

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 19-10791; 19-12819
Non-Argument Calendar

D.C. Docket No. 6:14-cv-01335-RBD-GJK

COMMODORES ENTERTAINMENT CORPORATION,

Plaintiff -
Counter Defendant
Third Party Defendant
Appellee,

versus

THOMAS MCCLARY,
FIFTH AVENUE ENTERTAINMENT, LLC,

Defendants -
Counter Claimants
Third Party Plaintiffs
Appellants,

DAVID FISH,
an individual, et al.,

Third Party Defendants.

Appeals from the United States District Court
for the Middle District of Florida

(July 23, 2020)

Before ROSENBAUM, JILL PRYOR and MARCUS, Circuit Judges.

PER CURIAM:

In this common-law trademark case, Thomas McClary and his company, Fifth Avenue Entertainment, LLC (“McClary”), appeal the district court’s summary judgment and damages rulings in favor of Commodores Entertainment Corporation (“CEC”), denial of his motion to modify the scope of a permanent injunction, and denial of his motion to join an indispensable party. After careful review, we affirm.

I.

The essential facts surrounding this appeal have been laid out in McClary’s previous appeals to this Court. See Commodores Entm’t Corp. v. McClary, 648 F. App’x 771 (11th Cir. 2016) (per curiam) (“Commodores I”); Commodores Entm’t Corp. v. McClary, 879 F.3d 1114 (11th Cir.), cert. denied, 139 S. Ct. 225 (2018) (“Commodores II”). The prolonged dispute concerns the ownership of the mark “The Commodores,” the name of a famous Grammy Award-winning rhythm and blues, funk and soul music band. McClary was an original member of The Commodores but left the band in 1984. He later formed a musical group that

performed as “The 2014 Commodores” and “The Commodores featuring Thomas McClary.” In 2014, CEC filed this lawsuit against McClary, claiming trademark infringement, trademark dilution, passing off, false advertising, and unfair competition. CEC also moved for a temporary restraining order or a preliminary injunction. McClary raised several counterclaims, alleging, among other things, intentional interference with present and prospective business relationships, trademark infringement, misappropriation of likeness and identity, breach of duty of loyalty and utmost good faith and breach of fiduciary duty, and defamation.

At the outset of the case, the district court granted CEC’s motion for a preliminary injunction. After the injunction was entered, CEC learned that McClary and his band were marketing upcoming performances in Europe. Upon CEC’s motion for clarification, the district court held that the injunction had extraterritorial application because use of the marks overseas would have a substantial and negative impact on CEC, an American corporation. We affirmed the entirety of the preliminary injunction in 2016. Commodores I, 648 F. App’x at 778.

The district court then bifurcated the trial. Phase I determined the trademark ownership rights and Phase II resolved issues of infringement, liability and damages. After the defense rested in Phase I, McClary’s renewed motion for judgment as a matter of law was denied, as was his motion to dismiss the case for failure to join an indispensable party. The district court then granted CEC’s motion for judgment as

a matter of law, converted its preliminary injunction into a permanent one, and entered final judgment for CEC. On appeal, we affirmed the order granting judgment as a matter of law to CEC and held that the scope of the injunction was not impermissibly broad, that we lacked jurisdiction to review the denial of the motion to dismiss, and that McClary did not establish any affirmative defenses. Commodores II, 879 F.3d at 1142.

Back in the district court for Phase II, the district court granted partial summary judgment in favor of CEC -- on its trademark infringement claim found in Count 1 -- and granted summary judgment on or dismissed all of McClary's counterclaims and third-party claims. Phase II of the trial began on January 29, 2019 and addressed: (1) damages on CEC's trademark infringement claim; and (2) CEC's claim for violation of Fla. Stat. § 501.201, Florida's Deceptive and Unfair Trade Practices Act ("FDUTPA"). The jury found that McClary had actual notice of CEC's trademark registrations as of June 2009 and that CEC was entitled to damages from McClary's profits resulting from musical performances at: (1) West Hampton Beach Performing Arts Center ("WHBPAC"); (2) Bury St. Edmonds, United Kingdom; (3) Norwich, St. Andrews; (4) Basingstoke, Anvil; (4) Northampton, Spinney; (5) Skegness, Butlins; and (6) Basel, Switzerland. The jury found that CEC had not shown it had suffered damages under the FDUTPA.

Thereafter, McClary moved to modify the permanent injunction, arguing that he had acquired licenses to use the trademark “The Commodores” in Mexico, New Zealand, and Switzerland. The district court denied the motion, finding that it was not timely and that McClary did not show a sufficient basis for modifying the injunction. This timely appeal follows.

II.

First, we are unpersuaded by McClary’s argument that the district court erred by including in its grant of summary judgment on CEC’s trademark infringement claim not only his performance at the WHBPAC, but also the European performances, which he says were not raised in the complaint or summary judgment motion. We review a district court’s grant of summary judgment de novo, applying the same legal standard as the district court and construing the facts and drawing all reasonable inferences therefrom in the light most favorable to the non-moving party. Josendis v. Wall to Wall Residence Repairs, Inc., 662 F.3d 1292, 1314 (11th Cir. 2011). We will affirm a grant of summary judgment if the movant has shown, based on our review of the entire record, “that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a).

Trademark infringement is proscribed by 15 U.S.C. § 1114(1)(a), which prohibits any person from using “in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for

sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive.” A party is entitled to damages incurred for trademark infringement, including those that continued to accrue after its complaint was filed, if properly established during discovery. See 15 U.S.C. § 1117(a) (plaintiff is entitled, “subject to the principles of equity,” to recover, inter alia, “any damages sustained by the plaintiff”); see also Wilcox v. Plummer’s Ex’rs, 29 U.S. (4 Pet.) 172, 182 (1830) (in negligence case, noting that “it is perfectly clear that the proof of actual damage may extend to facts that occur and grow out of the injury, even up to the day of the verdict”); Rea v. Ford Motor Co., 560 F.2d 554, 557 (3d Cir. 1977) (“[I]n general, a court has the power to award damages occurring up to the date of the ultimate judgment in the case.”).

The plain language of the summary judgment order did not limit CEC’s damages to any specific performance. The order provided that CEC was entitled to summary judgment on its trademark infringement claim under 15 U.S.C. § 1114, because there was no genuine issue of material fact as to whether CEC’s marks were “used in commerce by the defendant without the [plaintiff’s] consent” and “the unauthorized use was likely to cause confusion, or to cause mistake or to deceive.” McClary conceded at the summary judgment hearing that he had used the CEC marks in commerce. Further, the district court ruled, and our Court affirmed that the

use of the marks was likely to cause confusion. Commodores II, 879 F.3d at 1139. The district court simply did not limit its holding to any particular performance.

Moreover, the record reveals that McClary has long been on notice of his potential liability for the European performances. CEC's August 2014 complaint plainly sought damages for continuing infringing conduct that occurred after it filed its complaint. It alleged that McClary was improperly marketing the band online using CEC trademarks and using the name "The Commodores featuring Thomas McClary" in connection with live musical performances, and specified that McClary's conduct "has and will continue to cause confusion to, mistake by, and deception of customers." Then, after the district court entered a preliminary injunction -- enjoining McClary from "using any of the Marks at issue in a manner other than fair use, including performing under the name 'The Commodores featuring Thomas McClary' or 'The 2014 Commodores'" -- and after McClary nevertheless used "The Commodores featuring Thomas McClary" and "The Commodores" to schedule performances in Europe in 2015, the district court issued a clarification order on December 30, 2014, stating that this conduct violated its injunction. The court added that "[b]y proceeding in such a precipitous fashion, the Defendants [sic] conduct reflects contempt for the orders of the Court."

And later, CEC's motion for summary judgment argued that Phase I of the trial determined that McClary used the CEC marks in commerce without CEC's

consent and that his use of the marks was likely to cause confusion and did cause confusion. CEC noted that McClary had admitted to “improperly using the CEC Marks on their website, Facebook and through, at a minimum, a performance” at WHBPAC (emphasis added). Further, McClary cannot credibly argue that he had no notice that the European performances could constitute infringement when the extraterritorial scope of the injunction was litigated in his two prior appeals, both of which were decided before the district court entered the summary judgment order at issue here. Commodores I, 648 F. App’x 771; Commodores II, 879 F.3d 1114.¹

Nor, for similar reasons, did the district court err by awarding damages to CEC based on McClary’s European performances. The first time McClary argued that CEC could not seek damages for conduct in the EU was on December 18, 2018, in his response to CEC’s request for a case management conference as to Phase II. CEC countered that the issue could be tried by the parties’ express or implied consent “as a result of such issues being directly advanced in the litigation by both parties in multiple filings, including Defendants’ assertion of extraterritorial issues on appeal, and that were not identified as objectionable in the first pretrial statement, Doc. 319.”

¹ Thus, this case is unlike those where courts have found that a plaintiff impermissibly asserted a new claim or added new allegations without notice. Cf. Optimum Techs., Inc. v. Henkel Consumer Adhesives, Inc., 496 F.3d 1231, 1247 (11th Cir. 2007); Thompkins v. Lil’ Joe Records, Inc., 476 F.3d 1294, 1310 (11th Cir. 2007); Gilmour v. Gates, McDonald & Co., 382 F.3d 1312, 1315 (11th Cir. 2004). The remaining cases McClary relies on do not support his position, are distinguishable, and are not even binding on this Court.

Not only was McClary's objection delayed, but, as we've detailed, the complaint adequately alleged the conduct at issue, and McClary was on notice since December 2014 that the district court considered his scheduling of performances in Europe using the names "The Commodores featuring Thomas McClary" and "The Commodores" as a violation of its injunction. In addition, two of the parties' pretrial statements show that McClary was on notice -- in the joint pre-trial statement for Phase II, CEC said that if it were found to be owner of the marks, it would seek relief based on McClary's conduct "in the U.S. and overseas," and in its statement on alleged damages for Phase II, CEC said that it would seek damages for the "inappropriate use of the Commodores trademarks in booking performances in the U.S. and Europe." And again, in the parties' Joint Notice Regarding Phase II Issues, CEC restated that it was seeking to recover damages from the performances McClary booked in the United States and Europe.

The totality of the record thus belies McClary's argument that he was not on notice that CEC's claim would include damages from the U.S. and European performances he booked. As a result, we conclude that CEC was entitled to damages incurred for trademark infringement that continued to accrue after its complaint was filed. See 15 U.S.C. § 1117(a). We affirm the district court's orders granting

summary judgment and awarding damages on CEC's trademark infringement claim to include McClary's performances at the WHBPAC and in Europe.²

III.

Next, we are unconvinced by McClary's claim that the award of damages for the WHBPAC concert was improper because CEC did not satisfy 15 U.S.C. § 1111, which requires a defendant to have actual notice of trademark registration in order to recover for profits or damages. We review de novo the sufficiency of the evidence for a jury verdict, taking the evidence in the light most favorable to the prevailing party and drawing all reasonable inferences and credibility choices in favor of the jury verdict. U.S. EEOC v. St. Joseph's Hosp., Inc., 842 F.3d 1333, 1343 (11th Cir. 2016). "Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable." Id. (quotations omitted).

Here, there was ample evidence, viewed in the light most favorable to CEC, for the jury to decide that McClary had actual notice of CEC's trademark registration as of June 2009. At trial, CEC proffered a letter, dated June 8, 2009, from attorney

² In his reply brief, McClary adds new support for his claim that the performances in Europe weren't to be included -- that CEC sought to continue the Phase II trial until after the European Intellectual Property Office issued a final decision in ongoing EU litigation regarding "The Commodores" mark in Europe. However, this motion, which was denied, at most suggests that CEC thought that the lack of finality in the EU litigation might hinder its efforts to recover damages in the district court from conduct in the EU. In any event, "[a]rguments not properly presented in a party's initial brief or raised for the first time in the reply brief are deemed waived." In re Egidi, 571 F.3d 1156, 1163 (11th Cir. 2009).

Edwin Chanin to Thomas McClary with the subject line “Unauthorized Announcement Regarding Commodores Reunion.” The letter provided that “[a]ll intellectual property rights to use of the name Commodores and the Commodores logo are owned by Commodore Entertainment Corp. You have no right to make any announcement about or use the name Commodores.” The letter also said that “any future unauthorized use of the Commodores trade name or logo will be regarded as intentional misconduct which will not be tolerated.” McClary dismisses this as merely a threatening letter that did not mention the trademark registrations. But the letter clearly expressed that “[a]ll intellectual property rights” belong to CEC, and the jury quite reasonably could have concluded that this included registered trademarks. The statement that CEC would treat “any future unauthorized use of the Commodores trade name or logo” as misconduct further put McClary on actual notice of CEC’s trademark registrations. We affirm on this issue as well.

IV.

We also are unpersuaded by McClary’s challenge to the district court’s order denying his motion under Rule 60(b)(5) and (b)(6) to modify the permanent injunction. We review a district court’s decision under Rule 60(b) for abuse of discretion. Am. Bankers Ins. Co. of Fla. v. Nw. Nat. Ins. Co., 198 F.3d 1332, 1338 (11th Cir. 1999). To show an abuse of discretion, McClary “must demonstrate a

justification so compelling that the court was required to vacate its order.” Cavaliere v. Allstate Ins. Co., 996 F.2d 1111, 1115 (11th Cir. 1993) (quotations omitted).

Rule 60(b)(5) “permits a party to obtain relief from a judgment or order if, among other things, ‘applying [the judgment or order] prospectively is no longer equitable.’” Horne v. Flores, 557 U.S. 433, 447 (2009). Modification is proper if “‘a significant change either in factual conditions or in law’ renders continued enforcement ‘detrimental to the public interest.’” Id. (quotations omitted). “The party seeking relief bears the burden of establishing that changed circumstances warrant relief.” Id. Rule 60(b)(6) permits a party to obtain relief from a judgment or order for “any other reason that justifies relief.” “Relief from ‘judgment under Rule 60(b)(6) is an extraordinary remedy’” that requires showing “‘extraordinary circumstances’ to justify reopening an order. Arthur v. Thomas, 739 F.3d 611, 628 (11th Cir. 2014) (quotations omitted). Additionally, “[a] motion under Rule 60(b) must be made within a reasonable time.” Fed. R. Civ. P. 60(c)(1). What constitutes a reasonable time is determined by considering “whether the parties have been prejudiced by the delay and whether a good reason has been presented for failing to take action sooner.” BUC Int’l Corp. v. Int’l Yacht Council Ltd., 517 F.3d 1271, 1275 (11th Cir. 2008) (quotations omitted).

McClary argues that the permanent injunction should be modified to exclude Mexico, New Zealand, and Switzerland, because these countries issued exclusive

licenses for the mark “The Commodores” that cover live music performances. However, we agree with the district court that McClary’s motion was not filed within a reasonable time as Rule 60(c)(1) requires. McClary filed his motion to modify the permanent injunction on May 20, 2019 -- more than five years after the court entered the preliminary injunction, three years after it issued the clarification order confirming its extraterritorial reach, two-and-a-half years after it entered the permanent injunction, and over a year after our Court affirmed the scope of the permanent injunction. Moreover, McClary obtained the licenses in April 2017, July 2017, June 2018, and August 2018. He did not move for two years after his first acquisition, and about nine months after his last. The district court was well within its discretion to find this time frame unreasonable, especially in light of the extensive litigation over the injunction and McClary’s failure to explain the delay.³

V.

There is likewise no merit to McClary’s claim that the district court abused its discretion in denying his motion to join Ronald LaPreard -- who McClary says was an original member of The Commodores claiming partial ownership of the marks -- as an indispensable party. We “review a district court’s decision regarding the

³ Further, McClary has not shown that significant circumstances warrant relief under Rule 60(b)(5) or (6). As we see it, the district court did not err in finding that the substantial negative effects on CEC in the United States from McClary’s use of the marks abroad were sufficient to maintain the scope of the injunction. See Steele v. Bulova Watch Co., 344 U.S. 280, 288 (1952) (“Unlawful effects in this country . . . are often decisive.”); Commodores II, 879 F.3d at 1139–40.

joinder of indispensable parties for abuse of discretion.” Vanover v. NCO Fin. Servs., Inc., 857 F.3d 833, 837 (11th Cir. 2017) (quotations omitted). To determine whether a party is indispensable under Rule 19, a court first must determine whether the party should be joined if feasible. Focus on the Family v. Pinellas Suncoast Transit Auth., 344 F.3d 1263, 1279–80 (11th Cir. 2003). Second, if the party is required but joinder is not feasible, “then the court must inquire whether, applying the factors enumerated in Rule 19(b), the litigation may continue.” Id.

For starters, McClary has not addressed whether joinder of LaPread is feasible. Rule 19(a)(1) provides that joinder is feasible if the party is “subject to service of process” and the “joinder will not deprive the court of subject-matter jurisdiction.” LaPread’s 2015 affidavit says that he is a New Zealand resident, and trial witnesses confirmed this. McClary cites no authority about whether LaPread would be amenable to service of process in New Zealand.

Moreover, LaPread is not an indispensable party in this suit. “A party is considered ‘necessary’ to the action if the court determines either that complete relief cannot be granted with the present parties or the absent party has an interest in the disposition of the current proceedings.” Laker Airways, Inc. v. British Airways, PLC, 182 F.3d 843, 847 (11th Cir. 1999) (citation omitted); see also Fed. R. Civ. P. 19(a)(1). According to McClary, LaPread is an indispensable party under Rule 19(a)(1)(B)(i), in that LaPread “claims an interest relating to the subject of the action

and is so situated that disposing of the action in the person's absence may . . . as a practical matter impair or impede the person's ability to protect the interest."

In Commodores II, we held that the denial of McClary's motion to dismiss for failure to join an indispensable party was not a reviewable final order, and declined to exercise pendant appellate over the claim since it was not inextricably intertwined with the permanent injunction. 879 F.3d at 1127–28. Our analysis of the claim is nevertheless relevant. We noted that "LaPread would not be precluded from suing in the future to determine any ownership rights he may have in the marks because, in Florida, both res judicata and collateral estoppel require an identity of the parties and LaPread is neither a party to nor in privity with any party to this suit." Id. at 1128 (citations omitted). We adhere to our earlier analysis. Because disposing of this suit without LaPread does not impede his ability to later assert any claimed interest in the marks, the court did not abuse its discretion in denying the motion.⁴

VI.

Finally, we reject McClary's argument that the district court erred in granting CEC summary judgment on his counterclaims and third-party claims, which include (1) his commercial misappropriation counterclaim; (2) his FDUTPA counterclaim; (3) his defamation/business disparagement claims; (4) his interference-with-present-

⁴ As for any new arguments about LaPread that McClary raises in his reply brief, we again decline to consider them. See In re Egidi, 571 F.3d at 1163. Moreover, as we've said, LaPread remains free to sue to determine his rights in the marks.

and-prospective-economic-opportunities claims; and (5) his breach-of-duty-of-loyalty-and-utmost-good-faith and breach-of-fiduciary-duty claims.

As for McClary's argument that the district court erred in granting summary judgment in favor of CEC on his counterclaim for commercial misappropriation of his likeness and identity under Fla. Stat. § 540.08 -- when, he says, it used his name and likeness on "social media sites like Facebook" without his permission -- we disagree. "To defeat a motion for summary judgment, the nonmoving party may not rely on 'mere allegations.' It must raise 'significant probative evidence' that would be sufficient for a jury to find for that party." LaChance v. Duffy's Draft House, Inc., 146 F.3d 832, 835 (11th Cir. 1998) (footnotes and quotations omitted).

To support his claim, McClary offered screenshots of a Facebook page run by "The Commodores," which had a blue checkmark next to the name "The Commodores," and used his picture on the page. McClary alleged that the blue checkmark is a "verified badge," which means that Facebook has confirmed that the account belongs to the group it represents. CEC, in response, introduced an unsworn declaration from William King, current member of The Commodores and CEC's president, submitted pursuant to 28 U.S.C. § 1746(2), averring that CEC does not maintain a Facebook page. The district court accepted the declaration and treated it as an affidavit for summary judgment purposes. See United States v. Four Parcels of Real Prop. in Greene & Tuscaloosa Ctys. in State of Ala., 941 F.2d 1428, 1444

n.36 (11th Cir. 1991). McClary failed to present any rebuttal evidence, which could have included authority about the blue checkmark's meaning or how Facebook confirms the identity of a verified account. Indeed, the district court asked McClary's counsel at the summary judgment hearing whether she wanted the court to take judicial notice of the blue checkmark and what it meant. Counsel responded, "to be honest with you, Your Honor, I didn't know either. My daughter told me what the blue check meant." On this record, McClary, as the nonmovant, did not offer sufficient evidence to defeat summary judgment.

Nor are we convinced by McClary's challenges to the district court's summary judgment ruling on his FDUPTA counterclaim. A successful FDUTPA claim requires three elements: "(1) a deceptive act or unfair practice; (2) causation; and (3) actual damages." Dolphin LLC v. WCI Communities, Inc., 715 F.3d 1243, 1250 (11th Cir. 2013). The district court properly held that McClary maintained no ownership rights in the marks, so, as McClary concedes, his FDUTPA counterclaim fails to the extent it was based on his claim of trademark infringement. On appeal, he argues that this counterclaim was also based on the CEC's misappropriation of his likeness and identity, and relies on the argument we've just rejected. We, therefore, affirm on this ground as well.

We also disagree with McClary that the court erred in granting summary judgment on his counterclaim and third-party claims for defamation/ business

disparagement. Florida law generally requires five elements to prove defamation: (1) publication; (2) falsity; (3) the actor acted with knowledge or reckless disregard as to the falsity on a matter concerning a public official, or at least negligently on a matter concerning a private person; (4) actual damages; and (5) the statement is defamatory. Jews For Jesus, Inc. v. Rapp, 997 So. 2d 1098, 1106 (Fla. 2008).

McClary hinged this claim on allegedly false e-mail communications CEC's former manager David Fish made to non-parties, representing that McClary was enjoined from any use of CEC's marks. In the first e-mail, Fish requested contact information for a promoter after becoming aware that a band was marketing itself as The Commodores. The second e-mail informed John Hessenthaler, a UK promoter, that McClary was improperly marketing and promoting appearances by The Commodores in the UK and could not use CEC's marks, and directed Hessenthaler to the district court's preliminary injunction.⁵ Because the district court had already ruled that McClary's use of CEC's marks, including "The Commodores featuring Thomas McClary," created a likelihood of confusion and actual confusion, Fish's statements in the emails about McClary were therefore true when McClary continued to market himself as "The Commodores featuring Thomas McClary" in the EU. Additionally, Fish ameliorated any ambiguity about McClary's rights to use

⁵ To the extent he cites, for the first time on appeal, an e-mail from Matt Santos at Pyramid Entertainment Group, we decline to consider it. See Taylor v. Mentor Worldwide LLC, 940 F.3d 582, 598 (11th Cir. 2019) (litigants generally waive issues raised for the first time on appeal).

the marks by attaching the preliminary injunction to his e-mail to Hessenthaler. Thus, the district court did not err in granting summary judgment on this claim.

Likewise, we find no merit to McClary's argument that the district court erred in granting summary judgment on his counterclaims and third-party claims for present and prospective interference with economic opportunities. To establish a claim of tortious interference with a present or prospective business relationship in Florida, a plaintiff must show: "(1) the existence of a business relationship that affords the plaintiff existing or prospective legal rights; (2) the defendant's knowledge of the business relationship; (3) the defendant's intentional and unjustified interference with the relationship; and (4) damage to the plaintiff." Int'l Sales & Servs., Inc. v. Austral Insulated Prods., Inc., 262 F.3d 1152, 1154 (11th Cir. 2001). A plaintiff cannot establish a cause of action in a tortious interference case if the defendant merely provided truthful information to a third party. See Worldwide Primates, Inc. v. McGreal, 26 F.3d 1089, 1092 (11th Cir. 1994).

McClary's interference-with-present-economic-opportunities claim rested on Fish's alleged misrepresentations and threats of legal action to the WHBPAC, with whom McClary had an existing performance contract. McClary also alleged that after the preliminary injunction was entered, CEC sent "blast e-mails" threatening promoters and agents with litigation in booking McClary under the name "The Commodores featuring Thomas McClary." He further claimed that CEC interfered

with his business opportunity with The Halls performance center in the UK through an e-mail. The interference-with-prospective-economic-opportunities claim arose from Fish's communications with booking agents and talent buyers, informing them that McClary had no right to use "The Commodores" marks and threatening legal action for booking McClary's band. McClary argued that this interfered with prospective economic relationships with the Tampa Bay Black Heritage Festival, Italian promoter Luigi Sidero, U.S. promoter Carlos Keyes, and European venues. He also included the e-mail to The Halls in his prospective interference claim.

On appeal, McClary says that CEC's motion for summary judgment on the present-interference claim did not address all of his claims because it focused on his relationship with the WHBPAC and not on his relationships with European vendors. However, as we've detailed, McClary mostly listed interference with European relationships in his prospective interference claim, and CEC addressed those claims in its summary judgment motion. It noted the allegations regarding The Halls in its discussion of prospective inference. In its discussion of present interference, CEC duly addressed McClary's claims regarding the WHBPAC performance and the blast e-mails. CEC adequately responded to his claims.

Nor are we persuaded by McClary's other arguments that the court erred in granting summary judgment to CEC on these claims. We already decided, in the

context of the defamation claims, that the statements made by CEC's agents and Fish were truthful, and the court properly applied this finding to the interference claims.

Lastly, we conclude that the district court did not err in granting summary judgment in favor of McClary's third-party claims against current members of The Commodores King and Walter Orange for breach of the duty of loyalty and utmost good faith and their fiduciary duties by denouncing McClary's rights as a shareholder and failing to follow corporate formalities. Both parties acknowledge that these claims turn on whether McClary is still a shareholder in CEC. The district court held that there was no genuine dispute of material fact because McClary had presented no evidence to dispute CEC's contention that he was no longer a shareholder. The district court relied on King's statements acknowledging McClary's resignation and cancellation of his shares, as well as McClary's cancelled stock certificate. McClary attempts to create a dispute of fact about his status as a shareholder by citing his declaration, which stated that he "never sold, traded, surrendered or otherwise disposed of [his] shares" in CEC and that he had never seen the stock certificate.⁶

⁶ For the first time on appeal, McClary says that the stock certificate was not authenticated under Federal Rule of Evidence 901(a). Accordingly, this argument is waived. See Taylor, 940 F.3d at 598. Regardless, King authenticated the stock certificate in his declaration. See Fed. R. Evid. 901(b)(1) (testimony of a witness with knowledge satisfies the authentication requirement).

Notably, however, McClary did not present any evidence rebutting King's declaration that McClary never participated as a shareholder after he stopped performing with The Commodores in 1984. Indeed, as we previously held, "[n]o reasonable juror could have found that McClary remained with the group in the position he had previously held." Commodores II, 879 F.3d at 1132. Similarly, no reasonable juror could have found that McClary retained his status as a shareholder.

In short, we affirm the district court's summary judgment rulings in favor of CEC, its judgment granting damages to CEC, its denial of the motion to modify the scope of the permanent injunction, and its denial of the motion to join an indispensable party.

AFFIRMED.