trademark, and when and how co-ownership rights cease. In other words, the Court should explain what needs to be shown for a court of competent jurisdiction to

determine that more than one person or entity is entitled to use a mark.

2. The question of whether a purely legal issue needs to be objected to at trial to preserve it for appeal is also a recurring, important issue that is squarely presented in this appeal.

This case also presents the opportunity for the Court to clarify that objections to legal instructions provided to the jury preserve arguments on appeal, including arguments about the contents of a verdict sheet even if the verdict sheet was not objected to. Such clarification will align with this Court's recent holding in *Dupree v. Younger* that legal issues determined at summary judgment are preserved for appeal even if they are not included in a post-trial motion. *Dupree v. Younger*, 598 U.S. 729, 736 (2023). The Court's reasoning in *Dupree* was that "[f]rom the reviewing court's perspective, there is no benefit to having a district court reexamine a purely legal issue after trial, because nothing at trial will have given the district court any reason to question its prior analysis." That same reasoning applies to jury instructions and verdict sheets: This Court should apply the *Dupree* reasoning and hold that a party has not waived its right to appeal an adverse verdict where the party does not object to a proposed response on a verdict form ***so long as*** the party has objected to the jury instructions that led to the inclusion of the proposed response on the verdict sheet.

Petitioner notes that the Court's application of *Dupree* to this legal question would also align with the circuit law of the second circuit court of appeals, which the court of appeals failed to follow below. In a prior

decision, the second circuit court of appeals held that a "party who has timely objected to jury instructions is not obliged to renew its objection after the jury has rendered a verdict consistent with those instructions." *Denny v. Ford Motor Co.*, 42 F.3d 106, 111 (2d Cir. 1994); *see Rodick v. City of Schenectady*, 1 F.3d 1341, 1348 (2d Cir. 1993) (rejecting argument that appellant had waived its right to challenge the verdict and judgment where the "the verdict is so contrary to basic concepts of respondeat superior that it would be a miscarriage of justice to let it stand, and because the judgment entered on the verdict was inconsistent with New York state law of joint and several liability").

This is also an opportunity for the Court to resolve a split amongst the circuits concerning whether an objection that has been raised and ruled upon must be restated. The second, third, fourth, fifth, sixth, eighth, ninth, tenth, eleventh, and DC circuit courts of appeal permit limited exceptions to the strict rule requiring restatement of objections: "first, where a party has made its position clear to the court previously and further objection would be futile; and second, where it is necessary to 'correct a fundamental error or prevent a miscarriage of justice.'" *Teel v. Lozada*, 99 F.4th 1273, 1281 (11th Cir. 2024), quoting *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1018 (11th Cir. 2004) (some internal quotation marks omitted). The reasoning, for these circuits, is the same as this Court's reasoning in *Dupree*: "it is difficult to contemplate what objective would be served by requiring counsel to restate an objection that had already been raised and ruled upon." *Smith v. Borough of Wilkinsburg*, 147 F.3d 272, 277 (3d Cir. 1998).

But the first and seventh circuit courts of appeal adhere to a stricter, "ironclad rule" that unless specifically objected to and restated, objections are waived: "'Silence after instructions, including instructions on the form of the verdict to be returned by the jury, typically constitutes a waiver of any objections.'" *Wilson v. Mar. Overseas Corp.*, 150 F.3d 1, 6 (1st Cir. 1998), quoting *Putnam Resources v. Pateman,* 958 F.2d 448, 456 (1st Cir. 1992); *see also Chestnut v. Hall*, 284 F.3d 816, 819 (7th Cir. 2002) (rejecting argument that objections to similar jury instructions that were raised and ruled upon operated to preserve unmade objections to instructions).

This Court can harmonize the circuits' approaches to this subject with its recent decision in *Dupree.*

3. The Court has the opportunity to explain clearly to lower courts that federal courts must apply the principles of source identification and continuous use when determining ownership of a trademark.

The district court failed to instruct the jury that ownership of a mark requires that a mark be used in a continuous manner that identifies the user as the source of the mark. Instead of correcting this clear error, the court of appeals summarily upheld the erroneous jury verdict that resulted from the wrong instructions being provided to the jury.

Without correcting this, the Court is inviting a fundamental change in how ownership of a trademark

is established in the lower courts and at the USPTO. This Court can clearly set out what the USPTO should consider and what legal instructions must be provided to juries when they are charged with important questions of determining who or what entity owns a registered trademark.

B. The decision below is egregiously wrong.

The courts below confused "concurrent ownership," which is permitted under the Lanham Act with specific guardrails, with "co-ownership" of a trademark. The court of appeals said that, "[c]onsistent with the availability of co-ownership, the Lanham Act itself provides that "[c]oncurrent registrations may ... be issued ... when a court of competent jurisdiction has finally determined that more than one person is entitled to use the same or similar marks in commerce." *Zioness Movement, Inc. v. Lawfare Project, Inc.*, No. 24-974-CV, 2025 WL 2327522, at *3 (2d Cir. Aug. 13, 2025), citing 15 U.S.C. § 1052(d).

But concurrent ownership is not what the jury was instructed on and not what the jury verdict created. And in any event, even when a court of competent jurisdiction determines that more than one person is ***entitled to use*** the same or similar marks in commerce, in issuing the concurrent registrations, "the Director ***shall prescribe conditions and limitations as to the mode or place of use*** of the mark or the goods on or in connection with which such mark is registered to the respective persons." 15 U.S.C. § 1052 (emphasis added). This is because the purpose of a trademark is to be a source identifier and that purpose is defeated if entities that compete in the

same market are permitted to use the same mark. No such conditions or limitations were prescribed here.

The Lanham Act—unless a competent court grants concurrent registration—only permits concurrent registrations where the "Director determines that ***confusion, mistake, or deception is not likely to result*** from the continued use by more than one person of the same or similar marks under conditions and limitations as to the mode or place of use of the marks or the goods on or in connection with which such marks are used" and the concurrent use in commerce is prior to "(1) the earliest of the filing dates of the applications pending or of any registration issued under this chapter; (2) July 5, 1947, in the case of registrations previously issued under the Act of March 3, 1881, or February 20, 1905, and continuing in full force and effect on that date; or (3) July 5, 1947, in the case of applications filed under the Act of February 20, 1905, and registered after July 5, 1947," except that "Use prior to the filing date of any pending application or a registration shall not be required when the owner of such application or registration consents to the grant of a concurrent registration to the applicant." 15 U.S.C. § 1052 (emphasis added).

Here, the parties, in crossclaiming for exclusive ownership, admitted that their concurrent uses cause consumer confusion. Allowing the jury verdict of co-ownership to stand is an egregious wrong that will change how competitors act in commerce.

Further, the courts below erred in finding that Zioness Movement waived its ability to object to the

judgment because it did not object to the proposed verdict form. The court of appeals relied on *Lavoie v. Pac. Press & Shear Co.*, 975 F.2d 48, 55 (2d Cir. 1992) in support of its contention that the failure to object to the proposed verdict form was a waiver, but the *Lavoie* case involved a failure to object to a jury instruction. The trial transcript confirms that Zioness Movement objected to all of the jury instructions that could support the finding of joint ownership.

And, the court of appeals applied the wrong standard of review, relying on *Jarvis v. Ford Motor Co.*, 283 F.3d 33, 62 (2d Cir. 2002), and asserting that it could only review a jury instruction for fundamental error. But the correct standard of review is *de novo* where, as here, the jury instructions were objected to at trial. *Rasanen v. Doe*, 723 F.3d 325, 331–32 (2d Cir. 2013) ("we review challenges to jury instructions in civil cases *de novo*, and will grant a new trial if we find an error that is not harmless.") (citations omitted). And where, as here, the error was not harmless, a new trial should have been granted.

Zioness Movement objected to the jury instructions and the instructions provided failed to provide the jury with adequate legal guidance. *See Rasanen v. Doe*, 723 F.3d 325, 334–35 (2d Cir. 2013) ("An error that 'deprive[s] the jury of adequate legal guidance to reach a rational decision' on a case's fundamental issue constitutes plain error.").

* * *

Absent this Court's review, the district court's decision, affirmed by the court of appeals for the second

circuit will fundamentally change how ownership of a trademark is established. The court of appeals found "sufficient evidence" of co-ownership where there was some evidence that The Lawfare Project was involved in the creation of the mark and that Ms. Berman worked at The Lawfare Project during the transition period when she incorporated Zioness Movement and Zioness Movement, Inc. registered the mark. But under traditional principles of trademark law, trademark rights are established by continuous and intentional use, not creation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED AUGUST 13, 2025

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

No. 24-974-cv

ZIONESS MOVEMENT, INC.,

Plaintiff-Counter-Defendant-Appellant,

v.

THE LAWFARE PROJECT, INC.,

Defendant-Third-Party-Plaintiff-Appellee,

v.

AMANDA BERMAN,

Third-Party-Defendant-Appellant.

Filed August 13, 2025

Present: EUNICE C. LEE,
SARAH A. L. MERRIAM,
MARIA ARAÚJO KAHN,
Circuit Judges.

Appendix A

SUMMARY ORDER

Appeal from a March 27, 2024 judgment and various post-trial orders of the United States District Court for the Southern District of New York (Hellerstein, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED** in part and **VACATED** and **REMANDED** in part.

Zioness Movement, Inc. ("ZMI") and its founder Amanda Berman (collectively, "Appellants") appeal from a jury verdict finding that ZMI and The Lawfare Project, Inc. ("LPI" or "Appellee") are co-owners of the ZIONESS trademark; the district court's order denying Appellants' post-trial motions to set aside the verdict or for a new trial; the district court's order limiting the monetary sanction for LPI's discovery abuses to $20,000; and the district court's order denying Appellants' motion for attorneys' fees under the Copyright Act, 17 U.S.C. § 505.

In August 2017, LPI, a nonprofit organization "whose primary mission is protecting Jewish peoples' civil rights," began a new initiative aiming to "combat anti-Zionist sentiment permeating the progressive political movement." Appellee's Br. at 5. In order to protect its conservative reputation and avoid offending its established donor base, LPI sought to create some distance between the new initiative and its own brand. Accordingly, LPI

developed the Zioness movement,[1] using its own funds for the creation of the ZIONESS trademark (the "Mark"), as well as a corresponding logo; purchasing a website domain and designing a website; creating merchandise bearing the Mark; and coordinating event appearances using the name "Zioness." Because LPI's founder and executive director, Emily Goldstein, was a well-known Jewish conservative, the Zioness movement was promoted as a new movement spearheaded by Berman, then LPI's Director of Legal Affairs.

Over the next few months, the distance between the Zioness movement and LPI grew. In November 2017, LPI ceased providing financial support to Zioness. In February 2018, Berman, while still employed at LPI, formalized the Zioness movement by forming the nonprofit entity, ZMI, which she incorporated using her own funds. In April 2018, ZMI applied to register "ZIONESS" as a trademark with the United States Patent and Trademark Office ("USPTO"). At the end of 2018, while the trademark application was pending, Berman left LPI to run ZMI fulltime. And finally, on May 5, 2020, ZIONESS was registered as a trademark with ZMI listed as the sole owner.

In August 2020, LPI filed a petition with the USPTO, seeking to cancel the ZIONESS trademark. In response, ZMI filed this suit, asserting trademark infringement claims and seeking a declaratory judgment that ZMI is

1. We use the phrase "Zioness movement" to refer to the initial, pre-incorporation version of Zioness Movement, Inc.

the sole owner of the Mark. LPI countersued, seeking a declaratory judgment that LPI owned the Mark and asserting copyright infringement claims against ZMI and Berman. After an eight-day trial, a jury found, *inter alia*, that both ZMI and LPI were owners of the ZIONESS Mark.

We assume the parties' familiarity with the remaining underlying facts, the procedural history, and the issues on appeal.

* * *

On appeal, ZMI primarily argues that the jury's verdict must be set aside because it is fundamentally incompatible with basic principles of trademark law. Relatedly, ZMI argues that the district court erred by denying its post-trial motions to set aside the verdict, for a new trial, and to amend the judgment. Additionally, Appellants argue that the district court erred by limiting the monetary sanction against LPI for its discovery abuses to $20,000. Finally, Appellants argue that the district court erred in finding that ZMI and Berman were not prevailing parties eligible for attorneys' fees under the Copyright Act, 17 U.S.C. § 505. We address each argument in turn.

I. Challenges to the Verdict

ZMI generally challenges the jury's verdict of co-ownership of the Mark in two ways. First, ZMI argues that the verdict "is at odds with the basic principles of

trademark law and must be vacated." Appellants' Br. at 28. In its view, the touchstone of trademark law is consumer confusion, and joint ownership is disfavored because parties and customers are best served by exclusive ownership of a trademark by a single owner, especially where the possible co-owners are competitors. Second, ZMI argues that the verdict of co-ownership should be set aside because "[t]here was no evidence presented at trial that both Zioness Movement and LPI co-owned the trademark." Appellants' Br. At 28.

Before the district court, these challenges took various forms. At the close of evidence, ZMI moved for judgment as a matter of law under Federal Rule of Civil Procedure 50(a), arguing that there was insufficient evidence introduced at trial to establish LPI's use or ownership of the Mark. ZMI renewed that motion under Federal Rule of Civil Procedure 50(b) after the verdict was returned, arguing that there was insufficient trial evidence to support the verdict of co-ownership. ZMI additionally moved for a new trial under Federal Rule of Civil Procedure 59(a), arguing that various erroneous evidentiary rulings and jury instructions led the jury to a verdict inconsistent with trademark law. Finally, ZMI moved to alter or amend the judgment under Federal Rule of Civil Procedure 59(e), arguing that the verdict of co-ownership was "both inconsistent and legally unsupportable." Appellants' Br. at 43.

Appellants now appeal the district court's denial of each of these motions.

Appendix A

A. Rule 50 Motions

The district court denied ZMI's Rule 50 motions, explaining that there was ample evidence to support a verdict of co-ownership, including, *inter alia*, the resources expended by LPI in developing the Mark, Goldstein's role in developing messaging for the Zioness movement, and Berman's role in incorporating ZMI and filing the USPTO application. Yet, ZMI maintains on appeal that "[t]here was no evidence presented at trial that both Zioness Movement and LPI co-owned the trademark," since co-ownership was "a result that neither party sought and neither party argued for." Appellants' Br. at 28. We disagree.

"We review a district court's denial of a motion for judgment as a matter of law *de novo*." *Manganiello v. City of New York*, 612 F.3d 149, 161 (2d Cir. 2010). Here, the district court correctly held that there was sufficient evidence to support the jury's verdict that both ZMI and LPI own the ZIONESS trademark. As described above, the evidence showed that LPI spearheaded the creation of the Mark, including paying for its initial design and development, but Berman and ZMI eventually took control of the Mark and registered it with the USPTO. Complicating the record, much of this transition took place while Berman was running ZMI but still employed full-time by LPI. In short, there was sufficient evidence at trial to support a verdict of joint ownership. Because the jury's verdict was not "the result of sheer surmise and conjecture," or otherwise improper, we affirm the district court's denial of ZMI's Rule 50 motions. *Vangas*

v. Montefiore Med. Ctr., 823 F.3d 174, 180 (2d Cir. 2016) (quoting *Stampf v. Long Island R.R. Co.*, 761 F.3d 192, 197 (2d Cir. 2014)).

B. Rule 59 Motions

ZMI's arguments in support of its Rule 59 motions, both below and on appeal, rely on its contention that the jury's verdict of co-ownership was contrary to fundamental principles of trademark law.

As a preliminary matter, this argument has been waived. First, ZMI failed to timely object to the verdict sheet, which explicitly contemplated a potential verdict of co-ownership. *See* App'x at 2478 (question 1 on the verdict sheet asked, "Who owns the ZIONESS trademark?" and provided three potential answers: ZMI, LPI, or "[b]oth"); *see also* App'x at 3557 (at the charge conference, ZMI's counsel stated that "[a]t this time, the plaintiff doesn't have any comments to the verdict sheet"). "Failure to object to a jury instruction . . . prior to the jury retiring results in a waiver of that objection." *Lavoie v. Pac. Press & Shear Co.*, 975 F.2d 48, 55 (2d Cir. 1992). Once waived, this Court may review jury instructions and verdict sheets only for "fundamental" error. *Jarvis v. Ford Motor Co.*, 283 F.3d 33, 62 (2d Cir. 2002). Second, ZMI failed to object to the jury's verdict of co-ownership before the jury was excused. "It is well established that a party waives its objection to any inconsistency in a jury verdict if it fails to object to the verdict prior to the excusing of the jury." *Kosmynka v. Polaris Indus., Inc.*, 462 F.3d 74, 83 (2d Cir. 2006).

ZMI cannot establish the "fundamental error" required to reverse after its waiver of any objection to the verdict form permitting a finding of co-ownership. *Jarvis*, 283 F.3d at 62. "An error is fundamental under this standard only if it is so serious and flagrant that it goes to the very integrity of the trial." *Shade v. Housing Auth. of City of New Haven*, 251 F.3d 307, 313 (2d Cir. 2001) (internal quotation marks omitted). There is no fundamental error because, as ZMI itself acknowledges in its reply brief, "co-ownership can exist" in trademark law. Reply Br. at 4. Consistent with the availability of co-ownership, the Lanham Act itself provides that "[c]oncurrent registrations may . . . be issued . . . when a court of competent jurisdiction has finally determined that more than one person is entitled to use the same or similar marks in commerce." 15 U.S.C. § 1052(d); *see also* App'x at 3905-06 ("[C]o-ownership can exist from the very, very beginning . . . indeed the Lanham Act has a specific procedure for concurrent use of a trademark registration" (citing § 1052(d))). There is therefore nothing inherently improper—much less flagrant—about the jury's conclusion, as invited by the verdict form, that both ZMI and LPI own the Mark.

On appeal, ZMI further argues that the district court should have granted its motion for a new trial under Rule 59(a) because its "refusal to instruct the jury" on certain legal principles led to an improper verdict of co-ownership. Appellants' Br. at 35. "A trial court should not grant a motion for a new trial unless it is convinced that the jury reached a seriously erroneous result or that the verdict is a miscarriage of justice." *Ali v. Kipp*, 891 F.3d 59, 64

(2d Cir. 2018) (internal quotation marks omitted and alterations adopted). "We review a district court's denial of a Rule 59 motion for a new trial for abuse of discretion." *Id.* We discern no such abuse of discretion or miscarriage of justice here.

As for ZMI's Rule 59(e) motion, a district court may grant such a motion only where the movant demonstrates "an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Virgin Atl. Airways, Ltd. v. Nat'l Mediation Bd.*, 956 F.2d 1245, 1255 (2d Cir. 1992) (internal quotation marks omitted). Contrary to its arguments, ZMI has not demonstrated any clear error or manifest injustice related to the jury's verdict which would warrant altering or amending the judgment.

We therefore affirm the district court's denial of ZMI's Rule 59 motions.

II. Discovery Sanction

During discovery, the district court found that ZMI was entitled to sanctions for LPI's delayed production of certain witnesses and records. These monetary sanctions were to equal "one-half of [ZMI's] expenses incurred in the period of LPI's discovery delays." App'x at 1730. After trial, however, the district court found that ZMI's claim of $70,290 in expenses attributable to LPI's discovery abuse was "not credible." *Id.* at 4661. Accordingly, in the absence of proof of ZMI's expenses, the district court exercised its discretion to limit the sanction to $20,000.

On appeal, ZMI argues that the district court erred by limiting the monetary sanctions to $20,000. We disagree.

"We review 'all aspects of a District Court's decision to impose sanctions for abuse of discretion.'" *S. New England Tel. Co. v. Glob. NAPs Inc.*, 624 F.3d 123, 143 (2d Cir. 2010) (quoting *United States v. Seltzer*, 227 F.3d 36, 39 (2d Cir. 2000)). "The question, of course, is not whether this Court . . . would as an original matter have [applied the sanction]; it is whether the District Court abused its discretion in so doing." *Nat'l Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 642, 96 S. Ct. 2778, 49 L. Ed. 2d 747 (1976) (per curiam).

ZMI insists that the district court "provided no reason for [its] decision to ignore [its] prior determination" to award ZMI half of its expenses incurred in the period of LPI's discovery delays, and to award $20,000 instead. Appellants' Reply Br. at 21. In fact, the district court's ultimate award was based on its judgment that ZMI's claimed expenses were not believable—in part, because ZMI appeared to have inflated its billing rate from a prior submission in order to justify its request for a higher sanction award. ZMI has not identified any abuse of discretion in the district court's assessment, and we discern none. We therefore affirm the district court's discovery sanction award of $20,000.

III. Attorneys' Fees

ZMI and Berman also challenge the district court's decision to deny them attorneys' fees under Section 505 of the Copyright Act. That provision states:

> In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof. Except as otherwise provided by this title, the court may also award a reasonable attorney's fee to the prevailing party as part of the costs.

17 U.S.C. § 505.

"A prevailing party in a fee-shifting statute is one who has favorably effected a material alteration of the legal relationship of the parties by court order." *Manhattan Rev. LLC v. Yun*, 919 F.3d 149, 152 (2d Cir. 2019) (per curiam) (internal quotation marks omitted); *see also Roberson v. Giuliani*, 346 F.3d 75, 79 (2d Cir. 2003). Once a court has determined which is the prevailing party in a copyright case, it may exercise its discretion in determining whether to award attorneys' fees. *See Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534, 114 S. Ct. 1023, 127 L. Ed. 2d 455 (1994) ("[A]ttorney's fees are to be awarded to prevailing parties only as a matter of the court's discretion."). The Supreme Court has explained that, while "[t]here is no precise rule or formula for making [attorneys' fees] determinations," courts should use "equitable discretion" and consider "frivolousness, motivation, objective unreasonableness (both in the factual and in the legal components of the case) and the need in particular circumstances to advance considerations of compensation and deterrence." *Id.* at 534 & n.19 (internal quotation marks omitted). These

nonexclusive factors have become known as the *Fogerty* factors.

"The standard of review of an award of attorney's fees is highly deferential to the district court." *Alderman v. Pan Am World Airways*, 169 F.3d 99, 102 (2d Cir. 1999) (internal quotation marks omitted). "Attorney's fees must be reasonable in terms of the circumstances of the particular case, and the district court's determination will be reversed on appeal only for an abuse of discretion." *Id.* However, "[a] district court necessarily abuses its discretion if its conclusions are based on an erroneous determination of law," *Revson v. Cinque & Cinque, P.C.*, 221 F.3d 71, 78 (2d Cir. 2000), and "[w]hether a litigant qualifies as a 'prevailing party' constitutes a question of law warranting *de novo* review," *Manhattan Rev. LLC*, 919 F.3d at 152.

Although LPI dismissed its copyright claims with prejudice before trial, the district court nonetheless denied Appellants' motion for attorneys' fees based on its assessment that ZMI "was not the prevailing party on the issues of this case: who, between LPI and ZMI, owned the trademark Zioness, and who infringed." App'x at 4661. The district court further concluded that Berman "was dropped from the case before trial" and therefore "was not . . . the prevailing party." *Id.* Based on these findings, the district court found that Appellants were not eligible to recover fees under § 505.

Appellants argue that the district court erred in its prevailing party analysis. In their view, LPI's voluntary dismissal of its copyright claims with prejudice resulted in "a material alteration of the legal relationship of the parties," *Manhattan Rev. LLC*, 919 F.3d at 152-53 (internal quotation marks omitted), and therefore rendered ZMI and Berman the prevailing parties. Appellants additionally argue that the *Fogerty* factors weigh in favor of awarding them attorneys' fees because LPI's copyright claims were frivolous and asserted in bad faith.

LPI argues that Appellants were not prevailing parties under the Copyright Act because LPI "did not *lose* on its copyright infringement claim," but rather voluntarily withdrew the claim in order "to streamline the issues at trial." Appellee's Br. at 53 (emphasis in original). Moreover, LPI insists that its "copyright infringement claims were objectively reasonable"—noting that they survived a motion to dismiss—and therefore would not have warranted an award of fees under the *Fogerty* factors. *Id.* at 55. We disagree.

In the context of the prevailing party analysis, we have held that a plaintiff's "voluntary dismissal of an action with prejudice works" a material alteration of the legal relationship of the parties "because it constitutes an adjudication on the merits for purposes of *res judicata*, and any action so dismissed could not be brought again." *Carter v. Inc. Vill. of Ocean Beach*, 759 F.3d 159, 165 (2d

Cir. 2014) (internal quotation marks and citation omitted); *see also Penshurst Trading Inc. v. Zodax L.P.*, 652 F. App'x 10, 11 (2d Cir. 2016) ("Zodax was the prevailing party in light of Penshurst's voluntary dismissal of this action with prejudice."). In other words, because LPI voluntarily dismissed its copyright claims with prejudice, ZMI and Berman were the prevailing parties and were therefore eligible for attorneys' fees under § 505.

Because the district court's denial of fees appears to be based on its erroneous conclusion that ZMI and Berman were not prevailing parties under the Copyright Act, the denial constituted an abuse of discretion. *See Matthew Bender & Co. v. W. Pub. Co.*, 240 F.3d 116, 121 (2d Cir. 2001) ("[A] district court necessarily abuses its discretion if its conclusions are based on an erroneous determination of law, or on a clearly erroneous assessment of the evidence." (internal quotation marks and citations omitted)).

We therefore vacate the district court's order denying attorneys' fees under the Copyright Act and remand for the district court to consider in the first instance whether a fee award is appropriate under *Fogerty*.

* * *

We have considered Appellants' remaining arguments and find them to be without merit. Accordingly, we

AFFIRM in part and **VACATE** and **REMAND** in part the judgment of the district court.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk of Court

/s/ Catherine O'Hagan Wolfe

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED OCTOBER 15, 2025

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

Docket No. 24-974

ZIONESS MOVEMENT, INC.,

Plaintiff-Counter-Defendant-Appellant,

v.

THE LAWFARE PROJECT, INC.,

Defendant-Third-Party-Plaintiff-Appellee,

v.

AMANDA BERMAN,

Third-Party-Defendant-Appellant.

Filed October 15, 2025

Before: Eunice C. Lee,
Sarah A. L. Merriam,
Maria Araújo Kahn,
Circuit Judges.

Appendix B

ORDER

Appellants move, pursuant to Federal Rule of Appellate Procedure 39(a)(4), for an order awarding costs to Appellants.

IT IS HEREBY ORDERED that the motion is granted in part. Appellants are awarded costs in the amount of $3,223.65.

For the Court:
Catherine O'Hagan Wolfe,
Clerk of Court

s/ Catherine O'Hagan Wolfe

APPENDIX C — OPINION AND AMENDED ORDER OF THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK, FILED AUGUST 22, 2024

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

21 Civ. 7429 (AKH)

ZIONESS MOVEMENT INC.,

Plaintiff/Counterclaim Defendant,

-against-

THE LAWFARE PROJECT, INC.,

Defendant/Counterclaim Plaintiff.

Filed August 22, 2024

OPINION AND AMENDED ORDER DENYING PLAINTIFF'S POST-TRIAL MOTIONS

ALVIN K. HELLERSTEIN, U.S.D.J.:

After an eight-day trial in March 2024, the jury issued a verdict, answering questions on a form agreed to by both parties, that both Plaintiff Zioness Movement, Inc. ("ZMI") and Defendant The Lawfare Project, Inc. ("LPI") owned the ZIONESS trademark, and that LPI had failed to prove by clear and convincing evidence that ZMI had committed fraud on the U.S. Patent and Trademark Office

("USPTO") by registering the trademark as its own. *See* ECF No. 198. Judgment was entered on March 27, 2024. *See* ECF No. 201.

ZMI moves for judgment as a matter of law under Fed. R. Civ. P. 50(b), for a new trial pursuant to Fed. R. Civ. P. 59(a), and for an amended judgment pursuant to Fed. R. Civ. P. 59(e). For the reasons that follow, ZMI's motions are denied.

BACKGROUND

The evidence at trial showed that "Zioness" was coined by LPI's counsel, at the instigation of Brooke Goldstein, the founder and executive director of LPI, and Amanda Berman, then the director of legal affairs at LPI, in August 2017. Goldstein and Berman planned to use Zioness to promote Jewish American participation in a feminist march in Chicago scheduled for August 12, 2017, that had advertised plans to exclude Jewish organizations, ostensibly because of their identification with Israel.

Goldstein founded LPI as a non-profit corporation in 2011 to defend against the marginalization of Jewish people and combat antisemitism through litigation and investigations. Goldstein and Berman, with the help of LPI's lawyers and public relations consultant, and at LPI's expense, created ZIONESS to brand the movement they hoped to inspire. Goldstein and Berman were concerned that LPI should not identify itself with the march for fear of disturbing LPI's donor base, and developed ZIONESS as the brand to organize a progressive Zionist feminist

movement. They used LPI's funds, LPI's fundraising channels, and LPI's lawyers and design firm. *See, e.g.*, Trial Tr. at 522:12–523:10. They distributed information about how to join the ZIONESS group for the August 2017 march in Chicago from LPI's email accounts.

In August 2017, Berman stated that ZIONESS was "definitely a project of [LPI]," DX-30, and Goldstein instructed LPI's lawyers to classify ZIONESS as a project of LPI. PX-41. However, rather than Goldstein serving as the face of the operation as she usually did for LPI projects, Berman was designated as the face of the ZIONESS movement, so that the progressive vision for ZIONESS would be distinct from LPI and from Goldstein's personal affiliation with more conservative advocacy. Goldstein testified that she maintained oversight of internal decision-making for ZIONESS in the same manner she had oversight for any other LPI project. In October 2017, LPI's lawyers working on the trademark application considered LPI to be the applicant, though Berman testified that the lawyers were not apprised of her intentions to identify a soon-to-be corporation as the registrant of the trademark. PX-75; Trial Tr. 291:10 298:2.

The evidence also showed that while employed at LPI, Berman worked on Zioness-related work on nights and weekends, that her employment agreement permitted her to take on outside work, and that she used her own funds to incorporate ZMI in February 2018. She filed the ZIONESS trademark registration application under ZMI's name with the USPTO in April 2018. Although Goldstein knew that Berman was involved in promoting

Zioness as a movement separately from LPI, Goldstein testified that she did not know that Berman had filed a trademark registration application under ZMI's name. *See, e.g.*, Trial Tr. 642:5–8. In October 2018, Berman emailed Goldstein that she would reimburse LPI for the costs it had incurred in developing the ZIONESS mark, but never did. *See* DX-85. Around that same time, Berman took issue with Goldstein calling herself a "Zioness." Their angry text exchange shows their positions: "Goldstein: I am a zioness you don't own the word. Berman: Actually I do. Berman: Literally. Goldstein: I don't agree w how you have defined it and I know many other people that agree. Goldstein: No. You own a trademark." Trial Tr. at 651:17–654:8; PX-60.

Berman resigned from LPI as of December 2018, and thereafter ran ZMI full-time. Trial Tr. at 113:6–8. Berman maintains that the trademark never belonged to LPI, that there was no transfer of rights nor a license, and that the trademark was solely ZMI's, reflecting her promotion efforts and ZMI's USPTO registration. Goldstein maintains that LPI is the rightful owner, as Berman promoted ZIONESS while she worked at LPI, using LPI's lawyers and public relations consultant, at LPI's expense, and that LPI protested ZMI's use through cease-and-desist letters, and petitioned the Trademark Trial and Appeal Board ("TTAB") to cancel ZMI's registration of the mark. ZMI then filed this lawsuit.

The jury had to decide which entity owned the ZIONESS trademark: ZMI, LPI, or both. I instructed

the jury that the central issue was who was the first user of the mark:[1]

> From this and from the other evidence you've heard and there is sharp contrast between the testimony of Amanda Berman and Brooke Goldstein as to who owns and whose dime on which (sic) this trademark was first used and continued to be used, and that's an issue of credibility that you will have to decide and I'll give you instructions about that as we go along. You will have to find if Berman's activities with Zioness with the trademark were her own or if they were as an employee of Lawfare, through December 31, 2018, when Berman quit her employment. If Berman's activities were done as an employee, Lawfare should be considered the prior user of the mark, and Berman and the company she formed, ZMI, would not have the right to register or use the mark, except with the permission of Lawfare.
>
> If, on the other hand, Berman, alone or with others, created and used the trademark on her own time and independently of her

1. *Hana Fin., Inc. v. Hana Bank*, 574 U.S. 418, 419, 135 S. Ct. 907, 190 L. Ed. 2d 800 (2015) ("Rights in a trademark are determined by the date of the mark's first use in commerce."); *Cross Commerce Media, Inc. v. Collective, Inc.*, 841 F.3d 155, 167 (2d Cir. 2016) (mark is considered "used in commerce when it is employed" to identify goods and services "sold to consumers in a given market").

> work obligations to Lawfare, she should be considered the prior user, and she, and the company she formed, ZMI, could own, register, and exclusively use the trademark.
>
> As for the period after December 31, 2018, the owner of a trademark can allow another to use it, freely or under conditions, and take back that right at will, unless there is a contract preventing the owner of the trademark from doing so. There was no contract but there was a conflict of testimony between Goldstein and Berman regarding ownership and use. Thus, the paramount issue in this case is who owns the trademark. Lawfare has the burden to prove by a preponderance of evidence that it, not ZMI, is the lawful owner of the trademark.

See Trial Tr. at 854:19–:10.

ZMI made four main objections at the charging conference: first, that the instruction should have stated that Lawfare "should be considered *a* prior user" rather than *the* prior user. (See first quoted paragraph above, end of tenth line).

Second, ZMI requested that I strike the text after "user of the mark" towards the middle of the first paragraph of the above excerpt. Trial Tr. at 824:17–825:4. I declined to do so, in the interest of clarity and delineating the parties' respective positions. Trial Tr. at 825:16.

Third, ZMI requested that I add an instruction to the first paragraph of the above excerpt, that "trademark rights are tied to use in a source identifying way in the market pertinent to the bids." ZMI argued that "if a prior user ceases to use the mark in a source identifying way or intends not to use the mark going forward, that prior user loses its rights to the mark." Trial Tr. 825:9–826:1. I declined this request, stating that the whole issue "has to do with Berman's capacity" as an LPI employee, not the extent to which LPI continued to use the mark. Trial Tr. at 825:22–25. ZMI then requested that I add its request at the end of the above excerpt. Again, I declined, stating that it is "not the issue in the case. Abandonment was not a defense at trial. Whatever Berman did until December 31, 2018, is either attributable or not attributable to her job." Trial Tr. 828:13–15.

Fourth, ZMI objected to "freely or other conditions" in the third paragraph of the above excerpt, arguing that there is "no such thing as a naked license of a trademark." Trial Tr. at 827:22–828:3. I declined to alter the charge. Trial Tr. at 828:7–8.

None of the objections would have made a difference. Both parties accepted the propositions of the central issues of the case, whether ZIONESS belongs to LPI because Berman used and registered the trademark as an employee of LPI, using LPI's resources, or whether Berman used and registered the trademark on her own time and incident to her personal efforts and resources. I told the jury that LPI had to overcome the presumption of ownership afforded to ZMI because of the USPTO

registration and had the burden prove its ownership by a preponderance of the evidence.

I proposed a verdict sheet at the charging conference for the parties' consideration. I gave the jury three options. It read:

1. Who owns the ZIONESS trademark?

a) ZMI: ___

b) LPI: ___

c) both: ___

See ECF No. 198. ZMI did not object. Trial Tr. at 838:1–2 ("At this time, we don't have comments to the verdict sheet, your Honor.").

DISCUSSION

I. Motion for Judgment as a Matter of Law Pursuant to Fed. R. Civ. P. 50(b)

ZMI argues it is entitled to judgment as a matter of law, stating that it is the sole owner of ZIONESS, because there was no evidence at trial showing that LPI was a co-owner.

A court may grant judgment as a matter of law against a party if it finds "that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party

on that issue." Fed. R. Civ. P. 50(b). The motion should be granted only if "viewed in the light most favorable to the nonmoving party, 'the evidence is such that, without weighing the credibility of the witnesses or otherwise considering the weight of evidence, there can be but one conclusion as to the verdict that reasonable men could have reached.'" *Samuels v. Air Transport Local 504*, 992 F.2d 12, 14 (2d Cir. 1993) (internal citation omitted).

I instructed the jury on LPF's burden to prove by a preponderance of the evidence that it, not ZMI, owned ZIONESS and was its first user. The jury was given the option to choose co-ownership without objection by either party, and made that choice. The evidence is sufficient to support that verdict. The jury's verdict pre-supposes that LPI satisfied its burden of proof in support of its claim of ownership, but that Berman had also contributed to the use and development of the trademark, both as an employee of LPI and on her own time, pursuant to the provisions of her employment agreement that allowed her to do her own work.

ZMI fails to show that no reasonable juror could have found that both entities owned ZIONESS, and that both LPI and Berman were its first users. As a matter of law, co-ownership is permissible. *See Mikhlyn v. Bove*, 08cv3367 (CPS), 2008 U.S. Dist. LEXIS 81617, 2008 WL 4610304, at *3 n.12 (E.D.N.Y. Oct. 15, 2008); *Piccari v. GTLO Prods., LLC*, 115 F. Supp. 3d 509 (E.D. Pa. 2015); *Fairway Fox Golfv. Conolty O'Connor NYC LLC*, 111 U.S.P.Q.2d 1302 (T.T.A.B, 2014). The identity of the true owner need not be discernable to the public. *See Authentic*

Apparel Grp., LLC v. United States, 989 F.3d 1008, 1017 (Fed. Cir. 2021).

At trial, the evidence showed that LPI expended its resources to create and promote the ZIONESS mark, Goldstein had a leadership role in the design and messaging for the mark, and Berman conceded that prior to September 2017, ZIONESS was an LPI program. Evidence to the contrary – namely, that Berman incorporated ZMI, filed the USPTO application, and exerted control over the ZIONESS brand at ZMI after she left, and that Goldstein did not sit on the board of ZMI – created a question of fact. The issue was properly given to the jury. ZMI's motion for judgment as a matter of law is denied.

II. Motion for a New Trial Pursuant to Fed. R. Civ. P. 59(a)

1. Inadequate jury instructions

ZMI asserts that I erred by 1) directing the jury to consider the scope of Amanda Berman's employment as opposed to which entity used the trademark in a source-identifying manner; 2) not instructing that trademark rights are not acquired via naked or oral licenses; 4) improperly instructing the jury on the fair use defense and damages, and; 5) failing to instruct the jury on adverse inferences granted to ZMI in August 2023.

Inadequate jury instructions may constitute grounds for a new trial, provided the errors are "prejudicial in light

of the charge as a whole." *Lore v. City of Syracuse*, 670 F.3d 127, 156 (2d Cir. 2012). An erroneous jury instruction "misleads the jury as to the correct legal standard or does not adequately inform the jury on the law." *Id.* An error in a jury instruction is not prejudicial "when [the court is] persuaded it did not influence the jury's verdict." *Townsend v. Benjamin Enters., Inc.*, 679 F.3d 41, 56 (2d Cir. 2012). "An omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law." *Lore*, 670 F.3d at 156. A new trial is not warranted if the instructions "read as a whole, presented the issues to the jury in a fair and evenhanded manner." *Id.*

First, the jury instructions accurately reflected the key issues of the case. The parties did not dispute 1) that the ZIONESS mark was first used in August 2017, 2) that ZMI - the registrant and putative first user - was not incorporated until February 2018, 3) the contributions by both Goldstein and Berman, 4) Berman's role as both an employee and a lawyer able to pursue her own interests, 5) the use of LPT s resources - its lawyer, its public relations consultant, and its funds - in developing the mark, and 6) Berman's continuing promotion of the mark through ZMI. The instructions accurately explained the issues and allowed the lawyers to present their arguments, fully and with passion.

ZMI argues that it was error for me not to charge that there could not be a naked license of the trademark. But licensing was not the issue of the trial; ownership was the issue, and the jury was informed about that issue.

Appendix C

ZMI argues that it was error to reserve damages instructions until after the jury made a finding of infringement. Splitting a trial to consider liability and damages separately is a discretionary matter. *See Simpson v. Pittsburgh Corning Corp.*, 901 F.2d 277, 283 (2d Cir. 1990) ("leave the mode of trial ultimately to the discretion of the district judge"). Once the jury found that LPI and ZMI were co-owners of the mark, neither entity could infringe the mark as against the other, nor be entitled to infringement damages from the other. *Piccari v. GTLO Prods., LLC*, 115 F. Supp. 3d 509, 514–15 (E.D. Pa. 2015). And, as to ZMI's argument that I did not give an instruction on fair use, a defense raised by LPI and not ZMI, fair use was not an issue of the trial.

Fourth, ZMI complains that a discovery abuse of LPI entitled ZMI to an adverse inference. I previously had ruled that because LPI's board member Henry Shiner could not locate his own emails, ZMI was entitled to an inference that Shiner would have testified that Berman had permission from LPI to start ZMI as a separate entity and develop ZIONESS. Aug. 2, 2023 Tr. at 12:23–13:1. However, ZMI had elicited testimony from other LPI board members – chairman Lawrence Hill, Brooke Goldstein, and Jay Eisenhofer – and they were examined and cross-examined, Shiner, who lived in Canada, became available in New York to testify, and ZMI could have sought leave to call Shiner to testify. Since ZMI was able to present the full facts, I determined that an adverse inference charge would tilt the scales inappropriately, and I declined to give it. ZMI failed to request an adverse instruction in its amended jury charge instructions,

during the charge conference, and at any time before the jury was discharged, waiving this objection. Trial Tr. at 812:2–840:4.

2. Evidentiary rulings

ZMI seeks a new trial based on my evidentiary rulings regarding 1) a September 2019 email, 2) the zioness.org domain name, 3) costs LPI incurred in creating the ZIONESS trademark, 4) oral and naked licenses, and 5) lay witness Nancy Kelly.

In general, "an erroneous evidentiary ruling warrants a new trial only when a substantial right of a party is affected, as when a jury's judgment would be swayed in a material fashion by the error." *Restivo v. Hessemann*, 846 F.3d 547, 573 (2d Cir. 2017) (internal quotation marks omitted). A new trial is an extraordinary remedy that "ordinarily should not be granted unless the trial court is convinced that the jury has reached a seriously erroneous result or that the verdict is a miscarriage of justice." *Hugo Boss Fashions, Inc. v. Federal Ins. Co.*, 252 F.3d 608, 623 (2d Cir. 2001) (internal quotation marks omitted). I have reviewed the transcripts and stand by my rulings in each instance.

First, ZMI argues I erroneously prohibited ZMI from introducing a September 4, 2019 email discussing Google search results for an op-ed Brooke Goldstein wrote, which ZMI argues was probative of the source of the mark as of September 2019. However, ZMI was permitted to cross-examine Goldstein regarding the email, negating any prejudice from its exclusion. *See* Trial Tr. at 716:3–717:18.

Second, ZMI argues it should have been permitted to question Berman about her use in August 2017 of "zioness.org" as a domain name as probative of ZMI's exclusive first use. But ZMI had not been incorporated until six months later, in February 2018, and the testimony of a domain name was cumulative of other testimony.

Third, ZMI argues that I improperly admitted testimony and exhibits regarding LPI's payments of expenses relating to the creation of the ZIONESS mark without a limiting instruction that payments are irrelevant to the issue of trademark ownership. The fact that LPI bore the expenses of developing the trademark was relevant to whether Berman or LPI owned the trademark as the first user, and the limiting instruction sought by ZMI was not appropriate.

Fourth, ZMI argues that testimony regarding an oral or naked license of the ZIONESS mark was impermissibly admitted without a limiting instruction about the invalidity of oral licenses in trademark law. In response to a line of questioning by the Court, Goldstein testified that "Amanda, full time employee of ours, full time salary will run [ZMI] while she works for us, and we would retain ownership of the trademark so we could control how it's used. That was exactly the strategy." Trial Tr. at 631:1–5. ZMI did not object then, and it cannot object now. ZMI is incorrect that an oral at-will license cannot be valid. *Dial-A-Mattress Operating Corp. v. Mattress Madness*, 847 F. Supp. 18, 20 n.1 (E.D.N.Y. 2018) ("An agreement conferring a license to use a trademark for an indefinite time may be oral and is terminable at-will by

the licensor"); *see Cron v. Hargro Fabrics, Inc.*, 91 N.Y.2d 362, 694 N.E.2d 56, 670 N.Y.S.2d 973 (N.Y. 1998) (statute of frauds is not implicated in oral contracts terminable at-will). Again, ownership, not licensing, was the issue of the case, so this ruling could not have resulted in prejudice.

Finally, I properly excluded the testimony of Nancy Kelly, LPI's accountant. ZMI proposed to call her as a lay witness to testify that LPI had not instructed her to treat the ZIONESS mark as an asset. But ZMI had not identified Kelly, or anyone else, as an expert in non-profit accounting and her testimony as to accounting treatment was properly excluded under Fed. R. Evid. 403.

III. Motion to Amend the Judgment Pursuant to Rule 59(e)

ZMI asks that the judgment be amended pursuant to Fed. R. Civ. P. 59(e) because the verdict is internally inconsistent and not supported by the law. ZMI argues that the jury's finding of co-ownership cannot co-exist with the jury's finding that ZMI did not commit fraud on the USPTO.

Absent "an intervening change of controlling law[or] the availability of new evidence, a Rule 59(e) motion may properly be granted only if the movant shows the need to correct a clear error or prevent manifest injustice." However, "[i]t is well established that a party waives its objection to any inconsistency in a jury verdict if it fails to object to the verdict prior to the excusing of the jury." *Kosmynka v. Polaris Indus., Inc.*, 462 F.3d 74, 83 (2d Cir. 2006).

First, ZMI did not object to the verdict before the jury was excused. Second, ZMI makes no showing that a verdict of co-ownership is impermissible as a matter of law, let alone that there has been an intervening change in the law or overlooked factual matters bearing on this inquiry. Finally, the jury's finding that LPI did not prove by clear and convincing evidence that ZMI committed fraud on the USPTO is not inconsistent with co-ownership. ZMI shows no basis to amend the jury's unanimous verdict.

CONCLUSION

For the above reasons, ZMI's motion is denied on all grounds. The Clerk is instructed to terminate ECF No. 232.

SO ORDERED.

Dated: August 22, 2024
New York, New York

/s/ Alvin Hellerstein
ALVIN K. HELLERSTEIN
United States District Judge

APPENDIX D — ORDER DENYING PLAINTIFF'S POST-TRIAL MOTIONS OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED AUGUST 20, 2024

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

21 Civ. 7429 (AKH)

ZIONESS MOVEMENT INC.,

Plaintiff/Counterclaim Defendant,

-against-

THE LAWFARE PROJECT, INC.,

Defendant/Counterclaim Plaintiff.

Filed August 20, 2024

ORDER DENYING PLAINTIFF'S POST-TRIAL MOTIONS

ALVIN K. HELLERSTEIN, U.S.D.J.:

After an eight-day trial in March 2024, the jury issued a verdict, answering questions on a form agreed to by both parties, that both Plaintiff Zioness Movement, Inc. ("ZMI") and Defendant The Lawfare Project, Inc. ("LPI") owned the ZIONESS trademark, and that LPI had failed to prove by clear and convincing evidence that ZMI had

committed fraud on the U.S. Patent and Trademark Office ("USPTO") by registering the trademark as its own. *See* ECF No. 198. Judgment was entered on March 27, 2024. *See* ECF No. 201.

ZMI moves for judgment as a matter of law under Fed. R. Civ. P. 50(b), for a new trial pursuant to Fed. R. Civ. P. 59(a), and for an amended judgment pursuant to Fed. R. Civ. P. 59(e). For the reasons that follow, ZMI's motions are denied.

BACKGROUND

The evidence at trial showed that "Zioness" was coined by LPI's counsel, at the instigation of Brooke Goldstein, the founder and executive director of LPI, and Amanda Berman, then the director of legal affairs at LPI, in August 2017. Goldstein and Berman planned to use Zioness to promote Jewish American participation in a feminist march in Chicago scheduled for August 12, 2017, that had advertised plans to exclude Jewish organizations, ostensibly because of their identification with Israel.

Goldstein founded LPI as a non-profit corporation in 2011 to defend against the marginalization of Jewish people and combat antisemitism through litigation and investigations. Goldstein and Berman, with the help of LPI's lawyers and public relations consultant, and at LPI's expense, created ZIONESS to brand the movement they hoped to inspire. Goldstein and Berman were concerned that LPI should not identify itself with the march for fear of disturbing LPI's donor base, and developed ZIONESS

as the brand to organize a progressive Zionist feminist movement. They used LPI's funds, LPI's fundraising channels, and LPI's lawyers and design firm. *See*, *e.g.*, Trial Tr. at 522:12-523:10. They distributed information about how to join the ZIONESS group for the August 2017 march in Chicago from LPI's email accounts.

In August 2017, Berman stated that ZIONESS was "definitely a project of [LPI]," DX-30, and Goldstein instructed LPI's lawyers to classify ZIONESS as a project of LPI. PX-41. However, rather than Goldstein serving as the face of the operation as she usually did for LPI projects, Berman was designated as the face of the ZIONESS movement, so that the progressive vision for ZIONESS would be distinct from LPI and from Goldstein's personal affiliation with more conservative advocacy. Goldstein testified that she maintained oversight of internal decision-making for ZIONESS in the same manner she had oversight for any other LPI project. In October 2017, LPI's lawyers working on the trademark application considered LPI to be the applicant, though Berman testified that the lawyers were not apprised of her intentions to identify a soon-to-be corporation as the registrant of the trademark. PX-75; Trial Tr. 291:10-298:2.

The evidence also showed that while employed at LPI, Berman worked on Zioness-related work on nights and weekends, that her employment agreement permitted her to take on outside work, and that she used her own funds to incorporate ZMI in February 2018. She filed the ZIONESS trademark registration application under ZMI's name with the USPTO in April 2018. Although

Goldstein knew that Berman was involved in promoting Zioness as a movement separately from LPI, Goldstein testified that she did not know that Berman had filed a trademark registration application under ZMI's name. *See*, *e.g.*, Trial Tr. 642:5-8. In October 2018, Berman emailed Goldstein that she would reimburse LPI for the costs it had incurred in developing the ZIONESS mark, but never did. *See* DX-85. Around that same time, Berman took issue with Goldstein calling herself a "Zioness." Their angry text exchange shows their positions: "Goldstein: I am a zioness you don't own the word, Berman: Actually I do. Berman: Literally. Goldstein: I don't agree w how you have defined it and I know many other people that agree. Goldstein: No. You own a trademark." Trial Tr. at 651:17-654:8; PX-60.

Berman resigned from LPI as of December 2018, and thereafter ran ZMI full-time. Trial Tr. at 113:6-8. Berman maintains that the trademark never belonged to LPI, that there was no transfer of rights nor a license, and that the trademark was solely ZMI's, reflecting her promotion efforts and ZMI's USPTO registration. Goldstein maintains that LPI is the rightful owner, as Berman promoted ZIONESS while she worked at LPI, using LPI's lawyers and public relations consultant, at LPI's expense, and that LPI protested ZMI's use through cease-and-desist letters, and petitioned the Trademark Trial and Appeal Board ("TTAB") to cancel ZMI's registration of the mark. ZMI then filed this lawsuit.

The jury had to decide which entity owned the ZIONESS trademark: ZMI, LPI, or both. I instructed

the jury that the central issue was who was the first user of the mark:[1]

> From this and from the other evidence you've heard and there is sharp contrast between the testimony of Amanda Berman and Brooke Goldstein as to who owns and whose dime on which (sic) this trademark was first used and continued to be used, and that's an issue of credibility that you will have to decide and I'll give you instructions about that as we go along. You will have to find if Berman's activities with Zioness with the trademark were her own or if they were as an employee of Lawfare, through December 31, 2018, when Berman quit her employment. If Berman's activities were done as an employee, Lawfare should be considered the prior user of the mark, and Berman and the company she formed, ZMI, would not have the right to register or use the mark, except with the permission of Lawfare.
>
> If, on the other hand, Berman, alone or with others, created and used the trademark on her own time and independently of her

1. *Hana Fin., Inc. v. Hana Bank*, 574 U.S. 418, 419, 135 S.Ct. 907, 190 L.Ed.2d 800 (2015) ("Rights in a trademark are determined by the date of the mark's first use in commerce."); *Cross Commerce Media, Inc. v. Collective, Inc.*, 841 F.3d 155, 167 (2d Cir. 2016) (mark is considered "used in commerce when it is employed" to identify goods and services "sold to consumers in a given market").

> work obligations to Lawfare, she should be considered the prior user, and she, and the company she formed, ZMI, could own, register, and exclusively use the trademark.
>
> As for the period after December 31, 2018, the owner of a trademark can allow another to use it, freely or under conditions, and take back that right at will, unless there is a contract preventing the owner of the trademark from doing so. There was no contract but there was a conflict of testimony between Goldstein and Berman regarding ownership and use. Thus, the paramount issue in this case is who owns the trademark. Lawfare has the burden to prove by a preponderance of evidence that it, not ZMI, is the lawful owner of the trademark.
>
> *See* Trial Tr. at 854:19-:10.

ZMI made four main objections at the charging conference: first, that the instruction should have stated that Lawfare "should be considered *a* prior user" rather than *the* prior user. (See first quoted paragraph above, end of tenth line).

Second, ZMI requested that I strike the text after "user of the mark" towards the middle of the first paragraph of the above excerpt. Trial Tr. at 824:17-825:4. I declined to do so, in the interest of clarity and delineating the parties' respective positions. Trial Tr. at 825:16.

Third, ZMI requested that I add an instruction to the first paragraph of the above excerpt, that "trademark rights are tied to use in a source identifying way in the market pertinent to the bids." ZMI argued that "if a prior user ceases to use the mark in a source identifying way or intends not to use the mark going forward, that prior user loses its rights to the mark." Trial Tr, 825:9-826:1. I declined this request, stating that the whole issue "has to do with Berman's capacity" as an LPI employee, not the extent to which LPI continued to use the mark. Trial Tr. at 825:22-25. ZMI then requested that I add its request at the end of the above excerpt. Again, I declined, stating that it is "not the issue in the case. Abandonment was not a defense at trial. Whatever Berman did until December 31, 2018, is either attributable or not attributable to her job." Trial Tr. 828:13-15.

Fourth, ZMI objected to "freely or other conditions" in the third paragraph of the above excerpt, arguing that there is "no such thing as a naked license of a trademark." Trial Tr. at 827:22-828:3. I declined to alter the charge. Trial Tr. at 828:7-8.

None of the objections would have made a difference. Both parties accepted the propositions of the central issues of the case, whether ZIONESS belongs to LPI because Berman used and registered the trademark as an employee of LPI, using LPI's resources, or whether Berman used and registered the trademark on her own time and incident to her personal efforts and resources. I told the jury that LPI had to overcome the presumption of ownership afforded to ZMI because of the USPTO

registration and had the burden prove its ownership by a preponderance of the evidence.

I proposed a verdict sheet at the charging conference for the parties' consideration. I gave the jury three options. It read:

1. Who owns the ZIONESS trademark?

    a) ZMI: ____

    b) LPI: ____

    c) both: ____

See ECF No. 198. ZMI did not object. Trial Tr. at 838:1-2 ("At this time, we don't have comments to the verdict sheet, your Honor.").

DISCUSSION

I. Motion for Judgment as a Matter of Law Pursuant to Fed. R. Civ. P. 50(b)

ZMI argues it is entitled to judgment as a matter of law, stating that it is the sole owner of ZIONESS, because there was no evidence at trial showing that LPI was a co-owner.

A court may grant judgment as a matter of law against a party if it finds "that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue." Fed. R. Civ. P. 50(b). The motion should

be granted only if "viewed in the light most favorable to the nonmoving party, 'the evidence is such that, without weighing the credibility of the witnesses or otherwise considering the weight of evidence, there can be but one conclusion as to the verdict that reasonable men could have reached.'" *Samuels v. Air Transport Local 504*, 992 F.2d 12, 14 (2d Cir. 1993) (internal citation omitted).

I instructed the jury on LPI's burden to prove by a preponderance of the evidence that it, not ZMI, owned ZIONESS and was its first user. The jury was given the option to choose co-ownership without objection by either party, and made that choice. The evidence is sufficient to support that verdict. The jury's verdict pre-supposes that LPI satisfied its burden of proof in support of its claim of ownership, but that Berman had also contributed to the use and development of the trademark, both as an employee of LPI and on her own time, pursuant to the provisions of her employment agreement that allowed her to do her own work.

ZMI fails to show that no reasonable juror could have found that both entities owned ZIONESS, and that both LPI and Berman were its first users. As a matter of law, co-ownership is permissible. *See Mikhlyn v. Bove*, 08cv3367 (CPS), 2008 WL 4610304, at *3 n.12 (E.D.N.Y. Oct. 15, 2008); *Piccari v. GTLO Prods., LLC*, 115 F. Supp. 3d 509 (E.D. Pa. 2015); *Fairway Fox Golf v. Conolty O'Connor NYC LLC*, 111 U.S.P.Q.2d 1302 (T.T.A.B. 2014). The identity of the true owner need not be discernable to the public. *See Authentic Apparel Grp., LLC v. United States*, 989 F.3d 1008, 1017 (Fed. Cir. 2021).

At trial, the evidence showed that LPI expended its resources to create and promote the ZIONESS mark, Goldstein had a leadership role in the design and messaging for the mark, and Berman conceded that prior to September 2017, ZIONESS was an LPI program. Evidence to the contrary – namely, that Berman incorporated ZMI, filed the USPTO application, and exerted control over the ZIONESS brand at ZMI after she left, and that Goldstein did not sit on the board of ZMI – created a question of fact. The issue was properly given to the jury. ZMI's motion for judgment as a matter of law is denied.

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ZMI asserts that I erred by 1) directing the jury to consider the scope of Amanda Berman's employment as opposed to which entity used the trademark in a source-identifying manner; 2) not instructing that trademark rights are not acquired via naked or oral licenses; 4) improperly instructing the jury on the fair use defense and damages, and; 5) failing to instruct the jury on adverse inferences granted to ZMI in August 2023.

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First, the jury instructions accurately reflected the key issues of the case. The parties did not dispute 1) that the ZIONESS mark was first used in August 2017, 2) that ZMI – the registrant and putative first user – was not incorporated until February 2018, 3) the contributions by both Goldstein and Berman, 4) Berman's role as both an employee and a lawyer able to pursue her own interests, 5) the use of LPI's resources – its lawyer, its public relations consultant, and its funds – in developing the mark, and 6) Berman's continuing promotion of the mark through ZMI. The instructions accurately explained the issues and allowed the lawyers to present their arguments, fully and with passion.

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ZMI asks that the judgment be amended pursuant to Fed. R. Civ. P. 59(e) because the verdict is internally inconsistent and not supported by the law. ZMI argues that the jury's finding of co-ownership cannot co-exist with the jury's finding that ZMI did not commit fraud on the USPTO.

Absent "an intervening change of controlling law[or] the availability of new evidence, a Rule 59(e) motion may properly be granted only if the movant shows the need to correct a clear error or prevent manifest injustice," However, "[i]t is well established that a party waives its objection to any inconsistency in a jury verdict if it fails to object to the verdict prior to the excusing of the jury." *Kosmynka v. Polaris Indus., Inc.*, 462 F.3d 74, 83 (2d Cir. 2006).

First, ZMI did not object to the verdict before the jury was excused. Second, ZMI makes no showing that a verdict of co-ownership is impermissible as a matter of law, let alone that there has been an intervening change in the law or overlooked factual matters bearing on this inquiry. Finally, the jury's finding that LPI did not prove by clear and convincing evidence that ZMI committed fraud on the USPTO is not inconsistent with co-ownership. ZMI shows no basis to amend the jury's unanimous verdict.

Appendix D

CONCLUSION

For the above reasons, ZMI's motion is denied on all grounds.

SO ORDERED.

Dated: August 20, 2024
New York, New York

/s/ Alvin K. Hellerstein
ALVIN K. HELLERSTEIN
United States District Judge

APPENDIX E — ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED MAY 30, 2024

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

21 Civ. 7429 (AKH)

ZIONESS MOVEMENT INC.,

Plaintiff/Counterclaim Defendant,

-against-

THE LAWFARE PROJECT, INC.,

Defendant/Counterclaim Plaintiff.

Filed May 30, 2024

ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION

ALVIN K. HELLERSTEIN, U.S.D.J.:

Plaintiff's motion for reconsideration (ECF No. 238) is denied. "A motion for reconsideration is not a motion to reargue those issues already considered when a party does not like the way the original motion was resolved." *In re Facebook, Inc., IPO Sec. A Derivative Litig.*, 43 F. Supp.

3d 369, 374 (S.D.N.Y. 2014). Moreover, "the standard for granting a motion for reconsideration is strict, and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked." *Analytical Surveys, Inc. v. Tonga Partners, LP*, 684 F.3d 36, 41 (2d Cir. 2012). Plaintiff has failed to meet these strictuies. Instead, it reargues issues raised—and rejected—in its original brief and April 8, 2024 argument in support of its stay request.

The jury found that both parlies were involved in the creation of the trademark, and that even though they split apart and went their separate ways, neither gave up their rights to the other. *See, e.g.*, *Piccari v. GTLO Prods., LLC*, 115 F. Supp. 3d 509 (E.D. Penn. 2015) (co-owners of trademarks have "equal and unfettered rights of use"). The verdict sheet raised the possibility of co-ownership and neither side objected, Trial Tr. 837:23-24 ("At this time, the plaintiff doesn't have any comments to the verdict sheet."), and the jury so found. The evidence at trial supports the findings, showing that the current leadership of the Lawfare Project Inc. and Zioness Movement Inc. worked together at the Lawfare Project throughout 2017 and 2018, using the Lawfare Project's resources, to develop the Zioness mark. *Piccari*, 115 F. Supp. 3d at 515 ("Because co-owners are naturally associated with the same source . . . use by a co-owner cannot create confusion as to the source among customers").

One co-owner cannot sue the other for infringement, but they can both sue a third party. *Puri v. Yogi Bhajan Admin. Tr.*, No. CV 11-9503 FMO, 2015 WL 12684464,

at *11 (C.D. Cal. Oct. 30, 2015). Co-ownership may be disfavored, but it is not unlawful, and it does not void a trademark. *See E.W. Tea Co., Ltd. Liab. Co. v. Puri*, No. 3:11-cv-01358, 2022 WL 900539, at 6 (D. Or. Mar. 28, 2022) ("While joint ownership of trademarks is disfavored because it could lead to consumer confusion, it is not prohibited under federal trademark law."); 2 J.T. McCarthy, *McCarthy on Trademarks & Unfair Competition* § 16:40 (5th ed.). If the parties are not able to settle their differences, amicably or commercially, they will either have to tolerate a likelihood of confusion they believe exists between themselves, find a way to distinguish between themselves, or stop using the trademark. That is the risk of co-ownership.

Plaintiff's motion for reconsideration is denied. The Clerk shall terminate ECF No. 238.

SO ORDERED.

Dated: May 30, 2024
New York, New York

/s/ Alvin K. Hellerstein
ALVIN K. HELLERSTEIN
United States District Judge

APPENDIX F — ORDER DENYING PLAINTIFF'S MOTION FOR STAY OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED APRIL 8, 2024

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

21 Civ. 7429 (AKH)

ZIONESS MOVEMENT INC.,

Plaintiff/Counterclaim Defendant,

-against-

THE LAWFARE PROJECT, INC.,

Defendant/Counterclaim Plaintiff.

Filed April 8, 2024

ORDER DENYING PLAINTIFF'S MOTION FOR STAY

ALVIN K. HELLERSTEIN, U.S.D.J.:

For the reasons set forth in the transcript, Plaintiff's motion for a stay of the enforcement of the judgment is denied.

SO ORDERED.

Dated: April 8, 2024
New York, New York

/s/ Alvin K. Hellerstein
ALVIN K. HELLERSTEIN
United States District Judge

APPENDIX G — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED MARCH 27, 2024

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

21 CIVIL 7429 (AKH)

ZIONESS MOVEMENT, INC.,

Plaintiff,

-against-

THE LAWFARE PROJECT, INC.,

Defendant.

Filed March 27, 2024

JUDGMENT

It is hereby **ORDERED, ADJUDGED AND DECREED:** That after a Jury Trial before the Honorable Alvin K. Hellerstein, United States District Judge, both parties having requested declarations of their rights opposing and defending the registration of the trademark ZIONESS on the principal register of the U.S. Patent and Trademark Office in classes 16, 35, and 41; And the issues having been tried to a jury on March 5, 6, 7, 11, 12, 13, and 14; And the jury having delivered a verdict on March 15, 2024 that both The Lawfare Project, Inc. and Zioness Movement, Inc. own the ZIONESS trademark; And said

verdict also having found that Zioness Movement, Inc. did not commit fraud on the U.S. Patent and Trademark Office in the course of registering the ZIONESS trademark;

It is therefore **ORDERED, ADJUDGED AND DECREED** that: Zioness Movement, Inc. and The Lawfare Project, Inc. are equal co-owners of the trademark rights in and to the ZIONESS trademark, with equal right to use the trademark. The Lawfare Project, Inc. has not infringed upon Zioness Movement, Inc.'s trademark rights. Pursuant to 15 U.S.C. § 1119, the U.S. Patent and Trademark Office is ordered to amend Registration No. 6,048,225 to provide that The Lawfare Project, Inc. and Zioness Movement, Inc. are co-registrants and co-owners of the ZIONESS trademark.

DATED: New York, New York
March 27, 2024

/s/ RUBY J. KRAJICK
Clerk of Court

So Ordered:

/s/ Alvin Hellerstein
U.S.D.J.

BY: /s/ K. Mango
Deputy Clerk

APPENDIX H — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED SEPTEMBER 22, 2025

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

Docket No. 24-974

ZIONESS MOVEMENT, INC.,

Plaintiff-Counter-Defendant-Appellant,

v.

THE LAWFARE PROJECT, INC.,

Defendant-Third-Party-Plaintiff-Appellee,

v.

AMANDA BERMAN,

Third-Party-Defendant-Appellant.

Filed September 22, 2025

ORDER

Appellants filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court

have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

/s/ Catherine O'Hagan Wolfe

APPENDIX I — 15 U.S.C. § 1052

15 U.S.C. § 1052

§ 1052. Trademarks registrable on principal register; concurrent registration

No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it--

(a) Consists of or comprises immoral, deceptive, or scandalous matter; or matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute; or a geographical indication which, when used on or in connection with wines or spirits, identifies a place other than the origin of the goods and is first used on or in connection with wines or spirits by the applicant on or after one year after the date on which the WTO Agreement (as defined in section 3501(9) of Title 19) enters into force with respect to the United States.

(b) Consists of or comprises the flag or coat of arms or other insignia of the United States, or of any State or municipality, or of any foreign nation, or any simulation thereof.

(c) Consists of or comprises a name, portrait, or signature identifying a particular living individual except by his written consent, or the name, signature, or portrait of a deceased President of the United States during the life of his widow, if any, except by the written consent of the widow.

(d) Consists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive: *Provided,* That if the Director determines that confusion, mistake, or deception is not likely to result from the continued use by more than one person of the same or similar marks under conditions and limitations as to the mode or place of use of the marks or the goods on or in connection with which such marks are used, concurrent registrations may be issued to such persons when they have become entitled to use such marks as a result of their concurrent lawful use in commerce prior to (1) the earliest of the filing dates of the applications pending or of any registration issued under this chapter; (2) July 5, 1947, in the case of registrations previously issued under the Act of March 3, 1881, or February 20, 1905, and continuing in full force and effect on that date; or (3) July 5, 1947, in the case of applications filed under the Act of February 20, 1905, and registered after July 5, 1947. Use prior to the filing date of any pending application or a registration shall not be required when the owner of such application or registration consents to the grant of a concurrent registration to the applicant. Concurrent registrations may also be issued by the Director when a court of competent jurisdiction has finally determined that more than one person is entitled to use the same or similar marks in commerce. In issuing concurrent registrations, the Director shall prescribe conditions and limitations as to the mode or place of use of the mark or the goods on or

in connection with which such mark is registered to the respective persons.

(e) Consists of a mark which (1) when used on or in connection with the goods of the applicant is merely descriptive or deceptively misdescriptive of them, (2) when used on or in connection with the goods of the applicant is primarily geographically descriptive of them, except as indications of regional origin may be registrable under section 1054 of this title, (3) when used on or in connection with the goods of the applicant is primarily geographically deceptively misdescriptive of them, (4) is primarily merely a surname, or (5) comprises any matter that, as a whole, is functional.

(f) Except as expressly excluded in subsections (a), (b), (c), (d), (e)(3), and (e)(5) of this section, nothing in this chapter shall prevent the registration of a mark used by the applicant which has become distinctive of the applicant's goods in commerce. The Director may accept as prima facie evidence that the mark has become distinctive, as used on or in connection with the applicant's goods in commerce, proof of substantially exclusive and continuous use thereof as a mark by the applicant in commerce for the five years before the date on which the claim of distinctiveness is made. Nothing in this section shall prevent the registration of a mark which, when used on or in connection with the goods of the applicant, is primarily geographically deceptively misdescriptive of them, and which became distinctive of the applicant's goods in commerce before December 8, 1993.

Appendix I

A mark which would be likely to cause dilution by blurring or dilution by tarnishment under section 1125(c) of this title, may be refused registration only pursuant to a proceeding brought under section 1063 of this title. A registration for a mark which would be likely to cause dilution by blurring or dilution by tarnishment under section 1125(c) of this title, may be canceled pursuant to a proceeding brought under either section 1064 of this title or section 1092 of this title.

APPENDIX J — 15 U.S.C. § 1054

15 U.S.C. § 1054

§ 1054. Collective marks and certification marks registrable

Subject to the provisions relating to the registration of trademarks, so far as they are applicable, collective and certification marks, including indications of regional origin, shall be registrable under this chapter, in the same manner and with the same effect as are trademarks, by persons, and nations, States, municipalities, and the like, exercising legitimate control over the use of the marks sought to be registered, even though not possessing an industrial or commercial establishment, and when registered they shall be entitled to the protection provided in this chapter in the case of trademarks, except in the case of certification marks when used so as to represent falsely that the owner or a user thereof makes or sells the goods or performs the services on or in connection with which such mark is used. Applications and procedure under this section shall conform as nearly as practicable to those prescribed for the registration of trademarks.