

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Raymond P. Moore**

Civil Action No. 18-cv-02329-RM-MEH

ERIK M. UNDERWOOD, a Colorado citizen, and,
MY24HOURNEWS.COM, INC., a Colorado corporation,

Plaintiffs,

v.

BANK OF AMERICA CORPORATION, a Delaware corporation,

Defendant.

ORDER

This service mark infringement lawsuit is before the Court on remand from the United States Court of Appeals for the Tenth Circuit. *See Underwood v. Bank of Am. Corp.*, 996 F.3d 1038 (10th Cir. 2021). The Tenth Circuit vacated summary judgment in Defendant's favor on Plaintiffs' claims premised on their E.R.I.C.A. service mark but otherwise affirmed summary judgment for Defendant. The sole issue now is whether Plaintiffs have raised a genuine issue of material fact as to their actual use of the E.R.I.C.A. mark before October 2016. The Tenth Circuit has framed the three relevant factual issues as follows:

Under the correct view of the law, to establish a protectable interest in the E.R.I.C.A. mark based on actual use, [Plaintiffs] must establish (1) my24erica.com—the only place where Mr. Underwood claims services were offered in connection with the mark—was publicly accessible before [Defendant's] priority date of October 2016; (2) search engine and personal assistant services on my24erica.com were rendered to others before October 2016; and (3) as it appeared on the my24erica.com website display, the E.R.I.C.A. mark clearly identified and distinguished the services offered on the website.

Id. at 1057 (citations, quotation marks, and brackets omitted).

Having reviewed and reconsidered the record in light of this standard, the Court is not convinced there is evidence raising a genuine issue of material fact as to any of these three issues. However, the Court will provide an opportunity for supplemental briefing before ruling further.

Accordingly, the parties may file for the Court's consideration supplemental briefs based on the Tenth Circuit's opinion on or before June 10, 2022.

DATED this 10th day of May, 2022.

BY THE COURT:

A handwritten signature in black ink, appearing to read "Raymond P. Moore", written over a horizontal line.

RAYMOND P. MOORE
United States District Judge