

**NO. 18-1157**

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

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**LIBERTY COUNSEL, INC.**

**Plaintiff-Appellant,**

**v.**

**GUIDESTAR USA, INC.,**

**Defendant-Appellee**

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**On Appeal from the United States District Court for the  
Eastern District of Virginia, Case No. 4:17-cv-00071-RAJ-DEMVAED**

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**PLAINTIFF-APPELLANT'S OPENING BRIEF**

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Fed. R. App. P. 26-1, Plaintiff-Appellant Liberty Counsel, Inc. states that it is a non-profit corporation that has no parent corporation, is not publicly traded, and no publicly traded corporation owns ten (10) percent or more of its stock.

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## **JURISDICTIONAL STATEMENT**

The district court had jurisdiction in the matter below pursuant to 28 U.S.C. § 1331 and § 1338 because Plaintiff raised claims under the Lanham Act, 15 U.S.C. § 1125, *et seq.* The district court's order dismissing Plaintiff's claims is an appealable final decision under 28 U.S.C. § 1291.

The district court's order dismissing Plaintiff's claims was issued on January 23, 2018, and Plaintiff filed its notice of appeal February 7, 2018. The appeal is therefore timely under Fed. R. App. P. 4(a)(1)(A).

## **STATEMENT OF THE ISSUES**

1. Whether the district court erred in dismissing Plaintiff's claims under the Lanham Act and holding that GuideStar's profile of Liberty Counsel, which included the false and misleading "hate group" designation and advertised paid subscriptions to GuideStar's services, did not constitute commercial speech.
2. Whether the district court erred in dismissing Plaintiff's claims under the Lanham Act and holding that GuideStar's profile of Liberty Counsel, which included the false and misleading "hate group" designation and advertised paid subscriptions to GuideStar's services, was merely an informative statement and therefore pure speech without a commercial nature.
3. Whether the district court erred in holding that GuideStar's profile of Liberty Counsel did not request or propose a sale of GuideStar's goods or services

despite the fact that GuideStar advertised, promoted, and offered paid subscriptions to its premium services directly on Liberty Counsel's profile.

4. Whether the district court erred in reaching factual conclusions contrary to the well-pleaded allegations of Liberty Counsel's Complaint and drawing inferences in GuideStar's favor at the motion to dismiss stage.

5. Whether the district court erred in failing to grant Liberty Counsel leave to amend prior to dismissing its complaint with prejudice.

## STATEMENT OF THE CASE

### I. LIBERTY COUNSEL.

Liberty Counsel is a non-profit education, advocacy, and legal defense organization dedicated to advancing religious freedom, the sanctity of human life, and the preservation of family values from a Christian and Biblical perspective. (Joint Appendix, "JA," at 004, ¶15). Liberty Counsel is recognized by the Internal Revenue Service as a non-profit, tax-exempt organization under 26 U.S.C. § 501(c)(3). (*Id.*, ¶16). Liberty Counsel is known nationally and internationally for its litigation, education, and public policy activities. (*Id.*, ¶17). Liberty Counsel has represented many clients in courtrooms across the globe, candidates and members of state and federal legislatures, state Supreme Court justices, candidates for judicial office, colleges and universities, local branches of government, public school boards, individuals, businesses, and churches. (*Id.*, ¶18).

Liberty Counsel attorneys are admitted to the United States Supreme Court, every federal circuit court of appeals, numerous federal district courts across the country, and are licensed to practice law in numerous states. (*Id.* at 005, ¶19). Liberty Counsel and its attorneys have appeared before the United States Supreme Court, many state Supreme Courts, and many federal Circuit Courts of Appeal, district courts, and lower state courts. (*Id.*). Liberty Counsel attorneys are involved in numerous media interviews each year resulting in thousands of printed articles and media broadcasts, and have appeared on countless radio and television network and cable programs. (*Id.*, ¶20). Liberty Counsel attorneys have testified before United States congressional committees on public policy issues of national and international significance, including religious expression, religious liberty, speech, immigration, and employment discrimination. (*Id.*, ¶21). Liberty Counsel attorneys have also testified before many state legislatures and administrative agencies concerning matters of religious freedom, the sanctity of human life, and family values. (*Id.*, ¶22). Liberty Counsel has affiliated ministries, including Liberty Counsel Action, LCAction PAC, Liberty Prayer Network, Liberty Relief International, Christians in Defense of Israel, and Covenant Journey. (*Id.*, ¶23).

Liberty Counsel condemns violence of any kind, does not advocate for any group or individual to engage in any acts of violence, does not advocate for any unlawful activity, and does not condone any group or individual who engages in any

such activity. (*Id.* at 006, ¶24). Liberty Counsel seeks to advance its mission by lawful means through litigation, education, and public policy advocacy throughout the country and around the world. (*Id.*, ¶25). As a non-profit charitable entity, Liberty Counsel relies on its good reputation to attract and receive charitable donations from individuals, groups, churches, organizations, foundations, and others. (*Id.*, ¶26). As with other charitable organizations, these donations are the lifeblood of Liberty Counsel's public support, and Liberty Counsel would not be able to exist or serve its clients, constituents, and the public without such support. (*Id.*). Liberty Counsel's reputation is important to its mission and to its donors and prospective donors. (*Id.*, ¶27). Liberty Counsel's long-standing relationships with its donors is made possible by its good name and reputation. (*Id.*, ¶28).

## **II. GUIDESTAR.**

GuideStar was formed on September 6, 1994 as Philanthropic Research, Inc., and in October 1996 received its tax-exempt status under 26 U.S.C. § 501(c)(3). (JA at 006, ¶29) (citing GuideStar USA, Inc., *History*, <https://learn.guidestar.org/about-us/history> (last visited April 4, 2018)). In July 1996, GuideStar officially began publishing its "Directory of American Charities." (*Id.*, ¶30). Since 1996, GuideStar has continued to increase the number of charities it reviews and discusses on the nonprofit profiles on its website. (*Id.*, ¶31). Numerous state and national government bodies have used information published on GuideStar's website to consider and

make various decisions related to nonprofit organizations. (*Id.* at 007, ¶32). Donors, both individual and institutional, use GuideStar’s directory and rely upon the information provided by GuideStar to make decisions about donations, grants, and funding requests with respect to the non-profit entities on which GuideStar provides its reports. (*Id.*, ¶33).

GuideStar claims that its mission is to “revolutionize philanthropy by providing information that advances transparency, enables users to make better decisions, and encourages charitable giving.” (*Id.*, ¶34) (citing GuideStar USA, Inc., *About Us*, <https://learn.guidestar.org/about-us/> (last visited April 4, 2018)). GuideStar claims that it “gathers and disseminates information about every single IRS registered nonprofit organization” and that it aims to “provide as much information as [it] can about each nonprofit’s mission, legitimacy, impact, reputation, finances, programs, transparency, governance, and so much more.” (*Id.*, ¶35). GuideStar states that it is not “a charity evaluator or watchdog,” but merely a “public charity that collects, organizes, and presents the information you want in an easy-to-understand format,” and, importantly, it claims to do so “while remaining neutral.” (*Id.*, ¶36). GuideStar claims it is “the search engine for non-profit information.” (*Id.*, ¶37).

### III. GUIDESTAR'S ECONOMIC MOTIVATION FOR ADOPTING THE FALSE AND MISLEADING "HATE GROUP" DESIGNATION.

In 2017, GuideStar adopted the designation of certain nonprofit organizations as "hate groups" by the Southern Poverty Law Center ("SPLC") and began to prominently make representations of fact concerning these purported "hate groups" based solely on the SPLC's designation. (JA at 007, ¶38). GuideStar modified its description of 46 organizations, out of the 1,684,038 nonprofit organizations on which it claims to maintain profiles, to prominently display, at the top of each affected organization's profile, a banner indicating that the organization has been flagged as a "hate group" by the SPLC. (*Id.* at 008, ¶39). Jacob Harold, President and CEO of GuideStar, stated that GuideStar "added new information to the profiles of 46 of these organizations: the fact that they had been designated as hate groups by the Southern Poverty Law Center." (*Id.*, ¶40).

GuideStar has admitted that its motivation for adopting the false and misleading "hate group" designation was economic and tied to its economic interest in maintaining its customers. (*Id.*, ¶¶40-44). Mr. Harold said GuideStar's decision was based on GuideStar's "role in the nonprofit sector as being a hub of information about nonprofit organizations." (*Id.*, ¶41). GuideStar has admitted that its purpose and motivation for the adoption of the SPLC's designation was financial and economic, because it "started to hear from customers who were worried they might facilitate a donation to a hate group," which Mr. Harold "define[s] as an organization

that denigrates a group of people based on their identity.” (*Id.*, ¶43). GuideStar admitted that it was seeking to influence the consumers of its information in the decisions they make concerning donations to various nonprofit organizations. (*Id.*, ¶44). Based on its alleged concerns, GuideStar began researching “potential partners from whom [it] could obtain data on hate groups.” (*Id.*, ¶45).

GuideStar stated that it chose SPLC to be its partner because it “emerged as the best option” and because it purportedly “has the most comprehensive information on hate groups that [GuideStar] could find.” (*Id.* at 009, ¶47). GuideStar admitted its knowledge that there “are legitimate critiques of SPLC’s analysis” and that the SPLC has been accused of “political bias.” (*Id.*, ¶48). Despite the criticisms and its admission that the SPLC’s “data” is flawed, GuideStar proclaimed that it “intend[s] to continue using the SPLC as a data source.” (*Id.*, ¶49). Mr. Harold attributed GuideStar’s decision to include the SPLC designation for a limited number of nonprofit organizations, including Liberty Counsel, as “a response to the recent rise in ‘hateful rhetoric’ in the U.S.” (*Id.*, ¶50). Mr. Harold admitted that GuideStar’s decision is “highly politicized in a highly politicized moment in history,” admitted that GuideStar simply “relie[s] on the [SPLC’s] list,” and that GuideStar “did not conduct its own investigation of whether a nonprofit deserves to be labeled a hate group.” (*Id.*, ¶51).

Nevertheless, despite all the criticisms concerning the SPLC's ideological designations, Mr. Harold said GuideStar is "making a judgment to trust that third party." (*Id.*, ¶52). By making a judgement to trust the SPLC's designations, and relying on SPLC as its exclusive "data source" for designating certain nonprofit organizations as "hate groups," GuideStar is relying on SPLC as its exclusive source of fact on "hate groups." (*Id.*, ¶53). GuideStar's admitted desire to include relevant "data" (*i.e.*, facts) from the SPLC's "factual" determinations concerning certain nonprofit organizations demonstrates that GuideStar wanted to "obtain [facts] on hate groups" and that it "wanted to offer additional [facts]." (*Id.* at 010, ¶54). GuideStar's use of the term "hate group" as one element of purported "data" is therefore a purported assertion of fact, not opinion. (*Id.*, ¶55).

#### **IV. GUIDESTAR'S PROFILE OF LIBERTY COUNSEL.**

Despite all of the evidence that the SPLC's "hate group" designations are strictly ideological, not based on any objective criteria, designed solely to "completely destroy" organizations that the SPLC disagrees with, and have resulted in attempted mass murder of individuals at organizations so designated, GuideStar has chosen to adopt and prominently republish the SPLC's "hate group" designation as part of its purported representations of fact concerning Liberty Counsel. (JA at 017, ¶97). At the top of GuideStar's profile of Liberty Counsel, GuideStar included

a red banner with the SPLC logo and a headline stating that “This organizations was flagged as a hate group by the Southern Poverty Law Center.” (*Id.*, ¶98).

On June 23, 2017, GuideStar announced that it was going to remove the “hate group” designation from the profiles of the 46 organizations it has previously chosen to denigrate. (*Id.* at 018, ¶102). While GuideStar impliedly acknowledged the flaws inherent in SPLC’s purported “data,” GuideStar blamed its decision to drop the “hate group” designations on purported “harassment and threats directed at our staff and leadership” allegedly causing GuideStar to have “concerns for our staff’s wellbeing.” (*Id.*, ¶103). GuideStar has therefore neither abandoned, nor retracted, nor remedied its defamatory publications regarding Liberty Counsel. (*Id.*, ¶104). Instead, it has made those defamatory publications worse, by falsely implying that Liberty Counsel and other so-called “hate groups” are now threatening or causing others to threaten violence against GuideStar. (*Id.*). Moreover, GuideStar has indicated that it will continue to publish and republish the SPLC’s false and misleading “hate group” designation to the public “on request.” (*Id.*, ¶105).

**V. GUIDESTAR’S IDEOLOGICAL LEANINGS DEMONSTRATE IT IS NOT A NEUTRAL OR DISINTERESTED OBERVER.**

As GuideStar’s President and CEO made abundantly clear, GuideStar’s intention in adopting the SPLC’s “hate group” designations and representing them as fact on GuideStar’s profiles of nonprofit organizations, including Liberty Counsel, was to address and provide “a response to the recent rise in ‘hateful

rhetoric’ in the U.S.” (JA at 019, ¶106). GuideStar also stated unequivocally that GuideStar was representing the SPLC’s designations as fact and that it was keenly aware that its decision was political. (*Id.*, ¶107). As Mr. Harold stated, GuideStar’s decision is “unique in that it’s highly politicized in a highly politicized moment in history.” (*Id.*). GuideStar also admitted that it was adopting the SPLC’s “hate group” designations and representing them as fact because of GuideStar’s “broader shift in how [GuideStar] imagines [its] role in the (nonprofit) field.” (*Id.*, ¶108).

GuideStar also admitted that its justification for adopting the SPLC’s “hate group” designation was because it thought the SPLC was the “best option” available, even though it was aware of the political bias of the SPLC. (*Id.*, ¶109). GuideStar’s motivation for adopting the SPLC’s “hate group” designation also arises from its shared ideology with the SPLC. (*Id.*, ¶110). While purporting to be a “neutral” evaluator of nonprofit organizations, GuideStar has injected raw liberal political ideology into its profile of Liberty Counsel. (*Id.*, ¶111). GuideStar not only adopted SPLC’s designation of “hate group” for its profile of Liberty Counsel, but shares the same definition of a “hate group” as the SPLC. (*Id.*, ¶112). By adopting the SPLC’s designation of Liberty Counsel as a “hate group,” and adopting the same definition as the SPLC, GuideStar has demonstrated its shared political ideology with the SPLC, its identical approach to designating organizations as “hate groups,” and its economic motivations to financially destroy such organizations. (*Id.* at 020, ¶113).

GuideStar's President and Chief Executive Officer, the GuideStar official responsible for defending GuideStar's adoption of the SPLC's "hate group" designation, has also demonstrated his political ideology countless times. (*Id.*, ¶114) (citing GuideStar USA, Inc., *Leadership Team*, <https://learn.guidestar.org/about-us/management-team> (last visited April 4, 2018) (noting that Mr. Harold is devoted to liberal political causes, such as climate change and has worked for Greenpeace USA, Rainforest Action Network, and Citizen Works). Mr. Harold is a vocal and public advocate for abortion and is a financial supporter of pro-abortion organizations, such as the liberal group NARAL (National Abortion Rights Action League) Pro-Choice America. (*Id.*, ¶115) (citing Jacob Herald Twitter, @jacobherald (Jan. 23, 2017), <https://twitter.com/jacobcharold/status/823534419667517441/photo/1> (last visited April 4, 2018) (showing a picture of Mr. Harold at the "Women's March" in 2017 that was attended by activists opposed to President Trump and overtly supporting abortion); *Id.* (showing Mr. Harold holding a sign that said, "It turns out FACTS MATTER"); Men For Choice (Sept. 30, 2014), [https://act1.myngp.com/Uploads/10000/images/Men%20For%20Choice%20DC%20Invitation\\_9\\_25.jpg](https://act1.myngp.com/Uploads/10000/images/Men%20For%20Choice%20DC%20Invitation_9_25.jpg) (last visited June 28, 2017) (noting that Mr. Harold was a host of the DC Men For Choice event that was sponsored by the liberal group, NARAL Pro-Choice America)). Mr. Harold and GuideStar are also vocal supporters of LGBT

rights and causes. (*Id.*, ¶116) (citing Jacob Herald Twitter, @jacobherald (Apr. 27, 2017), <https://twitter.com/jacobcharold> (posting a story from GuideStar:Blog supportive of homosexual and transgender positions) (last visited April 4, 2018)). Mr. Harold has stated that GuideStar attempts to “[t]urn data on nonprofits into a story about social change.” Jacob Harold Twitter, @jacobherald (Mar. 24, 2017), <https://twitter.com/jacobcharold/status/845378076343242753> (last visited April 4, 2018)). (*Id.* at 021, ¶117).

Mr. Herald considers himself a “social change strategist” and so declares on his GuideStar biography. (*Id.*, ¶118). Mr. Herald has brought his personal political agenda into GuideStar and now GuideStar has become a politically-motivated organization using false, defamatory, and dangerous labels to harm nonprofit organizations, including Liberty Counsel, with which GuideStar and Mr. Herald disagree based on their different ideologies. (*Id.*, ¶119). Mr. Herald and GuideStar’s shared political ideology with the SPLC seek to diminish the opposing viewpoints and positions advanced by Liberty Counsel, namely religious liberty, the sanctity of human life, human sexuality, and family values. (*Id.*, ¶120). Because of its shared political ideology with the SPLC, GuideStar recklessly adopted the SPLC’s designation of Liberty Counsel as a “hate group” based purely on its ideological opposition to Liberty Counsel. (*Id.*, ¶121). GuideStar’s adoption of SPLC’s designation of Liberty Counsel as a “hate group” and the two groups’ unquestionably

shared political ideology evidences that GuideStar shares SPLC's stated intention to "completely destroy" Liberty Counsel and other conservative groups. (*Id.*, ¶122).

## **VI. LIBERTY COUNSEL'S INJURIES ARISING FROM GUIDESTAR'S ECONOMICALLY MOTIVATED PROFILE.**

GuideStar's representation of fact concerning Liberty Counsel as a "hate group" is false, misleading, and deceitful to Liberty Counsel's potential donors, and has the tendency to deceive all consumers of GuideStar's commercially available website, including Liberty Counsel donors and potential donors. (JA at 021-022, ¶123). GuideStar's false and deceitful labeling of Liberty Counsel as a "hate group" has been written about in numerous newspaper, media, and internet reports from news agencies, blogs, and organizations. (*Id.* at 022, ¶124) (citing CBSNews *supra* ¶ 50; Rachel del Guidice, *Nonprofit Tracker Smears Dozens of Conservative Organizations as 'Hate Group'*, The Daily Signal (June 21, 2017), <http://dailysignal.com/2017/06/21/nonprofit-tracker-smears-dozens-of-conservative-organizations-as-hate-groups/> (last visited April 4, 2018); Dawn Ennis, *This guide to charities is now flagging dozens of hate groups*, LGBTQNation (June 14, 2017), <https://www.lgbtqnation.com/2017/06/guide-charities-now-flagging-dozens-hate-groups/> (last visited April 4, 2018)).

The damage caused by GuideStar's false, misleading, and deceitful designation of Liberty Counsel as a "hate group" is also permanently etched in the history of GuideStar. (*Id.*, ¶125). GuideStar's false, misleading, and deceitful

designation of Liberty Counsel as a “hate group” is now spread throughout the media and the worldwide web. (*Id.*, ¶126). While GuideStar has temporarily removed the “hate group” warning label on Liberty Counsel’s profile, it has maintained that such a decision is only “for the time being.” (*Id.*, ¶127). However, GuideStar has also stated that it “will make [’hate group’] information available to any user on request” and thus will continue to disseminate the false, misleading, and deceitful designation of Liberty Counsel as a “hate group.” (*Id.*, ¶128). GuideStar also admits that it will be continuing to look for additional ways to share this information because it claims providing it “is in line with our mission.” (*Id.* at 023, ¶129).

By being deceitfully and falsely labeled as a “hate group” on GuideStar’s profile, Liberty Counsel has suffered, is suffering, and will continue to suffer actual damage to its reputation, good name, and standing with its donors and potential donors in the community of nonprofit organizations. (*Id.*, ¶130). Liberty Counsel has suffered actual damages in its ability to receive donations from donors and potential donors. (*Id.*, ¶¶131-134).

Donors, both individuals and institutional, use GuideStar’s directory and rely upon the information provided by GuideStar to make decisions about donations, grants, and funding requests with respect to the non-profit entities on which GuideStar provides its reports. (*Id.*, ¶135). Donors have relied upon GuideStar’s false and misleading “hate group” designation to refuse, cease, or divert donations

from the falsely designated groups. (*Id.*, ¶136). Such harm is ongoing, and will continue until GuideStar is enjoined from further publishing and republishing, whether “on request” or otherwise, the false and misleading “hate group” designations. (*Id.*). Donations to Liberty Counsel have and will be negatively affected by GuideStar’s false, misleading, and deceitful designation of Liberty Counsel as a “hate group,” including donations from individuals, matching corporate employee donations, and donations from foundations, churches, nonprofit organizations, corporate, and educational organizations. (*Id.* at 024, ¶137). Liberty Counsel’s mission of providing pro bono legal representation to many individuals, churches, nonprofit and for-profit corporations, and government agencies and political subdivisions has and will be directly harmed and hindered because of GuideStar’s false, misleading, and deceitful designation of Liberty Counsel as a “hate group.” (*Id.*, ¶138).

### **SUMMARY OF THE ARGUMENT**

The district court erred in finding that Liberty Counsel could not state a claim under the Lanham Act. The district court’s sole rationale was that GuideStar’s profile of Liberty Counsel did not constitute commercial speech. That decision was contrary to the record below and is incorrect as a matter of settled law.

GuideStar’s profile of Liberty Counsel and its adoption of the false and misleading “hate group” designation constitute an advertisement and promotion.

Indeed, GuideStar advertised and promoted its paid subscription services on the same Liberty Counsel profile page that included GuideStar's "hate group" designation. GuideStar placed that advertisement and promotion on its commercially available website and specifically aimed Liberty Counsel's profile at GuideStar's non-profit profile and paid subscription services.

GuideStar's profile of Liberty Counsel, including the false and misleading "hate group" designation and its advertising and promotion of its paid subscription services, specifically refer to GuideStar's subscription services. In addition, GuideStar unquestionably had an economic motivation for its profile of Liberty Counsel and the adoption of the false and misleading "hate group" designation. GuideStar's economic motivations are abundantly evident by the fact that its profile of Liberty Counsel (a) offered paid subscription services, (b) was admittedly based on the economic motivations of GuideStar and its customers, and (c) was tied to GuideStar's direct economic stake in the non-profit industry. GuideStar's customers are also likely to perceive GuideStar's motivations as economic because GuideStar admitted its intention to influence the economic decisions of donors and potential donors to Liberty Counsel.

The district court's finding that all of these economic motivations were insufficient to render GuideStar's advertisement and promotion of its paid subscription services into commercial speech for purposes of the Lanham Act

ignored this Court's unequivocal precedents, the record in this matter, and GuideStar's own admissions. The district court's erroneous decision should be reversed.

## ARGUMENT

### **I. THIS COURT REVIEWS THE DISTRICT COURT'S DISMISSAL OF LIBERTY COUNSEL'S COMPLAINT DE NOVO AND ITS DENIAL OF LEAVE TO AMEND FOR ABUSE OF DISCRETION.**

This Court “review[s] de novo the grant of a motion to dismiss for failure to state a claim.” *Harbourt v. PPE Casino Resorts Md., LLC*, 820 F.3d 655, 658 (4th Cir. 2016). At this stage of the proceedings, this Court is required to “accept as true all of the factual allegations contained in the complaint,” and “draw all reasonable inferences in favor of the plaintiff.” *E.I. du Pont De Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 440 (4th Cir. 2011). To satisfy its pleading burden, Liberty Counsel need only “allege sufficient facts to establish the elements of [its] claim and ‘advance that claim across the line from conceivable to plausible.’” *Harbourt*, 820 F.3d at 658 (quoting *Walters v. McMahan*, 684 F.3d 435, 439 (4th Cir. 2012)). Liberty Counsel “need not forecast evidence sufficient to prove his claim.” *Id.*

This Court reviews the district court's refusal to permit leave to amend for an abuse of discretion. *Gladhill v. General Motors Corp.*, 743 F.2d 1049, 1052 (4th Cir. 1984).

## **II. GUIDESTAR'S PROFILE OF LIBERTY COUNSEL AND REPLICATION OF THE SPLC'S "HATE GROUP" DESIGNATION IS COMMERCIAL SPEECH.**

GuideStar's profile of Liberty Counsel is commercial speech because GuideStar placed its profile in the commercial context and directed its profile of Liberty Counsel at the provision of GuideStar's services. GuideStar's profile of Liberty Counsel was placed on its commercially available website and was aimed at providing GuideStar's subscription services. Even if considered merely informational, which they are not, GuideStar's statements still constitute advertisements and promotions. GuideStar's profile of Liberty Counsel specifically refers to GuideStar's paid subscription services, and GuideStar has an economic motivation for its profile of Liberty Counsel. GuideStar advertises and promotes its subscription services on Liberty Counsel's profile, has admitted that it based its decision to adopt the "hate group" designation because of the financial motivations of its customers, and GuideStar has a direct economic stake in the provision of its service. Thus, contrary to the district court's conclusion, GuideStar's profile of Liberty Counsel, including the false and misleading "hate group" designation constitutes commercial speech.

The Lanham Act provides,

Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading

representation of fact, which . . . (B) in a commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

15 U.S.C. § 1125(a)(1)(B).

The threshold requirement for a party asserting a violation of the Lanham Act is that defendant's "false or misleading representation be a commercial advertisement or promotion." *Handsome Brook Farm, LLC v. Humane Animal Care, Inc.*, 193 F. Supp. 3d 556, 567 (E.D. Va. 2016). To determine whether a plaintiff has satisfied this requirement, this Court has largely adopted the test announced in *Gordon & Breach Science Publ'rs v. Am. Inst. of Physics*, 859 F. Supp. 1521 (S.D.N.Y. 1994). *See Handsome Brook Farm, LLC v. Humane Farm Animal Care, Inc.*, 700 F. App'x 251, 256 (4th Cir. 2017). Thus, to demonstrate that the false or misleading representation constitutes an advertisement or promotion, it must be (1) commercial speech, (2) for the purpose of influencing consumers to buy defendant's goods or services, and (3) must be sufficiently disseminated to the relevant purchasing public. *Id.*<sup>1</sup>

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<sup>1</sup> This Court declined to adopt the second factor articulated in *Gordon*, which required that the parties be in direct competition with one another. *Handsome Brook*, 700 F. App'x at 256-57 ("we do not adopt the second factor requiring a competitive relationship").

The district court determined that GuideStar's profile of Liberty Counsel did not constitute commercial speech and therefore did not reach the other factors. (JA at 278-279). Thus, this Court's consideration of Liberty Counsel's claims on appeal focuses solely on the issue of whether Liberty Counsel sufficiently pleaded that GuideStar's profile represented commercial speech. Liberty Counsel's allegations demonstrate that GuideStar's profile of Liberty Counsel is commercial speech, and the district court's decision to the contrary was in error.

Generally, commercial speech is that which "does no more than propose a commercial transaction." *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983). "Nevertheless, even where speech cannot be characterized merely as proposals to engage in commercial transactions, the speech may yet be deemed commercial." *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Baltimore*, 721 F.3d 264, 284 (4th Cir. 2013); *see also Handsome Brook*, 193 F. Supp. 3d at 567 ("Mixed messages often fall outside that 'core notion' of commercial speech, but may be commercial speech nonetheless."). Indeed, what is clear from significant precedent is that commercial advertising or promotion "is broader than merely the 'classic advertising campaign' . . . and covers misrepresentations by non-profit and for-profit organizations alike." *Gordon*, 859 F. Supp. at 1535.

In determining whether speech that does not simply propose a commercial transaction is nevertheless commercial, this Court looks to several factors: “whether the message is economically motivated, promotes a specific product, and is an advertisement.” *Handsome Brook*, 700 F. App’x at 257; *see also Greater Balt.*, 721 F.3d at 286. Additionally, a relevant consideration is “whether the message is placed in the commercial context and is directed at the providing of services rather than towards the exchange of ideas.” *Handsome Brook*, 700 F. App’x at 257 (quoting *Greater Balt.*, 721 F.3d at 286). But, while the presence of all these factors is strong support for the conclusion that the speech is commercial, “it is not necessary that each of the characteristics ‘be present in order for the speech to be commercial.’” *Id.* (quoting *Bolger*, 463 U.S. at 67). Despite the district court’s conclusion to the contrary, Liberty Counsel’s well-pleaded allegations establish that GuideStar’s profile of Liberty Counsel was an advertisement, was economically motivated, and promoted a specific service of GuideStar.

**A. GuideStar’s Profile Of Liberty Counsel And “Hate Group” Designation Constitutes An Advertisement And Promotion.**

GuideStar’s profile of Liberty Counsel constitutes an advertisement and promotion because it was placed in the commercial context and directed at the provision of GuideStar’s subscription services. GuideStar placed its profile of Liberty Counsel on its commercially available website, and directed its profile at the provision of its paid subscription services. Moreover, even if considered informative

statements, informative statements may also constitute advertisements and promotions under the Lanham Act.

**1. GuideStar's Profile of Liberty Counsel Was Placed in the Commercial Context and Directed at GuideStar's Providing of Services.**

In determining whether GuideStar's profile is commercial speech, this Court looks to whether the profile was "placed in the commercial context and is directed at the providing of services rather than towards the exchange of ideas." *Handsome Brook*, 700 F. App'x at 257 (quoting *Greater Balt.*, 721 F.3d at 286). GuideStar's profile of Liberty Counsel, which included GuideStar's offer for its paid subscriptions, was placed on its commercially available website and was directly aimed at the provision of GuideStar's services.

**a. GuideStar placed its advertisement on its commercially available website.**

Use of the internet for commercial reasons is sufficient in the Lanham Act context to make GuideStar's profile of Liberty Counsel, and its offer for paid subscriptions, commercial in nature. *See, e.g., Cardservice Int'l, Inc. v. McGee*, 950 F. Supp. 737, 742 (E.D. Va. 1997) (use of the internet to engage in commercial activity satisfied the "in commerce" requirement of the Lanham Act). Additionally, numerous courts have held that when the decision is motivated by the economic motivations of the speaker's audience, the speech is commercial in nature. *See Greater Balt.*, 721 F.3d at 286 (financial motivations of the audience is also relevant

for determining the commercial nature and context of the speech); *Huntington Life Sciences, Inc. v. Rokke*, 978 F. Supp. 662, 665 (E.D. Va. 1997) (speech aimed at the economic motivations of the audience is commercial in nature).

This Court's decision in *Handsome Brook* is particularly instructive of this analysis. See *Handsome Brook*, 700 F. App'x at 260. There, a nonprofit organization (HFAC) sent an email to various businesses and organizations in the humanely produced egg industry in which it disparaged the services of a different egg producer. *Id.* at 260. As here, HFAC's email was directed only at customers with whom it had an economic relationship or those who it hoped would become customers. *Id.* This Court held that such an email, "sent by an organization with an economic stake in the [customer's] decision," that "appealed to the [customer's] economic and commercial motivations," and that was "directed at offering [HFAC's] service" represented a communication placed in the commercial context. *Id.* Thus, HFAC's "identity as a non-profit organization did not override the many commercial qualities of its message," and its communication constituted commercial speech. *Id.*

Here, the same is true of GuideStar's profile of Liberty Counsel, and the same result should obtain. GuideStar has admitted that its purpose in including the "hate group" designation on its profile of Liberty Counsel was to influence the economic decisions of its audience. (JA at 008, ¶¶43-44). GuideStar has also admitted that it made the decision to include the "hate group" designation on Liberty Counsel's

profile because it had heard from its consumers that they wanted information for their economic decisions. (*Id.*, ¶44). Thus, GuideStar’s own admissions demonstrate that its decision to include the “hate group” designation was directly motivated by the financial motivations of its audience. (*Id.*, ¶44). Coupled with the fact that GuideStar makes the “hate group” designation on **the same profile page upon which its advertises its paid subscription services** (JA at 042), there can be no doubt that the decision is commercial. The district court’s decision, which ignored this clear precedent and GuideStar’s own admissions, was in error.

**b. GuideStar’s profile of Liberty Counsel was directed at the provision of GuideStar’s services.**

To determine whether GuideStar’s profile of Liberty Counsel, including the false and misleading “hate group” designation, was aimed at the provision of its services, it is relevant to examine the nature of the services that GuideStar offers and its articulated mission. *See Radiance Found., Inc. v. NAACP*, 786 F.3d 316, 325 (4th Cir. 2015) (noting that the offending statement must be analyzed in connection with the alleged offender’s goods or services). Here, GuideStar’s main function, it claims, it to be an evaluator of nonprofit organizations. (JA at 007, ¶¶36-37). GuideStar claims that its mission is to “revolutionize philanthropy by providing information that advances transparency, enables users to make better decisions, and encourages charitable giving.” (*Id.*, ¶34). GuideStar claims that it “gathers and disseminates information about every single IRS registered nonprofit organization” and that it

aims to “provide as much information as we can about each nonprofit’s mission, legitimacy, impact, reputation, finances, programs, transparency, governance, and so much more.” (*Id.*, ¶35). GuideStar states that it is not “a charity evaluator or watchdog,” but merely a “public charity that collects, organizes, and presents the information you want in an easy-to-understand format,” and, importantly, it claims to do so “while remaining neutral.” (*Id.*, ¶36). GuideStar claims it is “the search engine for non-profit information.” (*Id.*, ¶37). GuideStar also offers paid subscription services for its customers to provide additional information on nonprofit organizations. (*Id.* at 042). Thus, GuideStar’s profiles are its main service and the main source of its consumer base and revenue. It therefore cannot be doubted that GuideStar’s profile of Liberty Counsel, placed on its commercially available website, was aimed directly at the provision of GuideStar’s services and represents GuideStar’s primary service.

## **2. Informative Statements May Constitute Advertisements and Promotions.**

The district court also erroneously concluded that GuideStar’s profile of Liberty Counsel was not commercial speech because it represented merely an “informative statement.” (JA at 279). The district court’s reasoning was that GuideStar has a right to comment on social issues, so its adoption of the SPLC’s hate group designation reflected a social commentary rather than an economic message. Even if that contention was true, which it is not, it is only part of the

analysis and ignores substantial and binding precedent from this Court. Indeed, informative statements can also be advertisements and promotions. Speech does not have to merely propose a commercial transaction to be commercial speech. *Greater Balt.*, 721 F.3d at 268 (“even where speech cannot be characterized merely as proposals to engage in commercial transactions, the speech may yet be deemed commercial”); *Handsome Brook*, 700 F. App’x at 259 (“Where a nonprofit organization has a direct economic stake in the provision of its product or service, and structures its message in the hopes of realizing an economic gain rather than merely informing the public or pursuing its ideological views, it may reasonably be viewed as economically motivated.”).

Many other courts, too, have noted that the commercial speech determination is not limited to the traditional advertising campaign. *Bolger*, 463 U.S. at 67-68 (holding that informational pamphlets are still properly characterized as commercial speech when economic motivations are the basis for distributing them); *Semco, Inc. v. Amcast, Inc.*, 52 F.3d 108, 112 (6th Cir. 1995) (“Speech need not closely resemble a typical advertisement to be commercial.”); *Am. Needle & Novelty, Inc. v. Drew Pearson Marketing, Inc.*, 820 F. Supp. 1072, 1077 (N.D. Ill. 1993) (“Nothing in the Lanham Act suggests that ‘advertisement’ and ‘promotion’ should be given any interpretation other than their plain and ordinary meaning, **which includes the notion of public dissemination of information.**” (emphasis added)); *Gordon*, 859

F. Supp. at 1535 (commercial speech is “broader than merely the classic advertising campaign to which defendants would confine it, and it covers misrepresentations by non-profit and for-profit organizations alike.”).

The Supreme Court’s decision in *Bolger* demonstrates the error of the district court. There, a company had distributed certain mailings that included comments on social issues and also references to the sale of its own products. *Bolger*, 463 U.S. at 66-67. The pamphlets at issue, which were distributed by a manufacturer and distributor of contraceptives, included commentary on social issues such as venereal disease and family planning. *Id.* at 67. The Supreme Court held that “[t]he mailings constitute commercial speech notwithstanding the fact that they contain discussions of important public issues, such as venereal disease and family planning.” *Id.* 67-68. It is “clear” that an advertisement does not avoid characterization as commercial speech merely because it “links a product [or service] to a current public debate.” *Id.* “A company has the full panoply of protections available to its direct comments of public issues, so there is no reason for providing similar protection when such statements are made in the context of commercial transactions.” *Id.* at 68. Indeed, “[a]dvertisers should not be permitted to immunize false and misleading product information from government regulation simply by including references to public issues.” *Id.* (emphasis added).

The same is true here. As in *Bolger*, GuideStar's profile of Liberty Counsel included an advertisement for its paid subscription services. *Compare* (JA at 42), *with Bolger*, 463 U.S. at 66. As in *Bolger*, GuideStar's profile of Liberty Counsel made specific reference to GuideStar's services. *Compare* (JA at 037-042), *with Bolger*, 463 U.S. at 66. As in *Bolger*, GuideStar had an economic motivation for its profile of Liberty Counsel. *Compare* (JA at 008, ¶¶43-44 and JA 025, ¶145), *with Bolger*, 463 U.S. at 67. Thus, despite not being "merely proposals to engage in commercial transactions," the Supreme Court held that "[t]he combination of *all* of these characteristics, however, provides strong support for the District Court's conclusion that the informational pamphlets are properly characterized as commercial speech." *Id.* at 67 (emphasis original). The same result is compelled here. The district court's contrary conclusion was plainly in error. Regardless of whether GuideStar's profile of Liberty Counsel, including the false and misleading "hate group" designation, resembles informational comments on current public debate, GuideStar's advertisement, economic motivation, and specific reference to its services transform the profile from commentary to commercial speech.

**B. GuideStar's Profile Of Liberty Counsel, Including Its Adoption And Republication Of The SPLC's "Hate Group" Designation, Specifically Refers To GuideStar's Subscription Services.**

As this Court noted in *Handsome Brook*, the second question asks whether GuideStar's profile of Liberty Counsel "promoted a good [or service]." *Handsome*

*Brook*, 700 F. App'x at 259. In *Handsome Brook*, this Court looked to whether the offending email specifically referenced and offered or promoted any of defendant's products or services. *Id.* at 260. There, the email "touted" defendant's services, stated that it hoped the recipients would consider defendant's services, and offered such services for sale. *Id.* This Court held that such statements "were intended to, and did, promote" defendant's goods or services.

Here, there can be no dispute that GuideStar's profile of Liberty Counsel promotes a good, and offers GuideStar's paid services. GuideStar's profile of Liberty Counsel explicitly seeks to influence its consumers to purchase GuideStar services and subscriptions. GuideStar's profile of Liberty Counsel includes the following promotion of GuideStar's services and its offer of paid subscription services: "*Need the ability to download nonprofit data and more advanced search options? Consider a Premium or Pro Search Subscription.*" (JA at 042) (italics original; bold emphasis added)). Thus, GuideStar's profile of Liberty Counsel was intended to obtain subscriptions, *i.e.*, the purchase of GuideStar's own products and services, and therefore promoted its goods and services.

**C. GuideStar Has An Economic Motivation For Its Profile And "Hate Group" Designation Of Liberty Counsel.**

The third question relevant to whether GuideStar's profile of Liberty Counsel constitutes commercial speech is whether GuideStar had an economic motivation. *Handsome Brook*, 700 F. App'x at 258. "This prong asks whether [GuideStar] hoped

to realize an economic gain when disseminating its message.” *Id.* GuideStar’s status as a nonprofit organization is only part of the question, because nonprofit organizations can still have economic motivations for disseminating information. Here, GuideStar has an economic motivation because it advertises and promotes its paid subscription services on Liberty Counsel’s profile, it has admitted that it based its decision to include the false and misleading “hate group” designation on Liberty Counsel’s profile because of the financial motivations of its consumers, and it has a direct economic stake in the provision of its subscription services.

**1. GuideStar Advertises and Encourages Purchases of its Premium Subscriptions on its Profile of Liberty Counsel.**

As demonstrated above, GuideStar unquestionably proposes economic transactions on Liberty Counsel’s profile. In order to view Liberty Counsel’s complete profile, including financial documents, consumers of GuideStar’s website **must purchase** a Premium or Pro Search Subscription, and GuideStar indisputably offers the sale of its subscription services on its profile of Liberty Counsel. If such a proposal to engage in an economic transaction does not demonstrate GuideStar’s economic motivation for its profiles, then no offer or promotion of paid services could ever suffice.

The district court, however, found that GuideStar’s profile did not propose any economic transaction whatsoever. (JA at 278-279). It reasoned that the “hate group” notation “**itself**” did not offer the subscription services, but rather that

GuideStar had merely advertised and promoted its paid subscription services on “its website.” (*Id.* at 279) (emphasis added). This unnecessary circumscription of the proper analysis is incorrect as a matter of law and ignores the record.

First, as the record plainly demonstrates, GuideStar’s profile of Liberty Counsel includes **both** the false and misleading “hate group” designation **and** GuideStar’s advertisement and promotion of its paid subscription services. (JA at 037-42). GuideStar’s advertisement and promotion of its paid subscription services **was placed on Liberty Counsel’s profile**, not simply “somewhere” else on GuideStar’s website as the district court concluded. Thus, the district court’s conclusion was incorrect as a matter of fact.

Second, the district court’s conclusion is also incorrect as a matter of law. Because GuideStar’s profile of Liberty Counsel contained both the false and misleading representation **and** the advertisement and promotion of GuideStar’s subscription services, this Court’s decision in *Radiance Foundation* mandates a different conclusion. In *Radiance Foundation*, this Court noted that the false and misleading representation was “too attenuated from the [economic] solicitation and the billboard campaign to support Lanham Act liability.” *Radiance Found.*, 786 F.3d at 326. There, the false and misleading representation “**was displayed on a different page altogether.**” *Id.* (emphasis added). This Court said that “[i]t is important not to lose perspective,” on these issues because the fact that the offending language

appears “**somewhere in the content of a website**” is not alone sufficient to satisfy the commercial speech component. *Id.* (emphasis added). The same cannot be said of GuideStar’s false and misleading representation because it did not merely appear somewhere on its website or on a different page altogether, as was true in *Radiance Foundation*. Instead, GuideStar’s representation of Liberty Counsel as a “hate group” appeared on the **same page** as its advertisement and promotion of paid subscription services. Thus, the proper perspective under *Radiance Foundation* mandates a finding that GuideStar’s profile of Liberty Counsel, including its advertisement and promotion of paid subscription services, is commercial speech.

GuideStar’s false and misleading representation more closely resembles the offending language at issue in *Handsome Brook*. There, defendant’s email contained both the offending language disparaging another organization’s products and services **and** advertised and promoted the purchase of defendant’s own products and services. *Handsome Brook*, 700 F. App’x at 258. The email was also sent to defendant’s customers and potential customers, which this Court said demonstrated defendant’s “hope of economic gain . . . even more apparent.” *Id.* This Court held that because the email contained both the offending language and an advertisement and promotion of defendant’s own services, it represented commercial speech. *Id.* The same is true of GuideStar’s profile of Liberty Counsel and the false and misleading “hate group” designation, which was made available to all of GuideStar’s

customers and subscribers. (See JA at 037-042). The profile of Liberty Counsel included both the offending language (the false and misleading “hate group” designation) and the advertisement and promotion of GuideStar’s paid subscription services. Thus, *Handsome Brook* compels a finding that GuideStar’s profile of Liberty Counsel was commercial speech.

**2. GuideStar Admitted that it Based its Decision on the Economic Motivations of its Consumers.**

As the Supreme Court and many courts have recognized, the economic motivations of the audience matters for purposes of determining whether an organization’s speech was economically motivated. See, e.g., *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm.*, 447 U.S. 557, 562 (1980) (commercial speech includes expression related to the economic interests of “the speaker and its audience”); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 422 (1993) (commercial speech encompasses economic interests of the speaker’s audience); *Greater Balt.*, 721 F.3d at 286 (financial motivations of the audience is also relevant for determining the commercial nature and context of the speech); *Huntington Life Sciences, Inc. v. Rokke*, 978 F. Supp. 662, 665 (E.D. Va. 1997) (economic motivations of audience also represents commercial speech).

The district court failed to consider the fact that GuideStar admitted that its decision to include the false and misleading “hate group” designation was motivated by the economic interests of its consumers. (JA at 008, ¶¶43-44 and JA 025, ¶145).

Liberty Counsel’s allegations demonstrate that GuideStar made its decision to include the SPLC “hate group” designation because of the financial interests of its audience. (*Id.* at 008, ¶43) (“GuideStar has admitted that its purpose and motivation for the adoption of the SPLC’s designation was financial and economic, because it ‘started to hear from customers who were worried they might facilitate a donation to a hate group.’”); (*Id.*, ¶44) (alleging that GuideStar’s decision was specifically related to the economic interests of its audience). Moreover, not only did Liberty Counsel’s well-pleaded allegations demonstrate GuideStar’s economic motivations, but GuideStar admitted in its pleadings in the district court that its decision was related to the economic interests of its audience. (*Id.* at 078, n.10) (“the SPLC notation may serve the economic interests of *consumers* who use the GuideStar website to make financial decisions” (emphasis original)). GuideStar plainly has an economic incentive and motivation for its profile of Liberty Counsel

**3. GuideStar’s Profile of Liberty Counsel was Economically Motivated because it has a Direct Economic Stake in the Provision of its Profile and Subscription Services.**

GuideStar’s status as a nonprofit provides no refuge from a finding that its economically motivated advertisement and promotion of paid subscription services are commercial speech. *See, e.g., Radiance Found.*, 786 F.3d at 327 (holding that there is no basis “to say that in all instances a solicitation by a non-profit is immune from Lanham act liability”); *id.* (noting that a nonprofit organization’s false and

misleading representation can involve commercial speech where the plaintiff “demonstrates a sufficient nexus between the unauthorized use of the protected mark and clear transactional activity”); *Handsome Brook*, 700 F. App’x at 259 (the nonprofit “identity of the speaker does not categorically determine whether a speaker is economically motivated”); *Birthright v. Birthright, Inc.*, 827 F. Supp. 1114 (D.N.J. 1993) (holding that nonprofit organization’s speech can also be commercial for purposes of the Lanham Act); *Nat’l Artists Mgmt. Co., Inc. v. Weaving*, 769 F. Supp. 1225, 1232 (S.D.N.Y. 1991) (noting that any advertising or promotion for business purposes constitutes commercial speech “whether conducted by for-profit or non-profit organizations”); *Gordon*, 859 F. Supp. at 1535 (same).

Thus, the question is not whether GuideStar is a nonprofit organization, but whether GuideStar hoped to realize an economic gain from advertising and promoting its paid subscription services on Liberty Counsel’s profile. *Handsome Brook*, 700 F. App’x at 258. There can be no dispute that GuideStar had such a hope of economic gain. Indeed, as this Court held in *Handsome Brook*, “[w]here a **non-profit organization has a direct economic stake in the provision of its product or service**, and structures its message in the hopes of realizing an economic gain,” it has an economic interest in its speech. *Id.* at 259 (emphasis added).

GuideStar certainly had a direct economic stake in the provision of its paid subscription services and in its profiles of nonprofit organizations. GuideStar claims

that its *raison d'être* is to be the “search engine for nonprofits.” (JA at 007, ¶37). Its chief executive explains that GuideStar views itself as the “hub of information about nonprofit organizations.” (*Id.* at 008, ¶41). The donations GuideStar receives as a nonprofit and the subscription services it provides, both of which are the lifeblood of its organization, “depend on the value . . . consumers will attribute to” the information it provides. *Handsome Brook*, 193 F. Supp. 3d at 568. “Thus both the achievement of [GuideStar’s] public interest objective and its economic survival critically depend upon its [donations and subscriptions.]” *Id.* If consumers of GuideStar’s information do not trust GuideStar’s profiles or information, donations and subscription purchases would dry up. As the district court said in *Handsome Brook*, “[t]his creates an organizational **and economic incentive** for [GuideStar] to protect and promote [GuideStar’s] brand.” *Id.* at 569 (emphasis added). Thus, GuideStar has a direct economic stake in the profiles of nonprofit organizations and in its paid subscription services.

#### **4. GuideStar Is Not a Disinterested Non-Profit.**

GuideStar may argue that it merely provides informational services on its profile of Liberty Counsel, and that it is permitted to do so without transforming its advertisements into commercial speech. That argument, too, must fail. The presumption that a non-profit organization can disseminate reviews and critical reports on the practices, goods, or services of other non-profits is only applicable to

“watchdog non-profit organizations” or **disinterested non-profit organizations**. *Handsome Brook*, 700 F. App’x 258. As Liberty Counsel’s well-pleaded and presumed true allegations make clear, GuideStar qualifies as neither.

First, GuideStar cannot claim refuge under the “watchdog non-profit organization” status because it has admitted that it is not a watchdog organization. (JA at 007, ¶36) (noting that GuideStar states that it is not “a charity evaluator or watchdog,” but merely a “public charity that collects, organizes, and presents the information you want in an easy-to-understand format,” and, importantly, it claims to do so “while remaining neutral.”). Thus, an organization that does not claim to be a watchdog necessarily cannot take solace in an exception for watchdog organizations.

Second, GuideStar is not a neutral or disinterested non-profit, and its inclusion of the false and misleading “hate group” designation was admittedly done with political purposes. As GuideStar’s President and CEO made abundantly clear, GuideStar’s intention in adopting the SPLC’s “hate group” designations and representing them as fact on GuideStar’s profiles of nonprofit organizations, including Liberty Counsel, was to address and provide “a response to the recent rise in ‘hateful rhetoric’ in the U.S.” (JA at 009, ¶50). GuideStar also stated unequivocally that GuideStar was representing the SPLC’s designations as fact and that it was keenly aware that its decision was political. (*Id.*, ¶51). As Mr. Harold

stated, GuideStar's decision is "unique in that it's highly politicized in a highly politicized moment in history." (*Id.*). GuideStar also admitted that it was adopting the SPLC's "hate group" designations and representing them as fact because of GuideStar's "broader shift in how [GuideStar] imagines [its] role in the (nonprofit) field." (*Id.* at 019, ¶108).

GuideStar also admitted that its justification for adopting the SPLC's "hate group" designation was because it thought the SPLC was the "best option" available, even though it was aware of the political bias of the SPLC. (*Id.* at 009, ¶47, and JA at 019, ¶109). GuideStar's motivation for adopting the SPLC's "hate group" designation also arises from its shared ideology with the SPLC. (*Id.* at 019, ¶110). While purporting to be a "neutral" evaluator of nonprofit organizations, GuideStar has injected raw liberal political ideology into its profile of Liberty Counsel. (*Id.*, ¶111). GuideStar not only adopted SPLC's designation of "hate group" for its profile of Liberty Counsel, but shares the same definition of a "hate group" as the SPLC. (*Id.*, ¶112). By adopting the SPLC's designation of Liberty Counsel as a "hate group," and adopting the same definition as the SPLC, GuideStar has demonstrated its shared political ideology with the SPLC and its identical approach to designating organizations as "hate groups." (*Id.* at 020, ¶113).

GuideStar's President and Chief Executive Officer, the GuideStar official responsible for defending GuideStar's adoption of the SPLC's "hate group"

designation, has also demonstrated his liberal political ideology countless times. (*Id.*, ¶114) (citing GuideStar USA, Inc., *Leadership Team*, <https://learn.guidestar.org/about-us/management-team> (last visited April 4, 2018) (noting that Mr. Harold is devoted to liberal political causes, such as climate change and has worked for Greenpeace USA, Rainforest Action Network, and Citizen Works). Mr. Harold is a vocal and public advocate for abortion and is a financial supporter of pro-abortion organizations, such as the liberal group NARAL (National Abortion Rights Action League) Pro-Choice America. (JA at 020, ¶115) (citing Jacob Herald Twitter, @jacobherald (Jan. 23, 2017), <https://twitter.com/jacobcharold/status/823534419667517441/photo/1> (last visited April 4, 2018) (showing a picture of Mr. Harold at the “Women’s March” in 2017 that was attended by activists opposed to President Trump and overtly supporting abortion); *Id.* (showing Mr. Harold holding a sign that said, “It turns out FACTS MATTER”); Men For Choice (Sept. 30, 2014), [https://act1.myngp.com/Uploads/10000/images/Men%20For%20Choice%20DC%20Invitation\\_9\\_25.jpg](https://act1.myngp.com/Uploads/10000/images/Men%20For%20Choice%20DC%20Invitation_9_25.jpg) (last visited April 4, 2018) (noting that Mr. Harold was a host of the DC Men For Choice event that was sponsored by the liberal group, NARAL Pro-Choice America)). Mr. Harold and GuideStar are also vocal supporters of LGBT rights and causes. (JA at 020, ¶116) (citing Jacob Herald Twitter, @jacobherald (Apr. 27, 2017), <https://twitter.com/jacobcharold> (posting a story from

GuideStar:Blog supportive of homosexual and transgender positions) (last visited April 4, 2018). Mr. Harold has stated that GuideStar attempts to “[t]urn data on nonprofits into a story about social change.” Jacob Harold Twitter, @jacobherald (Mar. 24, 2017), <https://twitter.com/jacobcharold/status/845378076343242753> (last visited April 4, 2018)). (JA at 021, ¶117) Mr. Herald considers himself a “social change strategist” and so declares on his GuideStar bio. (*Id.*, ¶118).

Mr. Herald has brought his personal political agenda into GuideStar and now GuideStar has become a politically-motivated organization using false, defamatory, and dangerous labels to harm nonprofit organizations, including Liberty Counsel, with which GuideStar and Mr. Herald disagree based on their different ideologies. (*Id.*, ¶119). Mr. Herald and GuideStar’s shared political ideology with the SPLC seeks to diminish the opposing viewpoints and positions advanced by Liberty Counsel, namely religious liberty, the sanctity of human life, human sexuality, and family values. (*Id.*, ¶120). GuideStar recklessly adopted the SPLC’s designation of Liberty Counsel as a “hate group” based purely on its ideological opposition to Liberty Counsel. (*Id.*, ¶121). GuideStar’s adoption of SPLC’s designation of Liberty Counsel as a “hate group” and the two groups’ unquestionably shared political ideology evidences that GuideStar shares SPLC’s stated intention to “completely destroy” Liberty Counsel and other conservative groups. (*Id.*, ¶122)

**D. Consumers Are Likely to Perceive GuideStar's Profile of Liberty Counsel and "Hate Group" Designation as Intended to Influence Economic Transactions.**

A fourth factor is also relevant to the determination of whether GuideStar's profile of Liberty Counsel represents commercial speech, "the viewpoint of the listener." *Radiance Found.*, 786 F.3d at 331-32. Thus, this Court should also look to "whether the listener would perceive the speech as proposing a transaction." *Id.*

**1. GuideStar Intended to Influence Consumer Decisions with its Profile of Liberty Counsel and inclusion of the "Hate Group" Designation.**

Consumers are likely to perceive GuideStar's profile of Liberty Counsel, including the "hate group" designation, as intended to influence consumer decisions because that is precisely what it was intended to do. As Liberty Counsel's well-pleaded allegations make plain, GuideStar's unlawful conduct was intended to influence its consumers' decisions. If speech is intended to "assist consumers," it is commercial in nature. *Greater Balt.*, 721 F.3d at 286. If consumers of a service or product are specifically targeted in the representation, it cannot be doubted that the representation was "specifically intended to influence consumers." *Seven-Up Co. v. Coca-Cola Co.*, 86 F.3d 1379, 1386 (5th Cir. 1996); *see also Handsome Brook*, 193 F. Supp. 3d at 571 (if representation intentionally targeted consumers of the represented service, it is intended "to influence purchasing decisions").

Here, GuideStar's profile of Liberty Counsel is intended to influence consumer decisions because GuideStar's entire reason for existence is to influence consumer decisions in the nonprofit sector. (JA at 008, ¶¶43-44 and JA 025, ¶145). Indeed, GuideStar is used by donors, both individuals and institutional, to make decisions about donations, grants, and funding requests with respect to the non-profit entities on which GuideStar provides its reports. (*Id.* at 007, ¶33). GuideStar claims that its mission is to "revolutionize philanthropy by providing information that advances transparency, enables users to make better decisions, and encourages charitable giving." (*Id.*, ¶34). GuideStar claims that it "gathers and disseminates information about every single IRS registered nonprofit organization" and that it aims to "provide as much information as we can about each nonprofit's mission, legitimacy, impact, reputation, finances, programs, transparency, governance, and so much more." (*Id.*, ¶35). Thus, the entire reason for GuideStar's profiles of non-profit organizations is to influence customers in making their charitable giving and financial decisions.

Moreover, Guidestar has admitted that its purpose and intention with its profiles is to influence consumer transactions. (JA at 008, ¶43) (alleging that GuideStar has admitted that its purpose and motivation for the adoption of the SPLC's designation was financial and economic, because it "started to hear from customers who were worried they might facilitate a donation to a hate group"); (*Id.*,

¶44 and JA 025, ¶145) (GuideStar admitted that it was seeking to influence the consumers of its information in the decisions they make concerning donations to various nonprofit organizations.). Thus, GuideStar was attempting to, and has indeed, influenced consumer transactions with its profile of Liberty Counsel and the inclusion of the “hate group” designation.

**2. Consumers Are Likely To Perceive GuideStar’s Intention as Influencing their Economic Decisions because GuideStar Admitted It Was Attempting to Influence Them.**

Liberty Counsel’s allegations also demonstrate that GuideStar’s profile of Liberty Counsel was specifically designed to influence consumers. “[C]ontext matters [and] that context includes the viewpoint of the listener, for ‘commercial expression not only serves the economic interests of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information.’” *Greater Balt.*, 721 F.3d at 226 (quoting *Cent. Hudson*, 447 U.S. at 561-62)). Indeed, the economic interest of the audience is a relevant factor in determining consumer perception. *Huntington*, 978 F. Supp. at 665; *see also Radiance Found.*, 786 F.3d at 331.

Here, the Complaint plainly alleges that GuideStar’s audience is likely to perceive GuideStar’s profile of Liberty Counsel as influencing consumer transactions. (JA at 008, ¶¶43-44) (GuideStar admits that it seeks to influence consumer decisions and charitable giving); (*Id.*, ¶41) (alleging GuideStar sees itself

of the “hub of information” for consumers); (*Id.*, ¶43) (alleging GuideStar made its decision because of communications with its consumers and customers); (*Id.*, ¶44 and JA 025, ¶145) (alleging that GuideStar admits that it was seeking to influence its consumers’ financial decisions); (*Id.*, ¶43) (alleging that GuideStar admits that it made its decision based on customers’ and subscribers’ financial interests); (*Id.* at 025, ¶145) (GuideStar made its decision to “influence consumers’ decisions concerning Liberty Counsel’s goods and services”). As this Court held in *Handsome Brook*, there is “little difficulty concluding that speech is commercial” when “[t]he clear purpose” was to induce or affect the economic decisions of its listeners. *Handsome Brook*, 193 F. Supp. 3d at 569.

### **III. THE DISTRICT COURT IMPERMISSIBLY REACHED FACTUAL CONCLUSIONS CONTRARY TO THE WELL-PLEADED ALLEGATIONS OF LIBERTY COUNSEL’S COMPLAINT AND DREW INFERENCES IN GUIDESTAR’S FAVOR.**

“Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a ‘short and plain statement of the claim showing the pleader is entitled to relief.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009) (quoting Fed. R. Civ. P. 8(a)(2)). “[A] complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations,” but a plaintiff must meet his “obligation to show the grounds of his entitlement to relief.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A motion to dismiss under Rule 12(b)(6) tests the sufficiency of a complaint; importantly, **it does not resolve contests surrounding the facts**, the merits of a

claim, or the applicability of defenses. *See* 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1356 (1990) (emphasis added).

A district court cannot dismiss a complaint under Rule 12(b)(6) “**unless after accepting all well-pleaded allegations in the plaintiff’s complaint as true and drawing all reasonable factual inferences from those facts in the plaintiff’s favor**, it appears certain that the plaintiff cannot prove any set of facts in support of his claim entitling him to relief.” *Chao v. Rivendell Woods, Inc.*, 415 F.3d 342, 346 (4th Cir. 2005) (emphasis added).

Here, the district court ignored the well-pleaded allegations of Liberty Counsel’s complaint and impermissibly drew factual inferences in GuideStar’s favor. Indeed, the district court made the following finding: “Defendant simply intended the notation to be an informative statement that SPLC flagged Plaintiff’s organization as a hate group.” (JA at 279). Yet this finding is directly contrary to the well-pleaded allegations of Liberty Counsel’s complaint. (*See, e.g.*, JA at 008, ¶¶43-44) (alleging that GuideStar admitted that it seeks to influence consumer decisions and charitable giving); (*Id.*, ¶44) (alleging that GuideStar admitted that it was seeking to influence its consumers’ financial decisions); (*Id.*, ¶43) (alleging that GuideStar admitted that it made its decision based on customers’ and subscribers’ financial interests); (*Id.* at 025, ¶145) (alleging that GuideStar made its decision to “influence consumers’ decisions concerning Liberty Counsel’s goods and

services”). The district court’s refusal to accept these allegations as true is plainly erroneous as a matter of black letter law. *Chao*, 415 F.3d at 346.

Moreover, even if Liberty Counsel had not explicitly pleaded GuideStar’s economic motivation for adopting the false and misleading “hate group” designation – which it did – the district court’s decision drawing inferences in defendant’s favor was also plainly erroneous. GuideStar’s intent regarding the inclusion of the false and misleading “hate group” designation on its profile of Liberty Counsel is a question of fact. *See, e.g., McWhite v. ACE American Ins. Co.* 412 F. App’x 584, 587 (4th Cir. 2011) (“the intent of the parties is a question of fact”); *Morrison v. Nissan Co., Ltd.*, 601 F.2d 129, 141 (4th Cir. 1979) (same). Thus, drawing favorable inferences and making a factual finding about what GuideStar intended was improper on a motion to dismiss. This fatal error is itself sufficient to justify reversing the district court’s decision.

#### **IV. THE DISTRICT COURT SHOULD HAVE GRANTED LEAVE TO AMEND.**

This Court has held that it is an abuse of discretion to fail to permit a party leave to amend a complaint. *Laber v. Harvey*, 438 F.3d 404, 430 (4th Cir. 2006) (en banc) (holding that it is an abuse of discretion to deny leave to amend when no bad faith is involved and no prejudice results). Indeed, “leave to amend a pleading should be denied only when the amendment would be prejudicial to the opposing party, there has been bad faith on the part of the moving party, or the amendment would

be futile.” *Johnson v. Oroweat Foods Co.*, 785 F.2d 503, 509 (4th Cir. 1986). The district court made no finding – nor could it have – that Liberty Counsel’s Complaint was filed in bad faith or that leave to amend would have been futile. Nor did the district court make any finding that permitting Liberty Counsel an opportunity to amend prior to dismissing with prejudice would have resulted in any prejudice to GuideStar. Thus, the district court erred in dismissing Liberty Counsel’s Complaint with prejudice prior to permitting it the opportunity to amend.

### **CONCLUSION**

Because GuideStar’s profile of Liberty Counsel included both the false and misleading “hate group” designation and was economically motivated by GuideStar’s direct financial stake in such profiles of non-profit organizations, the district court erred in finding that Liberty Counsel’s well-pleaded allegations did not state a claim under the Lanham Act. Moreover, the district court abused its discretion in failing to grant Liberty Counsel leave to amend its complaint.

This Court should reverse and hold that GuideStar’s profile of Liberty Counsel constituted commercial speech sufficient to state a claim under the Lanham Act.

Respectfully submitted,

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/s/ Daniel J. Schmid

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Dated: April 10, 2018

**CERTIFICATE OF SERVICE**

I hereby certify that on this 10th day of April, 2018, I caused the foregoing to be electronically filed with this Court. Service will be effectuated on all counsel of record via the Court's ECF/electronic notification system.

/s/ Daniel J. Schmid

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*Attorney for Plaintiff-Appellant Liberty  
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