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ACTUAL CONFUSION AND TRADEMARK DAMAGES: THROUGH THE LOOKING GLASS

by Robert W. Payne¹

“The question is,” said Alice, “whether you can make words mean so many different things.”

“The question is,” said Humpty Dumpty, “which is to be master -- that’s all.”
-- Lewis Carroll, *Through the Looking Glass*, Chpt. 6

Lewis Carroll could have written a chapter on trademark monetary remedies. Although “codified” in the Lanham Act, recoveries in trademark cases are governed by byzantine and inconsistent case law. Circuits differ in their application of principles, such as awards for “damages.” Terms sometimes mean more than one thing; sometimes they mean less than one thing.

A STROLL THROUGH THE WONDERLAND

Consider the viewpoint of a patent litigator who has no background in trademark litigation matters. She would likely assume that “damages” is the term to apply to all monetary remedies in a case, save perhaps trebling of damages and attorneys’ fees and costs. She would think in terms of causation of harm, and then quantification of damages from that harm. She has no idea what awaits her in Trademark Remedies Wonderland.

Not so in trademark litigation. “Damages” in this wonderland only applies to remedies at law. That is, “damages” as a term of art only applies to claims for lost profits, expenses incurred and injury to reputation or goodwill.¹ A wholly different sort of recovery and set of equitable principles applies for an award of “profits.” “Profits” in trademark litigation does not (necessarily) mean “lost profits” that a plaintiff lost. Generally, it means “wrongful profits” that a defendant gained. If the patent litigator mixes these two up, she would be in good company. So do the courts: “When the Lanham Act has been violated, the Act provides for *actual damages*, consisting of the sum of (1) defendant’s profits, (2) “any damages sustained by the plaintiff,” and (3) court costs.”²

The case law on monetary recovery in trademark infringement cases is a confusing melange of common law and equity principles, sometimes guided (and misguided) by analogies to patent and

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copyright law, and finding little statutory guidance in the Lanham Act. The courts have balanced several factors such as: whether defendant was willful, negligent, or innocent; whether plaintiff suffered losses in any provable amount; whether there is proof of actual confusion of some customers; and whether defendant realized profits from its infringing actions. In various cases, different courts have given widely disparate emphasis to one or more of these factors, making predictability of result a dangerous undertaking. In modern cases, courts have occasionally awarded monetary recovery on the rationales of preventing unjust enrichment and/or deterrence of defendant and others. One commentator, after an exhaustive review of the cases, concluded that the public policy and theoretical basis underlying monetary awards in trademark cases have received inadequate judicial attention and have remained confused and undefined.³

This distinction is set out in the Lanham Act, qualified by the all-important phrase “subject to principles of equity.” Section 1117 provides that upon a finding of infringement, and subject to sections 1111 and 1114, the plaintiff shall be entitled, “subject to the principles of equity, to recover (1) defendant’s profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action.” 15 U.S.C. §1117(a).

The patent litigator, traveling further down the path, might meet up with the Cheshire Cat. The cat would explain that one is not “entitled” to an award of wrongful profits. Even if a defendant is liable and has enjoyed profits from its wrongdoing, a plaintiff may not recover all or part of those gains.⁴ As stated in *Lindy Pen Co. v. Bic Pen Corp.*, 982 F.2d 1400, 1406, fn 4, “[w]illful infringement may support an award of profits to the plaintiff, but does not require one.”⁵ In some jurisdictions, courts require a finding of willfulness before such an award will be entertained.⁶ Other circuits are more lenient, or the requirements are not clear, as in the Ninth Circuit’s position is not clear.⁷ Then there is “confusion.” Under sections 1114(1) and 1125(a) of the Lanham Act, it is a bedrock principle in trademark law that trademark infringement requires only a showing by plaintiff of likelihood of confusion.

That is the standard for liability. For monetary recovery, that is not nearly so clear. The Cheshire Cat might say, “That depends on where you want to go.” For an award of “profits” (i.e., wrongful profits gained by the defendant), actual confusion is not required in some circuits (Sixth, Seventh and arguably the Eleventh), because the issue is not seen to be compensation to an aggrieved plaintiff. Rather, the concern is to deter a defendant from remaining unjustly enriched.⁸ Most notably, the Ninth Circuit as well does not require proof of actual confusion for an award of wrongful profits.⁹ For an award of damages (i.e., lost profits and the like), some circuits have a “clear” rule that *actual* confusion (not merely *likely* confusion) must be proven by the plaintiff. Others, do not, as discussed below.

Further complicating this discussion, even a focus on “actual confusion” arises in two distinct contexts. Actual confusion is an important factor in determining likely confusion (as under the *Sleekcraft* factors in the Ninth Circuit). (Here, the Cheshire Cat grins demonically.) To determine liability for trademark *infringement*, the parties may point to the presence or absence of consumers’ actual confusion as a probative fact.¹⁰ That, however, is wholly separate from consideration of actual confusion as a factor in assessing *damages*.

Thus, the uninitiated patent litigator, venturing into case law on “actual confusion” and “damages” and (lost) “profits” in trademark law must tiptoe cautiously. She must know that many cases discussing “actual confusion” are not referring to monetary recovery matters. She must appreciate

that “damages” is not all-encompassing: it does not (necessarily) refer to the all-important realm of equitable recovery of a defendant’s wrongful profits. She must think of “profits” as something far broader than her prior experience allows.¹¹ She must appreciate that both “damages” and “profits” are used inconsistently in opinions, sometimes within the same circuit.

“ACTUAL CONFUSION” AND TRADEMARK DAMAGES

Our path is focused solely on the role of “actual confusion” in trademark damages. That means, regardless of entreaties by the Cheshire Cat, we will not examine actual confusion as a factor for determining *infringement*. We do not address further the requirements for an accounting for the wrongful profits earned by an infringing defendant. We only apply the concept of “actual confusion” to awards for lost profits and other items of damage at law.

But our journey through Wonderland has not now cleared away. Even in the tightly focused arena of actual confusion in connection with damages at law, there are misconceptions and some vagueness on “confusion.” This heightened “confusion on actual confusion” takes three disconcerting forms. The first is the split in requirements for proof of “actual confusion” among the circuits, and the lack of clarity of those requirements in some circuits. The second is the imprecise analysis provided by commentators on this very subject. Sometimes, as if written by the March Hare, writings inaccurately cite a case or jurisdiction as being in one camp or the other, when the case cited does not stand for proposition in question. The third is a legal fiction applied by some courts, “finding” or accepting actual confusion for damages even where the evidence noted is something else, like defendant’s intent.

A Split Among the Circuits

There is a basic split among the circuits on proof of actual confusion and damages. Numerous circuits require a plaintiff to prove that the defendant’s Lanham Act violation caused “actual confusion” among consumers in order to justify an award of damages. Such cases seem to be grounded on the view that a plaintiff cannot prove that it suffered “actual injury” – a prerequisite to recovery of damages – unless it can first present evidence that the defendant’s actions caused actual confusion.

Thus, for example, the Seventh Circuit had held that actual confusion is required. “A plaintiff wishing to recover damages for a violation of the Lanham Act must prove the defendant’s Lanham Act violation, that the violation caused actual confusion among consumers of the plaintiff’s product, and, as a result, that the plaintiff suffered actual injury, i.e., a loss of sales, [profits, or present value (good will)] . . . [Remedies such as recovery of the defendant’s profits] flow not from the plaintiff’s proof of injury or damage, but from its proof of the defendant’s unjust enrichment or the need for deterrence.”¹²

Similarly, the Sixth¹³ and Tenth Circuits have taken a firm stand on this position as well.

“Likelihood of confusion is insufficient; to recover damages plaintiff must prove it has been damaged by actual consumer confusion or deception resulting from the violation. . . . Actual consumer confusion may be shown by direct evidence, a diversion of sales or direct testimony from the public, or by circumstantial evidence such as consumer surveys.”¹⁴

Some other circuits, including the commercially important Second Circuit, require either actual confusion or intentional deception. Further, an intention to deceive is a surrogate notion for proof of actual confusion, as an evidentiary bridge to proof of confusion.

*“Our case law is ‘well settled that in order for a Lanham Act plaintiff to receive an award of damages the plaintiff must prove either actual consumer confusion or deception resulting from the violation . . . or that the defendant’s actions were intentionally deceptive thus giving rise to a rebuttable presumption of consumer confusion.’”*¹⁵

Other circuits are not so strict. In the Fifth Circuit, for example, it is “settled” “that actual confusion is not a necessary prerequisite to an award of money damages.”¹⁶ However, the case stating this did not bother to explain the reasoning behind it.¹⁷ The Third Circuit, as well, appears not to require proof of actual confusion, on the grounds that the Lanham Act does not require such proof, but this is not solidly established.¹⁸ The Eleventh Circuit’s approach is discussed further below.

The Ninth Circuit’s law on the necessity for actual confusion remains, well, confused. As a leading commentator puts it, “[T]he Ninth Circuit’s position on this issue is unclear[.]”¹⁹ Indeed, the Ninth Circuit stated that its case law reflects “confusion surrounding application of section 35 of the Act [15 U.S.C. § 1117].”²⁰

The most often cited case in the Ninth Circuit on this issue is *Lindy Pen*. There, a defendant challenged a district court finding that the plaintiff had proven the *fact of damage* (as distinct from the amount of damage) despite the fact that there was no evidence of actual confusion. The Ninth Circuit rejected the defendant’s appeal, holding that a plaintiff’s “inability to show actual damages does not alone preclude recovery under section 1117.”²¹ The court further expressed “a distinct preference” for permitting “relief based on the totality of the circumstances.”²² However, in support of its stated preference, the court cited out-of-circuit cases involving awards based on the *defendant’s profits*, rather than plaintiff’s damages. For example, the court cited the Eleventh Circuit’s decision in *Burger King Corp. v. Mason*, which involved an accounting and award of the defendant’s profits from the infringing activity.²³ Later cases have yet to sort this out.²⁴

Confusion Among Commentators, Explaining “Confusion”

As if that were not enough complication, commentators themselves sometimes contribute to the noise. One example is *Masters v. UHS of Delaware, Inc.*²⁵ One writer stated categorically that it established the Eighth Circuit rule. “In *Masters v. UHS of Del. Inc.*, Appeal No. 09-3543 (8th Cir., January 6, 2011) . . . in contrast to at least one other appellate court, the Eighth Circuit held that actual confusion is not a prerequisite to an award of monetary damages under the Lanham Act.”²⁶ However, this opinion discussed actual confusion in connection with *equitable* relief involving a disgorgement of wrongful profits.

“UHS contends that the relevant case law precluded the award of monetary relief absent proof of actual confusion. Masters urges that such proof is unnecessary in light of . . . the remedy of disgorged profits. We agree. . . . [¶] Violation of this provision [of liability for creating a likelihood of confusion] entitles a plaintiff, ‘subject to the principles of equity to recover (1) defendant’s profits, (2) any damages sustained by the plaintiff and (3) the costs of the action.’ . . . [T]he use of the conjunctive ‘and’ in the delineation of remedies invites a distinction between an award of a defendant’s profits and the award of plaintiff’s damages. . . . [¶] The jury determined that

*disgorgement of UHS's profits was appropriate in light of such willful infringement. Proof of actual confusion is not necessary to sustain that confusion.*²⁷

As we saw earlier, in some jurisdictions, including the Eighth, proof of actual confusion is not required to obtain an award of disgorgement of wrongful profits in equity. However, that is not our issue, which concerns an award of damages at law.

Another case occasionally cited is *Taco Cabana Int'l, Inc. v. Two Pesos, Inc.*²⁸ Some observers say this case holds that actual confusion is not required for damages in the Fifth Circuit.²⁹ Indeed, remedies at law were affirmed for lost profits. However, it stands for cryptic authority for the issue at hand. The defendant argued that actual confusion was required because diversion of sales was the only form of damages permitted. The Court ignored the issue of actual confusion and decided instead that other forms of economic injury were permissible. It did not address actual confusion in that context.³⁰ Moreover, the language cited is mere dicta on the issue of actual confusion in any event. The facts in the case acknowledged that actual confusion in fact existed in evidence presented by a survey. (“Surveys present evidence of actual confusion, which does not exhaust the confusion indicia.”³¹)

The *Aronowitz* case is occasionally cited to indicate that proof of actual confusion is not required in the Eleventh Circuit for trademark damages.³² It is true that the court permitted an award of damages without discussion of a need for proof of actual damages.³³ However, again, actual confusion existed in the record, as acknowledged earlier by the court. (“Finally, the record contains evidence of actual confusion.”³⁴) Moreover, there is no indication that the parties raised the issue of an actual confusion prerequisite, and the court did not address the issue explicitly.

Thus, while the authorities such as the above do speak to the proposition for which they are cited, confusion rather than clarity is invited. The authority is not the precedent it is presented to be, when it is misapplied or merely dicta.

What Satisfies the “Actual Confusion” Requirement?

Even for courts which purport to follow an “actual confusion” standard, a range of evidentiary proof issues -- and judicial fiction -- develop which make the so-called bright line blurry. Straddling the exquisite line between “actual confusion” and “actual injury,” and proof of “actual confusion” versus proof of intentional deception as a surrogate level of proof of the former, one district court in the 11th Circuit discussed the problem at some length.

“A party seeking monetary damages for false advertising in violation of 15 U.S.C. §1125(a) of the Lanham Act must establish that it has been injured by the false advertising. To make this showing, the plaintiff must demonstrate that the false advertisement actually deceived or misled consumers which in turn caused injury to the plaintiff. See . . . United Indus. Corp. v. Clorox Co., 140 F.3d 1175, 1180 (8th Cir. 1998) (“T[o] recover money damages under the Act, a plaintiff must prove both actual damages and a causal link between the defendant’s violation and those damages.”)
[¶] *“Courts have noted that ‘marketplace damages and actual confusion are notoriously difficult and expensive to prove. Thus, many courts -- including the Eleventh Circuit -- routinely presume that literally false advertising actually deceives consumers. Moreover, a growing number of courts have also adopted a presumption . . . that willfully deceptive, comparative advertisements cause financial injury to the party whose product the advertisement targets.”*³⁵

As we saw above, the Second Circuit also applies a surrogate notion of intentional deception. In other words, courts strain to find “actual confusion” when no direct evidence of such exists, because they believe other evidence is sufficiently indicative of confusion sufficient to demonstrate causation of injury. Further, actual injury tends to be equated with actual deception, or even intent to deceive, as if that is the only way injury for damages purposes can occur.

SHOULD “ACTUAL CONFUSION” BE REQUIRED FOR DAMAGES?

The purpose of this paper is not to provide a complete survey of all circuits’ case law, nor is it to provide an academic analysis of what the “better rule” should be. It is a simple fact that some circuits say they require proof of actual confusion, however they may define that. It is also a fact that other circuits say they do not. In both cases, the precedent is tortured and confusing. To some extent, one has to work with the rules provided in the jurisdiction.

It is therefore useful to recognize several fundamental truths: (1) As shown in the *United Industry* case above,³⁶ even where actual confusion is not required, a strong policy exists requiring proof of *causation of injury*. This is longstanding in all realms of damage law, except when circumvented by specific statutory or case law. (2) Causation of *injury* from trademark infringement, as we have seen in some of the above cases, is not identical to causation of *confusion*. (3) Courts have strained with false issues of proof to fit a roughly square peg (proof of a defendant’s intent) into a round hole (proof of a plaintiff’s injury). (4) There is a problem with language: courts and observers speak of “profits” and “damages” as one of two different things or as both of two different things. Similar issues arise with other terms, as we have seen. (5) Even less so than in most realms of law, one should be wary of accepting “precedent” as presented on its face. Cases do not support the propositions as consistently in trademark law as they might in other areas.

If the issue is causation of harm, for purposes of determining whether monetary damages at law may be assessed, why not simply make that the standard? A showing of actual confusion is certainly one (and arguably the strongest) means of proving the existence of damages as well as a causal connection between a defendant’s actions and the plaintiff’s claimed injuries. Nevertheless, other equally valid means of allowing for damage flowing from liability will occasionally arise, as recognized in some circuits. Thus, for example, where plaintiff has proved both liability from a likelihood of confusion and a showing a sharp drop in the plaintiff’s sales with a temporal connection with the defendant’s infringing activity, why should damages not be awarded, based on lost sales? Could there not be sufficient evidence of causation, if no other plausible explanation is put forward for the decline? Should not the trier of fact have discretion to find that there has in fact been some injury and to quantify it, subject to any countervailing evidence the defendant might be able to provide? General legal policy is to provide a remedy when there is a wrong and to favor the injured when injury has been shown to have been caused by culpable conduct.

Thus, in the various circuits in which the state of the law on actual confusion is unclear, an opportunity exists for advocates. One can acknowledge the case law in that jurisdiction and then seek to steer the decision toward “the better rule” by distinguishing -- and occasionally criticizing the logic behind -- contrary case law.

Our stroll through Wonderland is arduous enough in the realm of trademark remedies. Words mean different things to different people. Logic traps abound. Inconsistencies are rampant. We are viewing

trademark damages through the Looking Glass. In the paraphrased words of Lewis Carroll, *If you don't know where you're going, any road will get you there*. If the policy and logic considerations are the same, however, would it not be better to all travel down the same road?

NOTES

¹ Ninth Circuit Model Civil Jury Instructions, No. 18.25 (2007).

² *Chanel, Inc. v. Vernoique Idea Corp.*, 795 F.Supp.2d 262 (S.D.N.Y. 2011). Emphasis added.

³ 5 McCarthy on Trademarks and Unfair Competition, §30.58 (4th ed. 2012) (footnotes omitted).

⁴ 5 McCarthy, *supra* §30.59.

⁵ Citing *Fabrege, Inc. v. Saxony Products, Inc.* 605 F.2d 426, 429 (9th Cir. 1979).

⁶ See, e.g., *George Basch Co. v. Blue Coral, Inc.* 968 F.2d 1532 (2d Cir. 1992); *Bishop v. Equinox Int'l Corp.*, 154 F.3d 1220 (10th Cir. 1998); *ALPO Petfoods, Inc. v. Ralston Purina Co.*, 913 F.2d 958, 968 (D.C. Cir. 1990).

⁷ See *Lindy Pen, supra*, 1405-1406; *Maier Brewing Co. v. Flieschmann Dist. Corp.*, 309 F.2d 117 (9th Cir. 1968); *Fabrege, Inc. v. Saxony Prods., Inc.*, 605 F.2d 426 (9th Cir. 1979); *Adray v. Adry-Mart, Inc.*, 76 F.3d 984, 988 (9th Cir. 1995) (willful required when not seeking damages); *R&R Partners Inc., v. Tovar*, 2007 U.S. Dist. Lexis 29819 at *4-5 (D. Nev. 2007) (9th Circuit previously required willfulness when parties not in direct competition, but changed by 1999 amendments to Lanham Act language re Section 43(c)); *M2 Software, Inc. v. Viacom Inc.*, 223 Fed. Appx. 623, 656 (9th Cir. 2007) (declining to decide whether 1999 amendments negated the willfulness requirement); *Gracie v. Gracie*, 217 F.3d 1060, 1068 (9th Cir. 2000) (willfulness required); *Contessa Food Prods. Inc. v. Lockpur Fish Processing Co., Ltd.*, 123 Fed. Appx. 747, 751 (9th Cir. 2005).

⁸ *Web Printing Controls Co., v. Oxy-Dry Corp.*, 906 F.2d 1202 (7th Cir. 1990); *Wynn Oil Co. v. American Way Serv. Corp.*, 943 F.2d 595 (6th Cir. 1991). See also *Burger King Corp. v. Mason*, 855 F.2d 779 (11th Cir. 1988) (“actual damages” not required).

⁹ *Gracie v. Gracie*, 217 F.3d 1060 (9th Cir. 2000) (“[A] showing of actual confusion is not necessary to obtain a recovery of profits.”).

¹⁰ *AMF, Inc. v. Sleekcraft Boats*, 599 F.2d 341 (9th Cir. 1979). The eight factors are: (1) strength of the mark; (2) proximity of the goods; (3) similarity of the marks; (4) evidence of actual confusion; (5) marketing channels used; (6) type of goods and the degree of care likely to be exercised by the purchaser; (7) defendant’s intent in selecting the mark; and (8) likelihood of expansion of the product lines.

¹¹ Patent law has its own inconsistencies. An award of wrongful profits *is* permitted for infringement of design patents. 35 U.S.C. §289 (infringer “liable to the extent of his total profit”).

¹² *Web Printing Controls Co. v. Oxy-Dry Corp.*, 906 F.2d 1202, 1204-5 (7th Cir. 1990).

¹³ *Balance Dynamics Corp. v. Schmitt Indus.*, 204 F.3d 683, 690 (6th Cir. 2000) (“... recovery of monetary damages is only available upon a showing of actual confusion.”); *American Council of Certified Podiatric Physicians & Surgeons v. American Bd. of Podiatric Surgery, Inc.*, 185 F.3d 606, 618 (6th Cir. 1999) (“recovery of damages requires proof of actual consumer deception.”).

¹⁴ *Brunswick Corp. v. Spinit Reel Co.*, 832 F.2d 513, 525 (10th Cir. 1987); cited by *Australian Gold, Inc. v. Hatfield*, 436 F.3d 1228, 1241 (10th Cir. 2006).

¹⁵ *Boosey & Hawkes Music Publ. Ltd. v. Walt Disney Co.*, 145 F.3d 481, 493 (2d Cir. 1998). See also *W.W.W. Pharmaceutical Co. v. The Gillette Co.*, 984 F.2d 567, 576, n.6 (2d Cir. 1993); *Irby v. Thompson*, 2007 U.S. Dist. Lexis 50433, *10 (S.D.N.Y. 2007).

¹⁶ *Board of Supervisors for La. State Univ. Agric. & Mech. College v. Smack Apparel Co.*, 550 F.3d 465, 490 (5th Cir. 2008).

¹⁷ It merely cites the *Taco Cabana* case. See below.

¹⁸ *Video Pipeline, Inc. v. Buena Vista Entertainment, Inc.*, 275 F.Supp.2d 543, 575 (D. NJ 2003), citing *Choice Hotels Int'l v. Pennave Assoc., Inc.*, 43 Fed. Appx. 517, *1 (3rd Cir. 2002). However, *Choice Hotels* is designated as unpublished, and *Video Pipeline* also cites *Int'l Election Sys. Corp. v. Shoup*, 452 F.Supp. 712 (E.D. Pa. 1978), aff’d 595 F.2d 1212 (3rd Cir. 1979) (plaintiff must show actual confusion to collect damages).

¹⁹ 5 McCarthy, *supra* §30:74

²⁰ *Maier Brewing Co. v. Fleischmann Distilling Corp.*, 390 F.2d 117, 121 (9th Cir. 1968).

²¹ *Lindy Pen Co. v. Bic Pen Corp.*, 982 F.2d 1400, 1410-1411 (9th Cir. 1993).

²² *Id.* at 1411.

²³ *Burger King Corp. v. Mason*, 855 F.2d 779, 781 (11th Cir. 1988).

24 A subsequent decision by the Ninth Circuit in a case involving a false advertising claim under section 43(a) of the Lanham Act (15 U.S.C. § 1125(a)) creates some additional confusion. In *Southland Sod Farms v. Stover Seed Co*, 108 F.3d 1134, 1146 (9th Cir. 1997), the court reiterated its preference for a “totality of the circumstances” approach to awarding “monetary relief.” Here again the court created confusion by lumping “damages” and “profits” together into a single category (“monetary relief”), rather than analyzing them as alternative bases for relief. It then went on to equate intent to deceive as a surrogate of actual deception/confusion, as if the requirement of actual confusion nevertheless remained the state of Ninth Circuit law.

25 631 F.3d 464 (8th Cir. 2011).

26 “The 8th Circuit Clarifies its Position on Trademark Damages, Highlighting Fractures Among the Federal Circuits on Monetary Damages,” Venable LLP website, (www.venable.com/) article dated January 2011.

27 *Id.* at 472-473. Emphasis added.

28 932 F.2d 1113 (5th Cir. 1991), cert granted on other grounds (and decision on trade dress inherent distinctiveness), 505 U.S. 763, 112 S. Ct. 2753 (1992).

29 Henn, Monetary Recovery in Trademark Litigation, *IP Litigator* (Nov/Dec 2010), p. 3

30 *Taco Cabana, supra*, at 1126.

31 *Id.* at 1122.

32 Marino, “Is Actual Confusion Required to Recover Actual Damages?” ABA, Litigation Section online paper (April 18, 2012) (“At the other end of the spectrum are . . . Eleventh Circuits, which permit recovery based on all elements of injury to the business. . . . See *Aronowitz v. Health-Chem Corp.*, 513 F.3d 1129, 1241 (11th Cir. 2008).”

33 513 F.3d at 1241.

34 *Id.* at 1240.

35 *Trilink Saw Chain LLC v. Trilink Global LLC*, 583 F.Supp.2d 1293, 1320-1321 (N.D. Ga. 2008). Emphasis added. Citations omitted.

36 *United Indus. Corp. v. Clorox Co.*, 140 F.3d 1175, 1180 (8th Cir. 1998). See quotation in *Trilink* case, *supra*.