

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

ARISTOTLE INTERNATIONAL, INC.,)	
)	
Plaintiff,)	Civ. No. 05-1700 (TFH)
)	
vs.)	
)	
)	
NGP SOFTWARE, INC.,)	
)	
Defendant.)	

**FINDINGS OF FACT &
CONCLUSIONS OF LAW**

This case involves a dispute between Plaintiff Aristotle International, Inc. ("Aristotle") and Defendant NGP Software, Inc., which became NGP VAN ("NGP") after a merger in late 2010. Aristotle claims that NGP has engaged in false and misleading advertising in violation of section 43(a) the Lanham Act, 15 U.S.C. § 1125(a), in connection with the sales of its computer software. NGP counterclaims that Aristotle violated the same provision of the Lanham Act by publishing false and misleading comparative advertisements aimed at persuading customers to choose Aristotle's software over NGP's. NGP also asserts an unclean-hands defense against Aristotle, citing not only the ads involved in the counterclaim, but a host of others that Aristotle has published that reference NGP.

The Court previously denied the parties' cross motions for summary judgment, but made some specific findings related to the parties' claims. *Aristotle Int'l, Inc. v. NGP Software, Inc.*, 714 F. Supp. 2d 1 (D.D.C. 2010). Accordingly, the Court held a five-day bench trial to hear the parties'

evidence. This memorandum sets forth the Court's findings of fact and conclusions of law. After carefully reviewing the evidence offered at trial, the parties' proposed findings of fact and conclusions of law, and the entire record of this case, the Court concludes that neither party is entitled to any relief for the reasons set forth below.

I. Findings of Fact¹

The following findings of fact are based on the evidence (testimony and evidence² presented at trial), the parties' stipulations of undisputed facts, and the record as a whole.

A. The Parties and the Marketplace

Aristotle and NGP provide political software products and related services for the nationwide political and campaign marketplace. Founder and Chairman of NGP, Mr. Nathaniel Pearlman ("Pearlman"), TR I³ 31; Founder and CEO of Aristotle, Mr. John Phillips ("Phillips"), TR II 131. That marketplace includes elected officials, candidates, political action committees ("PACs"),⁴

¹ Findings of fact may also appear in the "Conclusions of Law" section, and vice versa. The substance of the finding or conclusion, not the Court's characterization, controls.

² The Court uses the abbreviations "JX", "PX", and "DX" to refer to "Joint Exhibit", "Plaintiff's Exhibit", and "Defendant's Exhibit", respectively.

³ The Court designates the bench trial transcripts as follows: January 4, 2011 transcript ("TR I"); January 5, 2011 transcript ("TR II"); January 6, 2011 (morning) transcript ("TR III"); January 6, 2011 (afternoon) transcript ("TR IV"); January 7, 2011 (morning) transcript ("TR V"); January 7, 2011 (afternoon) transcript ("TR VI"); January 10, 2011 transcript ("TR VII").

⁴ Corporations and trade associations form PACs to help them advocate their interests: "[T]he business world, including corporations and unions, gives money to political parties . . . [because] they believe that if they decline solicitations for such contributions, elected and appointed officials will ignore their views or, worse, that competing business interests who do make large contributions to the party in question will have an advantage in influencing legislation or other government decisions." *McConnell v. FEC*, 251 F. Supp. 2d 176, 858, 863-64

political party organizations, trade associations, corporations, 527 organizations⁵ and other entities required to report political fundraising contributions and expenditures. The marketplace is at the federal, state, and local levels. Pearlman, TR I 31; Phillips, TR II 131.

John Phillips and his brother founded Aristotle in 1983. Phillips, TR II 130. Aristotle represents itself to be non-partisan—*i.e.*, it is irrelevant to Aristotle whether a client is a Democrat or Republican. Phillips, TR II 131, 144; Aristotle Executive Vice President of Sales, Mr. Gordon Stoll (“Stoll”), TR IV 20. However, since at least 2006 the majority of Aristotle’s clients have been Republican. DEX 268; JEX 112; Phillips, TR II 144–45. Indeed, approximately 88% of Aristotle’s federal House candidate software clients were Republican in the 2010 election cycle. DEX 268; President of NGP, Mr. Stuart Trevelyan (“Trevelyan”), TR VI 73–75. It has sold its software to a number of high-profile Republicans such as John Boehner, Eric Cantor, Trent Lott, Tom Delay, John Ashcroft, Newt Gingrich, and Dennis Hastert. DEX 268; JEX 112. In the 2006 to 2007 time frame, Aristotle’s main competitors for federal business on the Republican side were CompleteCampaigns and FEC File⁶, although Aristotle later purchased CompleteCampaigns. Phillips, TR III 26:22–25. On the Democratic side, Aristotle competes with NGP and a number of other software vendors. Phillips, TR II 132:6–8; JEX 316 (list of software vendors). Since its founding, Aristotle has become a highly visible and influential firm in this marketplace.

(D.D.C. 2003) (quoting Sen. Rudman); *see also* Pearlman, TR I 52–54 (explaining nature of PACs); Trevelyan, TR VI 15:15–16:15, 24 (same).

⁵ “527” refers to the section of the tax code “applicable to non-profits engaged in political activities.” *Emily’s List v. FEC*, 581 F.3d 1, 4 (D.C. Cir. 2009). These non-profits’ goals are primarily “influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization, or the election of Presidential or Vice-Presidential electors.” 26 U.S.C. § 527(e)(2).

⁶ FEC File is a free software program offered by the Federal Election Commission. Phillips, TR III 22:5–10.

Nathaniel Pearlman founded NGP in 1997.⁷ Pearlman, TR I 159:23–25, 163:2–4. Since that time, NGP and Aristotle have directly competed for the provision of political software in the political and campaign marketplace. *Id.* 31; Phillips, TR II 132. Pearlman ran the company out of his attic for the first four and-a-half years. Pearlman, TR I 161:1–4. NGP’s first clients were fundraisers who needed technological and Federal Election Commission (“FEC”) reporting compliance software to assist their customers. *Id.* 161:8–13. But beginning in approximately 2000, NGP started working with prominent Democratic senators such as Hillary Clinton (who switched to NGP from Aristotle) and Mary Laudrieu. *Id.* 161–62. Like Aristotle, NGP has since become a major fixture in this marketplace, and the number of Aristotle clients who have switched to NGP over the years is roughly “in the eighties”. Pearlman, TR II 21:4–6. Less than ten customers have switched from NGP to Aristotle. *Id.*

Unlike Aristotle, NGP markets itself as a partisan firm, favoring Democrats. It is undisputed that at all relevant times, the vast majority of NGP’s business has come from Democratic candidates and organizations. JEX 179 (NGP client list). The remainder comes from sales to PACs (NGP has roughly ten direct PAC clients), corporations, trade associations, compliance firms, non-profits, and other sales through certain re-seller agreements. Trevelyan, TR V 98–99; JEX 179. It is further undisputed that NGP has never maintained a client relationship with a Republican candidate, Republican Party committee, or any other entity with an ideological Republican allegiance. Indeed, in 2004 when Congressman Rodney Alexander switched allegiances from the Democratic to the Republican Party, NGP dropped him as a customer. JEX 10c; Pearlman, TR I 187:17–188:2. NGP has apparently done this with other clients as well (Pearlman, TR I 188:1–2), and in at least one other

⁷ Mr. Pearlman actually worked at Aristotle for two years approximately from 1988 to 1990. Pearlman, TR I 159.

instance NGP referred a potential customer to another firm because the candidate was a Republican. PX 14, NGP Head of Sales Mr. Christopher Massicotte (“Massicotte”) Dep. at 100:17–22.⁸ NGP has consistently emphasized this Democratic allegiance in its advertising. Such advertising, discussed below, lies at the heart of this case.

B. NGP’s Partisan Advertising

Since its inception, NGP has spent approximately \$2,000 per year on advertising. Trevelyan, TR VI 55:21–56:6. It spends no money on billboards, radio, or television advertisements. Pearlman, TR I 193:10–16. Instead, NGP’s advertising generally consists of its website (*Id.* 162:15–21), descriptions in political directories (*id.*; *see also* JEXs 176, 304), and relatively short product and service descriptions distributed to prospective clients. JEX 177; Pearlman, TR I 150:6–151:10. NGP also sometimes sends blast emails to its existing customers. Pearlman, TR I 193–94. Thus, a significant part of NGP’s advertising also occurs through “word of mouth.” JEXs 123, 75 at 2.

Also since its founding, NGP’s advertising has emphasized its allegiance to the Democratic Party and Democratic interests, and that at least as between Democratic and Republican candidates and organizations NGP is exclusively Democratic. *See, e.g.*, Pearlman, TR I 50, 51–52 (NGP has “always advertise[d] that we’re a Democratic firm”). For example, NGP spreads this message via its website⁹ (JEXs 9, 9a, 9b, 9c, 9d, 9e, 9f, 10, 10a, 10b, 10c, 34), in advertisements (JEXs 15, 15a, 19, 19a), through flyers (JEX 17), through web log—or “blog”—posts by Mr. Pearlman (JEXs 21, 22), by newsletters (JEX 18), at seminar presentations (JEX 20), and by communications with individual

⁸ The objection raised regarding this deposition designation as being beyond scope is overruled.

⁹ NGP created its first website in approximately 1999. Pearlman, TR I 32.

customers and prospects (JEXs 13, 13a, 13b, 13c, 13d, 13e, 13f, 13g, 13h, 13i, 13j, 14); *see also* Pearlman, TR I 31–32.

Specific examples of this message include, but are not limited to:

- NGP “*work[s] only for Democrats and their allies,*” (JEX 9b) (NGP website) (emphasis added) and that “NGP...*is serving only Democrats and their allies.*” JEX 9f (NGP website) (emphasis added).
- “NGP seeks to be a responsible, dedicated partner to our clients, working toward our common goal: **Victorious Democrats.**” JEX 9b (NGP website) (bold in original).
- “– we are **PARTISAN...**” JEX 9b (NGP website) (bold in original).
- “NGP seeks to make the electoral map **blue.**¹⁰ That’s why we are passionate about delivering technology and support to Democrats and their allies.” JEX 9b (NGP website) (bold in original).
- NGP fliers offering a donkey mascot named “Lefty”, a symbol of the Democratic Party. JEX 17; Pearlman, TR I 38.
- Changing NGP’s color scheme to blue in 2006 “in honor of our service to Democrats.” JEX 9f; Pearlman, TR I 36:5–10.
- “Since our incorporation in January of 1997, NGP has helped elect Democrats.” JEX 9c (NGP website).
- In August 2004, the Wall Street Journal published an article about NGP (the “WSJ Article”). Shortly thereafter, NGP linked this article to NGP’s website, making it part of its advertising. NGP also emailed this article to its clients. JEXs 10, 10a, 10b, 24; Pearlman, TR I 38–39; PEX 14, Pearlman Dep. at 331:2–13. The WSJ Article was displayed on NGP’s website for almost two years. Pearlman, TR I 39, 40; PEX 14, Trevelyan 30(b)(6) Dep. at 56:15–22, 58:14–17. The article stated that Pearlman “formed NGP in 1997 with a mission to help only Democrats” and that “[Pearlman] didn’t like the idea of helping Republican customers.” JEX 10b.
- “What makes us [NGP] unique in our world is that, like you, we are Democrats and we only work with Democrats.... [W]e also work with organizations that are

¹⁰ Mr. Pearlman testified that “blue” means “Democrats,” “red” means “Republicans,” and NGP’s message is that NGP seeks to elect only Democratic Party candidates. Pearlman, TR I 35–36.

committed to getting Democrats elected like the AFL-CIO, SEIU, and America Votes.” JEX 13j (May 2006 prospective customer communication).

- In March 2005, the NGP website linked a web log written by Mr. Pearlman. In his web log, Mr. Pearlman stated: “...When I started my company in 1997, I did not choose Democrat-only as a marketing strategy. I simply wanted to be able to look in the mirror and be proud of my work and my clients. I wanted to work for the good guys and I wanted that ethic to be a core value of my company.” JEX 22.

Such examples are generally representative of similar NGP ads appearing in the record.

Mr. Pearlman testified that this partisan message means NGP, at least as between Democratic and Republican candidates, is supportive of only Democratic candidates and ideologically-aligned Democratic entities like party committees. *See generally* Pearlman, TR I 34–45. But NGP does not only sell its software to Democratic candidates and Democratic Party committees. Over the years, NGP has also disclosed it sells to PACs, corporations, and other types of organizations—*i.e.*, entities that may be either partisan or bipartisan, depending on their purpose and/or ideological posture. Such disclosures rarely label these entities as bi-partisan, and they always appear in context with NGP’s usual messages of professed Democratic allegiance or surrounded by otherwise Democratic credentials.

For example, in 1999, NGP advertised that it provides its software to “non-partisans, Democratic campaigns and Democratic political consulting firms.” JEX 64. In 2002, NGP advertised that it sold to “some corporations and non-profits” in the same section of the ad where NGP listed its Democratic affiliations. JEX 67. In 2004 and 2005, NGP similarly advertised that it sold to “PACs” and “non-profits and select corporations.” JEX 68. From at least 2000 until the filing of this lawsuit in 2005, NGP has also disclosed in its website that its software was being used by fundraising and compliance firms, such as Perkins Coie LLP and Winpisinger Associates. JEXs

65–69, 224. Perkins Coie LLP, which apparently only deals with Democratic candidates (*see* JEX 179 p. 2350), has its own non-partisan PAC that NGP services (Pearlman, TR I 166–67; JEX 259), but that PAC, specifically, has not been listed on the NGP web site. Moreover, in its proposals to clients, NGP has stated that it is recommended by the “DCCC, Emily’s List, numerous fundraising firms, state parties, and PACs.” JEX 178 (Bates NPG 0275). NGP has also advertised in political magazines and publications that it provides its services to PACs and/or corporations. JEXs 176, 304.

Additionally, NGP’s website often referred to PACs and other non-candidate organizations that were using its software as “progressive.” JEX 34 (“a wide variety of progressive PACs”); JEX 10c (“a wide variety of progressive PACs”); JEX 68 p. 5392 (“a wide variety of progressive PACs”); JEX 9a (“numerous progressive organizations”); JEX 9b (“numerous progressive organizations”); Pearlman, TR I 128. Similarly, a recent NGP customer proposal (JEX 309, p. 5668 “Executive Summary”) states that “NGP has met the needs of a variety of Democratic campaigns, PACs, fundraising firms, union[s], non-profits, *and other progressives*”. (emphasis added). Mr. Pearlman stated at trial that the term “progressive” generally denotes political organizations that support left-leaning causes and/or Democratic Party candidates. Pearlman, TR I 84.

NGP’s advertising has recently changed in two relevant ways. First, NGP dropped the word “only” from the phrase “only Democrats and their allies” from its advertising in about May 2009, although Mr. Pearlman has testified that the change did not significantly alter the substance of that language. PEX 14, Pearlman Dep. at 129–30; *see also* Pearlman, TR I 136–37; Trevelyan, TR V 9:2–4, 16. Second, NGP also dropped the word “partisan” from its website in approximately May 2009, although NGP continues to claim it is “partisan” in its standard customer proposal and in recent

advertisements and a recent press release. Trevelyan, TR V 8–9, 12; JEXs 59, 60 p. 2859, 61. NGP has not committed to maintaining either change permanently. Trevelyan, TR V 24–25, 27–28.

The merger of NGP with Voter Activation Network (“VAN”), that apparently serves non-partisans and labor unions among other clients, did not trigger any material change to NGP’s advertising regarding its Democratic allegiance. Trevelyan, TR V 91:6–18.

C. The Capitol Advantage Reseller Agreement

1. *Background and Terms*

Capitol Advantage (aka “CQ-Roll Call” as of 2008) (“CA”) is a non-partisan provider of software and services to a variety of entities. CQ-Roll Call Vice President of Operations, Mr. Barkley Kern (“Kern”), TR VII 54:6–57:3. Its clients are non-partisan or bipartisan corporations and trade associations. *Id.* 56:10–18. In 2004, CA approached NGP because CA’s clients were interested in obtaining political reporting software and preferred a one-stop shop for their political software needs. *Id.* 58:5–17. CA did not have the expertise or money to build the software itself, so it approached NGP for help. *Id.* 58:18–24.

On May 25, 2004, NGP signed an agreement with CA, entitled the “Capitol Advantage (CA) and NGP Partnership Agreement” (the “CA Agreement”). JEX 1. Despite the title, the agreement created no legal partnership, but was, rather, a reseller license agreement.¹¹ It gave CA the exclusive right to provide a rebranded version of NGP’s software (which became known as “PACBuilder”) in

¹¹ A “partnership” generally means “[a] voluntary association of two or more persons who jointly own and carry on a business for profit.” BLACK’S LAW DICTIONARY (9th ed. 2009). As discussed *infra*, NGP and CA co-owned nothing and CA was assigned too many exclusive responsibilities under the contract to characterize the CA Agreement as a partnership.

North America to “corporations, trade associations, and right-leaning 527 organizations¹²”. JEX 1. In exchange for the exclusive license, CA paid NGP royalties on the PACBuilder sales. *Id.* at 1. The CA Agreement also gave NGP veto rights with respect to CA’s sale of PACBuilder to organizations. *Id.* at 2 (“Any license or agreement for the CAPAC software entered into between CA and a customer shall be reasonably acceptable to NGP”). No sale has ever been made to a “right-leaning 527 organization” (Pearlman, TR I 199–200) and NGP has indicated that they would have vetoed such a sale if it found the sale to be unacceptable. *Id.* 103–04 (NGP would have vetoed CA’s decision to sell PACBuilder to, for example, Swift Boat Veterans for Truth).

Under the CA Agreement, the PACBuilder customers are the “exclusive” customers of CA. JEX 1 at 2. This statement is borne out in the CA Agreement’s terms. CA has sole responsibility for marketing, selling, and pricing the product. *Id.*; Kern, TR VII 59–61. CA also provides its customers with technical support and training. Kern, TR VII 61–62. NGP does, however, have some indirect PACBuilder client contact. For example, if CA cannot answer its customers’ technical questions, CA may contact NGP to resolve the issue, but the customer never directly contacts NGP. *Id.* 62–63. NGP also initially took possession of CA clients’ data and converted it, *i.e.*, NGP made the PACBuilder user’s data compatible with NGP’s software (JEXs 1 at 3, 8; Pearlman, TR I 76; Trevelyan, TR V 84–86) and NGP hosted on its servers the data for some PACBuilder users. JEXs 1 at 3, 8; Pearlman, TR I 79. However, NGP performed such services for CA, having no business arrangement with the PACBuilder clients. *See, e.g.*, Pearlman, TR I 77, 153–54; Trevelyan, TR V 84–86. Thus, at all times under the CA Agreement, CA stood between NGP and the PACBuilder customers. Pearlman, TR II 7:5–7 (NGP never worked with the CA clients directly).

¹² The parties would determine jointly whether a particular organization was right- or left-leaning. JEX 1 at 2.

The CA Agreement also refers to a separate “confidentiality agreement” that was incorporated into the CA Agreement by reference. JEX 1 at 6. NGP conceded that the CA Agreement was confidential but that NGP didn’t think deeply about such matters in drafting the agreement, and that CA was the party that primarily desired confidentiality because it wanted to preserve the impression to its clients that it was selling its own product. Pearlman, TR I 106–09; Trevelyan, TR V 65–66; Kern, TR VII 62:16–22, 64:8–13. The CA Agreement provided that “[a]t NGP’s discretion, [CA] or NGP may tell customers and prospects that NGP is the manufacturer of [PACBuilder].” JEX 1 at 2. Apparently, CA has only disclosed the relationship in instances where a prospective customer has recognized the software as NGP’s. Kern, TR VII 62:23–63:6. Although the CA Agreement was initially designated as confidential in this case, on May 12, 2010, the Court ordered that parts of the CA Agreement previously designated as confidential be unsealed. Dkt. No. 133.

NGP and CA entered into a new agreement in August 2009, running through January 31, 2013. JEX 4. Under the terms, CA may sell a rebranded version of NGP’s software “to corporations and trade associations.” *Id.* at 1. The language concerning right-leaning 527’s was dropped. NGP may sell its software to any corporation or trade association provided that it is not a customer or prospective customer of CA. *Id.* at 2. Most other terms remained substantially the same.

Over the years, the CA relationship has represented roughly 1–3% of NGP’s revenues. Trevelyan, TR VI 4:2–9. That percentage will likely drop to approximately 1.5% in 2011 due to NGP’s merger with another company in December 2010. *Id.* 3:24–4:11.

2. CA's Clients

At the time of trial, there were 57 PACBuilder users. *See* Trevelyan, TR V 21:14–20; Trevelyan, TR VI 6:13–15. All of them are corporate and trade association PACs.¹³ It is undisputed that the PACBuilder clients are non-partisan, or at least are not ideologically beholden to any political party. For example, the Printing Industries of America, the Professional Insurance Agents, the American Iron and Steel Institute, Title Industry, and National Association of Mortgage Brokers specify on their websites that they are non-partisan. JEXs 302, 293, 278, 281, 291. Others explicitly state that they are bipartisan. JEXs 288 (Consumer Electronics Association), 275 (American Academy of Physician Assistants). Other organizations do not provide their party affiliation but instead state that they support candidates who support their issues. JEXs 282 (American Road & Transportation Builders Association, states that it “only contributes to candidates and officeholders who strongly support federal transportation investment, and Congressional leaders who shape the legislative process”), 284 (American Wind Energy Association, states that its “purpose is to help elect candidates to the U.S. Congress who support AWEA’s legislative goals for growing wind power in America”).

CA clients give to both Republican and Democratic candidates. In many instances such clients have given more money to Republican candidates than Democratic candidates. In the 2006 election cycle, thirteen individual corporate and trade association PACs using PACBuilder each gave more of its money to Republicans than to Democrats. JEXs 11, 11a, 11e, 11h, 11n, 11p, 11r, 11t,

¹³ Corporate and trade association PACs are categorized as “Separate and Segregated Fund” PACs. Such PACs may only solicit funds from the individuals associated with their sponsoring organization, *e.g.*, a corporation. Trevelyan, TR VI 6–7.

11w, 11bb, 11gg, 11hh, 11pp¹⁴; Pearlman, TR I 55–76, 94–95. In the 2008 election cycle, twelve individual corporate and trade association PACs using PACBuilder each gave more of its money to Republicans than to Democrats. JEXs 11c, 11g, 11o, 11s, 11aa, 11dd, 11ee, 11jj, 11nn, 11qq, 11ss, 11tt; Pearlman, TR I 75–76, 94–95. In the 2010 election cycle, eleven PACBuilder clients each gave more of its money to Republicans than to Democrats. JEXs 11b, 11f, 11j, 11u, 11x, 11z, 11ii, 11kk, 11mm, 11oo, 11rr; Pearlman, TR I 75–76, 94–95. Thus, an individual PAC using PACBuilder gave more money to Republicans than to Democrats at least thirty-six times since 2005. Nine such times, PACBuilder clients contributed to Republicans over Democrats by margins of approximately 3 to 1, 4 to 1 and even 9 to 1. JEXs 11, 11a, 11b, 11c, 11e, 11f, 11g, 11h, 11j. However, all of the PACs in question have contributed to Democrats (JEX 315 (showing PACBuilder users during 2008 and 2010 election cycles)) and all but approximately five of the 57 current PACBuilder users contributed more to Democrats in at least one recent election cycle. JEXs 308, 315; *see also* Trevelyan, TR V 21:14–20. This memorandum will refer to the PACBuilder clients that have given more to Republicans than Democrats in a recent election cycle as the “Republican Giving PACs”. It is the PACBuilder sales to the Republican Giving PACs that Aristotle claims makes NGP’s advertising false and misleading.

In June or July 2010, NGP edited its website to state that its software was being resold by CQ-Roll Call (the entity that purchased CA). JEX 224; Stoll, TR V 61:24. However, at least at the time of trial, NGP had never specifically advertised that it allowed its software to be used by entities that gave more money to Republicans than Democrats. Pearlman, TR I 112:17–22.

¹⁴ JEX 11 includes documents prepared by a website called OpenSecrets.org that summarize FEC data. The parties stipulated that, unless otherwise objected to, such summaries are to be relied on as substitutes for the original FEC data. TR V 7.

3. 720 Strategies

In 2010, NGP entered into an arrangement with 720 Strategies—which is also a non-partisan provider of services and technology—that is similar to the CA Agreement. JEX 5. 720 Strategies and CA had been under common ownership, but when CA was later sold to CQ-Roll Call, 720 Strategies, which was then no longer affiliated with CA, approached NGP to enter into this deal. Trevelyan, TR VI 4:21–5:13. Accordingly, 720 Strategies is reselling a version of NGP’s software to its own customers, but as of the time of trial, 720 Strategies only had two such clients. See JEX 7.

D. Aristotle’s NGP-Related Advertising¹⁵

Aristotle has launched an ad campaign to educate the marketplace about this lawsuit and its claims, and to create the impression that NGP is not a partisan firm due to the CA Agreement and the ensuing PACBuilder sales to the Republican Giving PACs. Such efforts have been remarkably aggressive and comprehensive. Equally remarkable, however, is the absence in the record of evidence that the ad campaign worked.

The centerpiece of this effort appears to be a website originally named askngp.com in 2007 or 2008. JEX 265. Aristotle sent the link for this website to NGP’s customers. JEX 265. Aristotle later changed the website’s name to notrobinhood.com. See JEX 255. The website contains detailed information about NGP’s advertising regarding its Democratic allegiance and details essentially the

¹⁵ Since at least 2004, Aristotle has published various advertisements that, in some way, reference NGP. In this section the Court focuses on Aristotle’s advertisements that bear upon Aristotle’s claim. Because the Court finds *infra* that Aristotle’s claim fails on its merits, advertisements solely applicable to NGP’s unclean hands defense are moot, and advertisements solely applicable to NGP’s counterclaim are treated independently in the Conclusions of Law section.

same allegations made in this lawsuit. It also provides information regarding certain PACBuilder users that contribute substantial amounts of money to Republicans. *Id.* It also contains a form letter template, intended for NGP customers, that website viewers can send NGP indicating that the customer was misled by NGP's partisan advertising and requesting a refund. *Id.*

References to this website have been made in other Aristotle ads targeting NGP. For instance, Aristotle sent a series of postcard mailers to NGP's clients that inform the recipient that NGP has been selling its software through a third party to Republican and GOP organizations, and directing the recipients to visit askngp.com for more detailed information. JEXs 251–54. One such mailer included a picture of former President George W. Bush, stating “Mission Accomplished,” and suggested that NGP works with Republicans. Aristotle then sent out a second mailer showing a picture of “Lefty,” NGP's mascot, looking at a mirror that reflected a picture of an elephant. JEX 252. The ad campaign has included other efforts as well. In the summer of 2007, Aristotle published and distributed an article it created in a fake magazine called the “Software Enquirer.” JEXs 168, 169. It invites clients to contact NGP to ask Mr. Pearlman what his definition of “allies” is, suggesting that NGP serves Republican interests. *Id.*

This market reeducation campaign apparently reached a turning point in 2008 when Aristotle hired a consultant, Hamilton Campaigns (“Hamilton”) (Phillips, TR II 185–87) to conduct focus-group research regarding NGP clients to gauge their reactions to Aristotle's advertising about this lawsuit.¹⁶ *Id.*; JEX 194. Hamilton's report, dated December 15, 2008 (the “Hamilton Report”), contains a number of interesting findings. Perhaps the most significant theme to the Hamilton Report

¹⁶ Aristotle has hired other consulting firms to do research in connection with its advertising campaign concerning NGP. Phillips, TR III 55:12–56:3. For example, it has hired marketing firms, including a company by the name of Bright Line, to implement Hamilton's recommendations. *Id.* 55:7–11. Aristotle apparently spends approximately \$5,000 to \$10,000 a month on such advertising activities. *Id.* 56:4–12.

is that the customers surveyed did not respond strongly to the lawsuit's allegations. However, customers appeared to react more strongly to an allegation that Republican users of NGP software paid less than Democratic users. *Id.* at 7.

The Hamilton Report was also prescriptive. Hamilton recommended that Aristotle keep the lawsuit in the public's eyes to call into question NGP credentials as a partisan software vendor. *Id.* at 10. It also recommended that Aristotle emphasize the pricing issue to which customers seemed to respond. *Id.* at 7, 9. Aristotle appeared to implement these recommendations. Starting a few days after the release of the Hamilton Report, on December 19, 2008, Aristotle sent letters and emails to NGP's clients. JEXs 195, 197, 198; *see also* Phillips, TR II 196:15–17 (“I have taken much of the advice that Hamilton gave me. I found it to be valuable advice.”); *Id.* 205:2–4 (“Their research [Hamilton] showed that a price differential would be a relevant—would be an important consideration among NGP customers.”). Among other things, the communications highlight this lawsuit, NGP's “Reseller Agreement” (*i.e.*, the CA Agreement), suggest that the Republican-supporting organizations using NGP software paid less for the software than Democratic NGP clients, and once again directed recipients to the askngp.com website for further information. *Id.* Aristotle casts itself in the communications as a trusted non-partisan vendor and asks that clients consider switching to it. JEXs 195, 197, 198.

Thereafter, Aristotle continued to send advertisements to the market about this lawsuit, continuing to repeat its allegations, and other comparative claims. JEXs 209 and 210 (email advertisements regarding notrobinhood.com website sent in February 2009); JEX 215 (ads placed on Google apparently during April 2009); JEX 216 (May 2009 email to clients regarding entitlement to a refund from NGP and inviting customers to use Aristotle's “refund calculator”); JEX 226 (March

2010 press release regarding FEC decision and commenting on the lawsuit); JEXs 227 and 229 (April 2010 emails to clients regarding article in TechPresident and providing a separate comment regarding this lawsuit); JEX 231 (May 2010 press release regarding certain FEC decision and commenting on the lawsuit); JEX 232 (June 2010 press release regarding the Court's decision to unseal the CA Agreement); JEXs 235 and 237 (July 2010 press release regarding the lawsuit); Phillips, TR III 91:8–17 (discussing November 2010 press release asserting that the NGP “deception trial” had been moved to January 2011); DEX 503 (January 4, 2011 press release regarding lawsuit). Again, in these advertisements Aristotle tends to cast itself as a non-partisan alternative to NGP. JEX 209 (“proudly non-partisan since 1983”); JEX 237 (“Aristotle is a non-partisan vendor that for 25 years has served all parties equally . . .”); JEX 229 (“Aristotle casts itself as a nonpartisan technology provider.”).

II. Conclusions of Law: Aristotle's Claim

Under section 43(a) of the Lanham Act, “[a]ny person who . . . uses in commerce any . . . false or misleading description of fact, or false or misleading representation of fact, which . . . in 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). To prevail on a Lanham Act false advertising claim a plaintiff must show that the defendant's advertising was “(1) false or misleading, (2) actually or likely deceptive,

(3) material in its effect on buying decisions, (4) connected with interstate commerce¹⁷, and (5) actually or likely injurious to the plaintiff.” *Fernandez v. Jones*, 653 F. Supp. 2d 22, 32 (D.D.C. 2009) (quotation marks and citation omitted); *see also Riggs Inv. Mgmt. Corp. v. Columbia Pictures, LLC*, 966 F. Supp. 1250, 1267 (D.D.C. 1997) (citing *ALPO Petfoods, Inc. v. Ralston Purina Co.*, 913 F.2d 958, 964 (D.C. Cir. 1990)). Aristotle alleges that what makes NGP’s advertising false are the PACBuilder sales to the Republican Giving PACs.

A. False or Misleading

“A Lanham Act plaintiff must allege and prove that an alleged false or misleading representation of fact was literally false or misleading to the public or verifiably false or misleading.” *Fernandez*, 653 F. Supp. 2d at 32 (citations omitted). To satisfy this element, Aristotle must demonstrate that NGP’s advertising is either literally false or at least likely to mislead or confuse consumers. *Riggs*, 966 F. Supp. at 1268 (citing *Johnson & Johnson-Merck v. Smithkline Beecham*, 960 F.2d 294, 297 (2d Cir. 1992)).

Aristotle offers two theories for why NGP’s advertising is literally false. First, Aristotle alleges that NGP’s claims to service “only Democrats and their allies” (and substantially similar messages) is literally false because the Republican Giving PACs are not “allies” of Democrats. Second, Aristotle claims that the necessary implication of NGP’s advertising, taken together, is that NGP would never do anything to help a Republican get elected, which the Republican Giving PACs do via their contributions to Republican candidates. The Court addresses each theory in turn.

¹⁷ The parties stipulated for both Aristotle’s claim and NGP’s counterclaim that this element is satisfied. TR V 7–8.

1. Explicit Literal Falsity: The Definition of “Allies”

The parties disagree over who NGP’s true clients are under the CA Agreement. NGP argues that its only client under the agreement is CA, while Aristotle argues that the Court should treat the PACBuilder clients as direct clients of NGP. The Court will assume that Aristotle’s perspective applies because even under this conceptualization NGP’s advertising is not literally false.

The issue is thus whether PACs that contribute to both Democrats and Republicans, regardless of the respective amounts, can be deemed “allies” of both parties in a strict literal sense. *See, e.g.*, PEX 14, NGP Senior Vice President Mr. Louis Levine (“Levine”) Dep. at 34:4–17 (arguing that this is the case); Trevelyan, TR VI 77. The NGP ads do not define “allies”. Further, the parties’ employees and officers appear unsure as to what this term means in the political space. For example, Mr. Samuel Osborne, a NGP salesman, said in a deposition that the term “allies” in NGP’s advertising, at least to him, meant that they would “support Democratic values”. *See* TR IV 85 (offering testimony into the record).¹⁸ Mr. Massicotte testified that he once declined to sell NGP software to a certain PAC because he did not consider it to be a Democrat or an ally of Democrats because it gave more to Republicans than Democrats. *See* TR IV 91–92 (offering testimony into the record); PEX 14, Massicotte Dep. at 25:5–26:6.¹⁹ Mr. Brian Williams, Aristotle’s Vice President of Marketing, testified that his definition of “ally” would be any organization that gives over 90% of its

¹⁸ However, Mr. Osborne is a low-level employee who primarily sold to party leadership PACs and labor union PACs—*i.e.* not corporate or trade association PACs that CA was focusing on. He started at NGP in 2005, after the CA Agreement was concluded, and thus never was able to sell to corporate and trade association PACs. Trevelyan, TR VI 54–55.

¹⁹ However, Mr. Massicotte reached this conclusion after specifically consulting the CA Agreement to determine whether he could sell to this PAC. It is thus unclear to what extent the CA Agreement, which does not use or define the term “allies”, was influencing his market perspective. He also later appeared to state that entities that deal with both Republicans and Democrats can be allies of both. PEX 14, Massicotte Dep. at 80:16–81:10 (the objection regarding this deposition designation as being beyond scope is overruled).

contributions to candidates from a single political party. DEX 517, Williams Dep. at 43:1–20. Mr. Stoll was unclear on where that line should be drawn in terms of percentages. DEX 517, Stoll Dep. at 71–72. Mr. Dean Phillips, Aristotle’s President, testified he would need to know how an entity contributed to candidates over a number of years before making this call. DEX 517, Dean Phillips Dep. at 61:8–68:6.

Gaining little clarity from the record, the Court consults the dictionary. The Webster’s Third New Int’l Dictionary (Unabridged) offers no definition for “ally” that provides for mutual exclusivity vis-à-vis other entities. The most relevant definitions appear to be “to unite or form a connection between . . . : join in association” and “someone or something associated with another as a helper.” The Court therefore finds that the Republican Giving PACs can, in a strict literal sense, be deemed “allies” of both political parties so long as they contribute to both parties, which all the Republican Giving PACs recently have done.

This literal understanding of the term “ally” has intuitive weight as well. For example, the United States is regularly considered an “ally” of countries that often have extreme ideological tension between them—consider Saudi Arabia and Israel. More specifically, consider a PACBuilder client that gave a majority to Democrats in an election cycle. It would be strange, indeed, that if when a Republican senator who received thousands of dollars from that PAC thanked the PAC for being his or her ally, the PAC had to inform the senator that the PAC is actually in no way his or her ally, and that its allegiance lies instead with his or her opponent. Indeed, that PACs are so easily able to give to both parties strongly suggests that political candidates are indifferent to such considerations and are not held to task for dealing with the enemy in such cases.

Thus, even if the PACBuilder clients were considered to be NGP's direct clients, NGP's advertising is not explicitly, literally false.

2. *Literal Falsity by Necessary Implication: The Understanding of the Marketplace*

Aristotle proposes that literal falsity may be “conveyed by necessary implication when, considering the ad in its entirety, the audience would recognize the false claim as readily as if it had been explicitly stated.” *Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharms. Co.*, 290 F.3d 578, 587 (3d Cir. 2002) (citing *Clorox Co. v. Proctor & Gamble Commercial Co.*, 228 F.3d 24, 35 (1st Cir. 2000)); *see also Time Warner Cable, Inc. v. DIRECTV, Inc.*, 497 F.3d 144, 158 (2d Cir. 2007) (adopting the “necessary implication” test). While this “necessary implication” standard—which tends to expand the ambit of literal falsity—has gained favor in a number of circuits, it has not yet gained traction in this circuit, and it is unclear whether it will do so. *See, e.g., Richard J. Leighton, Literal Falsity By Necessary Implication: Presuming Deception Without Evidence In Lanham Act False Advertising Cases*, 97 TRADEMARK RPTR. 1286 (2007) (exploring the expansion of the standard across the circuits). However, the Court need not determine whether to adopt this standard because even if deployed it would not benefit Aristotle.

Aristotle argued that the necessary implication here is that “NGP would never help or serve those [who] favor Republicans more than Democrats” (Aristotle counsel Mr. Robert Bredhoff (“Bredhoff”), TR I 10) although Aristotle formulated this message slightly different in other instances. *See, e.g., Bredhoff*, TR I 46 (“NGP’s message . . . is that NGP would never do anything to help elect a Republican”); *Bredhoff*, TR VII 24–25 (same); Aristotle counsel Mr. David Fierst

(“Fierst”), TR VII 102 (same); Pl.’s Proposed Findings of Fact and Conclusions of Law 15 (same). Mr. Phillips also advocated this interpretation at trial. TR III 45–46; TR IV 9–10.

This “necessary implication” argument fails for two main reasons. First, the literal meaning of the term “allies”, which appears in NGP’s advertising, cuts against its grain, as discussed above. Second, NGP offers an alternative prism through which to view the marketplace that is at least as convincing as Aristotle’s. NGP splits the market into ideological and non-ideological camps. In the first lie partisan Democratic and Republican candidates and entities that assist such candidates because of that political label (*e.g.*, Democratic committees) or perhaps because of a given party’s traditional allegiance to a specific position on an issue (*e.g.*, abortion). In the other camp lie bipartisan or non-partisan entities that are more business-oriented, and who do not particularly care whether they give to a Republican or Democrat so long as that candidate supports their bottom lines (*e.g.*, a group lobbying for corn subsidies). NGP argues that the marketplace understands that its Democrat-only advertising addresses the partisan space, and that the marketplace further understands that dealing with the non-partisan camp does not pollute otherwise pure partisan bona fides.²⁰ Pearlman, TR I 34–35, 51:7–8, 163, 165, 173; Trevelyan, TR V 51:3–12, 69:4–13, 102–03, 107–09; Trevelyan, TR VI 63–64.

To reinforce its market prism, NGP offered evidence that other, similar software companies in the marketplace that hold themselves out to be partisan simultaneously deal with non-partisan entities. On the Republican side, a company named Filpac advertises that it provides its software to “Republicans only.” JEXs 307, 165; *see also* Trevelyan, TR V 105:3–18; Trevelyan, TR VI 92:14–18 (same); Pearlman, TR II 17:10–18:6. Despite that entity’s “Republican only” advertising, it has

²⁰ “Within the partisan realm [NGP is] a Democratic firm, and [it serves] only partisan Democrats.” Pearlman, TR I 51:7–8.

provided its software to the Advanced Acoustic Concepts PAC through April 2010, and that nonpartisan PAC has provided most but not all of its contributions in recent years to Democrats. JEX 306; *see also* Trevelyan, TR V 103:6–23 (discussing CNDI, which works only for Republicans but also has corporate and trade association PACs); Pearlman, TR II 17:10–18 (same). Mr. Trevelyan testified that on the Democratic side, vendors such as Sage, C-E Systems, and Campaign Lab have sold their software to non-partisan PACs, such as CityPAC, Standard Insurance Co., and Silicon Valley Bank, respectively. TR VI 92:25–93:13. Mr. Trevelyan testified that those PACs have contributed more to Republicans than Democrats in certain election cycles.²¹ *Id.*

Although Mr. Phillips testified that NGP’s market understanding was incorrect (TR III 46–48), surprisingly, Aristotle offered no evidence beyond such testimony supporting this opinion. No survey evidence was offered, no expert testified, and there appears to be little evidence—discussed in greater detail in Part II(B)(3), *infra*—in the record that customers or other entities in the marketplace disagree with NGP’s understanding. Thus, NGP appears to have a slightly stronger marketplace theory.

This cloud of ambiguity over not just the specific terms NGP uses in its advertising but the general message it conveys when put into context prevents the Court from confirming Aristotle’s proposed necessarily implied message in NGP’s advertising for purposes of literal falsity.²² *See Johnson & Johnson Vision Care, Inc. v. Ciba Vision Corp.*, 348 F. Supp. 2d 165, 182 (S.D.N.Y. 2004) (“To be found false by necessary implication, the challenged advertisement must be

²¹ Although Mr. Trevelyan’s testimony is the only evidence that the Court has concerning such entities other than Filpac, Mr. Trevelyan’s testimony is entitled to some weight, especially given its specificity.

²² Although discussed in the context of the necessary implication test, NGP’s market prism could also be used to defeat explicit literal falsity.

susceptible to no more than one interpretation.”) (internal quotation marks and citation omitted).

Thus, the Court turns to whether the ads are likely to mislead, confuse, or deceive consumers.

B. Deception

Because the Court has found NGP’s advertising not to be literally false, the Court must find whether the advertisements nevertheless are implicitly false because they “tend to mislead or confuse consumers.” *Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 273 (4th Cir. 2002); *see also Clorox Co.*, 228 F.3d at 33; *Johnson & Johnson-Merck Consumer Pharms. Co.*, 960 F.2d at 297; *American Home Products Corp. v. Johnson & Johnson*, 577 F.2d 160, 165 (2d Cir. 1978). The parties advocate different tests regarding this prong, discussed in turn below.

1. *Inherent Deception*

Aristotle argues that the Court may, on its own, determine that an ad is inherently deceptive without presentation of any extrinsic evidence, citing *FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 42 (D.C. Cir. 1985).²³ The case does not go this far. Rather, the case stands for the more modest proposition that consumer survey evidence, specifically, is not necessary as a matter of law to prove deception for implicitly false statements. *Id.* at 39–42. But the Court must still base its finding on some kind of evidence, such as reliable expert testimony. *Id.* at 41.

Aristotle also cites *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985) for the same general proposition. However, the *Brown & Williamson* court explained that “the [*Zauderer*]

²³ Although the *Brown & Williamson* court was addressing a claim made under the Federal Trade Commission Act, 15 U.S.C. § 45(a) (1982), it engaged in specific analysis of Lanham Act case law for analogical purposes.

Court did not go so far as to state that a judge may make such a finding without evidence . . . [although its] language seems to give a court considerable leeway, and the opinion explicitly stated that if a court finds the deception ‘self-evident,’ no *survey data* are required.” *Brown & Williamson*, 778 F.2d at 41 (emphasis added). *Zauderer* is further distinguishable because it concerned “technical meanings” of legal terms of art advertised to non-lawyers. Here, in contrast, are more ambiguous political characterizations marketed to other persons in the political marketplace. Further, for reasons already discussed above, the Court considers such terms to be too ambiguous to find that deception is self-evident. Thus, these precedents are ill-suited for this case where “the court’s reaction is at best not determinative and at worst irrelevant.” *American Home Products*, 577 F.2d at 165 (citation omitted).

2. *Deceptive Intent*

a. Applicability and Formulation

Aristotle also argues that if the Court finds that a party deliberately set out to deceive consumers in its advertising, then a presumption of deception attaches, demanding that the opposing party then rebut that presumption. Some circuits have adopted this test, although the decisions appear inconsistent as to the egregiousness of the conduct that is required to trigger the burden shift. *See Johnson & Johnson Merck Consumer Pharmaceuticals Co.*, 960 F.2d at 298–99 (“[W]here a plaintiff adequately demonstrates that a defendant has intentionally set out to deceive the public, and the defendant’s deliberate conduct in this regard is of an egregious nature, a presumption arises that consumers are, in fact, being deceived.” (internal quotation marks and citation omitted); *Johnson & Johnson-Merck Consumer Pharmaceuticals Co. v. Rhone-Poulenc Rorer Pharmaceuticals*, 19 F.3d

125, 131–32 (3d Cir. 1994) (adopting the Second Circuit’s formulation); *Porous Media Corp. v. Pall Corp.*, 110 F.3d 1329, 1333 (8th Cir. 1997) (citing the rule with approval); *Cashmere & Camel Hair Mfrs. Inst. v. Saks Fifth Ave.*, 284 F.3d 302, 316 (1st Cir. 2002) (“It is well established that if there is proof that a defendant intentionally set out to deceive or mislead consumers, a presumption arises that customers in fact have been deceived”); *William H. Morris Co. v. Group W, Inc.*, 66 F.3d 255, 258 (9th Cir. 1995) (“If [Defendant] intentionally misled consumers, we would presume consumers were in fact deceived and [Defendant] would have the burden of demonstrating otherwise.”).

This rule has also been favorably cited by at least one court in this circuit. *See Riggs Inv. Mgmt. Corp.*, 966 F. Supp. at 1269 (“If there were no actually false statements of advertising, a plaintiff must show that defendant’s advertising was misleading or confusing to consumers. A plaintiff may shift this burden and presume actual consumer confusion where the evidence shows that the defendants engaged in a deliberately deceptive commercial practice.”). *But see Brown & Williamson*, 778 F.2d at 40 (“[I]f the lower court confronts an advertisement involving literally true or grammatically correct statements, the trial judge cannot make a finding of deceptiveness unless the parties provide evidence of substance about what the person to whom the advertisement is addressed find[s] to be the message.”) (internal quotation marks and citation omitted). Noting this test’s rising acceptance, the Court must decide neither its applicability in this circuit nor whether it requires “egregious” conduct because Aristotle has not proven that NGP more likely than not possessed such intent.

b. Evidence of Deceptive Intent

At trial, Aristotle offered several pieces of evidence purporting to show that NGP has intended to deceive its customers and the marketplace regarding the nature of the CA Agreement and the sales to the Republican Giving PACs. The Court reviews this evidence below.

i. The CA/NGP Letter of Understanding's Defined Markets

On March 23, 2004, NGP and CA concluded a letter of understanding that preceded the CA Agreement. JEX 2. The letter divided the markets of each entity as follows: "In general, NGP will sell to the Political candidate and to Democrats and their allies (leadership PACs/unions/political 527s) market while CA will sell to the Non-Profit, Trade Association, and Corporate markets." *Id.* at 1. An earlier draft shows that Mr. Pearlman inserted the language "and to Democrats . . . 527s)" language. JEX 3. The implication is that Mr. Pearlman knew that the CA markets would be outside NGP's advertised market of "only Democrats and their allies" and contrary to the necessarily implied message that NGP would never do anything to help get a Republican elected.

Mr. Pearlman testified that this language was not a substantive attempt to sharply define what a Democratic "ally" was, but rather to try to generally shield NGP's "core" markets from CA, which did not include corporate or trade association PACs. Pearlman, TR I 86–89. Mr. Pearlman testified that his "core" market were "the candidates; the fundraising firms; and compliance firms; the party committees; and leadership PACs. The people that were most closely tied to the candidates and who were indisputably partisan." *Id.* 176. But even if this language were an attempt to comprehensively define what a Democratic "ally" was—which is somewhat doubtful given the context and that Mr. Pearlman considered the edit "minor" (JEX 3)—the language appears consistent with NGP's offered

market prism—*i.e.*, it defines a partisan sphere for NGP and a neutral sphere for CA with whom NGP considered acceptable to deal. Thus, this evidence is unpersuasive.

ii. The CA Agreement’s Defined Markets

The term “Democrats and their allies”, used in the NGP/CA letter of understanding, does not appear in the CA Agreement in any form. This suggests that Mr. Pearlman’s explanation for its inclusion in the preceding letter of understanding is correct—*i.e.*, it was not a sharp enough market definition for the final agreement. Diluting that notion, however, is the fact that the CA Agreement does not define NGP’s market. CA’s market is defined as, “corporations, trade associations, and right-leaning 527 organizations” with “the exception of the NGP desktop product and compliance firms.” JEX 1 at 2.

Although the “right-leaning 527” language in the CA Agreement is curious, it is largely irrelevant. Aristotle tried this case on the theory that what makes NGP’s advertising false is not the conclusion of the CA Agreement *per se*, but the actual sales that occurred to the Republican Giving PACs. *See* Bredhoff, TR I 122:17–23; Fierst, TR VII 103:1–7; Pl.’s Trial Br. 19–20; Pl.’s Proposed Finding of Fact and Conclusions of Law 15, ¶ 34.²⁴ Thus, the Court must find deceptive intent to sell to those PACs. To do otherwise would improperly uncouple the conduct at issue with the intent to perform that conduct. The “right-leaning 527” language, therefore, is only color on NGP’s intent behind concluding the agreement as a whole and as applied to those other markets. But the Court has

²⁴ Even if Aristotle had tried the case on the theory that the signing of the CA Agreement was the specific conduct that made NGP’s ads false and misleading, it would face an uphill battle given, for example, the ambiguity of what a “right-leaning 527 organization” is, the overall context of the CA Agreement, that Mr. Pearlman considered only CA to be NGP’s direct client, that no sales ever occurred to a 527 under the CA Agreement, and that Mr. Pearlman testified that NGP would have vetoed such a sale. Aristotle suggested at trial that the only reason CA did not sell to any right-leaning 527s is because of this lawsuit. That may be so, but—perhaps fortunately for NGP—the Court will never know.

already found that the corporate and trade association markets appear proper under NGP's market prism, a prism to which Aristotle has not provided a more powerful alternative. Thus, even if the 527 language did suggest deceptive intent, the Court sees no reason to ascribe any such intent to granting CA the other markets.

Reinforcing this conclusion is the fact that NGP had PACs similar to the Republican Giving PACs as direct clients before and during the CA Agreement, and apparently through trial. *See* Trevelyan, TR V 101–02. In fact, Aristotle personnel were almost certainly aware that NGP serviced bipartisan PACs before filing this lawsuit. In late 2003, the Kelly Services PAC switched from Aristotle to NGP. Stoll, TR IV 29:3–8 (testifying that he was aware in 2003 that Kelly Services had switched from Aristotle to NGP); *see also* JEX 76. Kelly Services had contributed more to Republicans than Democrats in certain election cycles prior to the switch. JEX 267. Although it is unclear whether Aristotle knew of such contributions specifically, it is highly likely that Mr. Stoll and others at Aristotle were savvy enough to know that it was bipartisan.

FEC records also confirm that NGP provided its software to corporate and trade association PACs for years, at least some starting to use NGP before this lawsuit even began and continuing after: Burger King PAC (JEX 268); Dallas-Fort Worth Association of Mortgage Brokers (JEX 271); Wine Institute PAC (JEX 260); National Association of Shareholders and Consumers Attorneys (“NASCA”) (JEX 269); and DMJM+Harris PAC (JEX 270); *see also* Trevelyan, TR VI 9:1–17:17. NGP's Burger King PAC client gave more to Republicans in the 2010 election cycle, and remains a direct NGP client since 2003. Trevelyan, TR VI 13. NASCA was still a direct NGP client when it gave more to Republicans than Democrats in 2006. *Id.* 13–14. The Dallas-Fort Worth Association of Mortgage Brokers PAC gave more to Republicans to Democrats in 2004 while it was a direct NGP

client, and remained a direct NGP client at least through 2010. *Id.* 16–17. Such information is publicly available, and there is no convincing evidence that NGP ever sought to hide it from consumers.²⁵ *See* Pearlman, TR I 164:5–8, 167:13–17, 168–69, 170:1–4, 174:9–17; Phillips, TR II 203:4–7. That such PACs never appeared by name on NGP’s website is of little moment considering they represent a tiny fraction of NGP’s client base,²⁶ and there is no evidence NGP ever denied it had such PACs to anyone. Indeed, Mr. Trevelyan testified that certain NGP compliance-firm clients actually referred bipartisan PACs to NGP who sometimes give more to Republicans than Democrats. TR V 15–25.

Relatedly, there is no credible evidence that NGP was ashamed of its direct bipartisan PAC clients, that it attempted to graft them off onto CA to hide them, or that prior to signing the CA Agreement NGP thought that increasing its direct PAC client roster was undesirable as an ideological matter. Moreover, in at least 1999 NGP did specifically advertise that it sold to non-partisan entities, and since the summer of 2010 NGP has advertised that a rebranded version of its software is available to PACs.

iii. The CA Agreement and Confidentiality

Two other pieces of evidence concern the confidentiality of the CA Agreement. First is the following language in the CA Agreement: “At NGP’s discretion, CA of NGP may tell customers and prospects that NGP is the manufacturer of [PACBuilder].” JEX 1 at 2. This provision allegedly

²⁵ Curiously, Aristotle does not claim that these direct NGP client PACs, even the ones that have given more to Republicans than Democrats in recent election cycles, make NGP’s advertising false.

²⁶ *See* Pearlman, TR I 183:10–21 (testifying that the NGP client lists proportionately recognized its client base). Indeed, out of NGP’s approximately 1,500 total clients, approximately 1,490 are Democratic candidates/party committees or similar Democratic partisan organizations. JEX 179; TR V 98:6–99:1.

shows that NGP was the party mainly concerned with protecting the secrecy of the agreement. Mr. Pearlman testified that this provision was not particularly important to him and that there was no particular reason for NGP to maintain contractual control over the disclosure of the relationship; rather, he simply sought to control whatever he could when negotiating the terms of the contract. Pearlman, TR I 107–108. Mr. Kern testified that CA also did not focus on who had the right to disclose the agreement to CA customers. TR VII 72. Moreover, CA apparently did disclose that PACBuilder was a rebranded version of NGP’s software when customers asked (Kern, TR VII 62–63) and there is no evidence NGP ever objected to CA doing so. Thus, this datum is underwhelming as an indicia of deceptive intent.

Second, Aristotle argues that NGP’s efforts to keep the CA Agreement confidential during the course of these court proceedings further shows NGP’s fear that the CA Agreement’s terms could reach the public. This argument is also unconvincing. Both Mr. Pearlman and Mr. Kern considered the CA Agreement as generally confidential. Pearlman, TR I 107:5–7, 108:21–22, 109:1–3; Kern, TR VII 62–65. In addition, following the filing of this lawsuit, CA apparently became concerned that Aristotle would advertise its relationship with NGP in a false and misleading fashion if it were disclosed. Kern, TR VII 67–69. NGP claims to have shared this concern. *See* Dkt. No. 82. Such concerns appear to be at least somewhat legitimate, as Aristotle wasted no time in bringing the marketplace’s attention to it along with other aspects of this case as they occurred. *See* JEX 235 (press release regarding unsealing of the CA Agreement) and DEX 503 (press release regarding testimony at trial with a negative-NGP slant). Moreover, the Court only unsealed portions of the CA Agreement—the rest remained properly confidential—and the Court derives little deceptive intent from hostile litigants’ efforts to contest the confidentiality of private business agreements that are regularly kept confidential.

iv. The WSJ Article

Aristotle claims that the WSJ Article contributes to the mosaic of deceptive intent because it trumpets NGP's alliance with the Democratic Party when NGP had just concluded the CA Agreement which allows sales to the Republican Giving PACs. Apparently, NGP's Democrat-only advertising increased following 2004, which was the year NGP signed the CA Agreement. Pearlman, TR II 122–23. Aristotle argues that this is evidence that NGP felt “emboldened” after “consigning” NGP PAC clients to CA. *Id.* 123. This argument makes little sense, however. As already discussed, NGP still had its own direct PAC clients at this time, and did not transfer any such clients over to CA. There is also no evidence that NGP was on the cusp of signing numerous other direct PAC clients that NGP was then relieved went to CA instead. In this context, it is difficult to see why NGP would have felt “emboldened.”

v. Mr. Pearlman's “Shadow Company” Blog

In February 2005, nine months after NGP signed the CA Agreement, Mr. Pearlman linked to NGP's website a web log he had written. In the web log he stated: “It would be easy to sell to the other side, or form a shadow company to do so, but we have worked only for Democrats and their allies. That feels good.” JEX 21; Pearlman, TR I 129–30.²⁷ Mr. Pearlman contrasted “the other side,” with “Democrats and their allies.” Pearlman, TR I 130. Of course, the implication is that Mr. Pearlman wrote this because he actually did form a “shadow company” with the CA Agreement. But this could just as easily be an innocent comment, and the language also directly implies that Mr.

²⁷ Mr. Pearlman testified that he knew of companies that had actually done this through, for example, subsidiaries in this marketplace. TR I 158:3–7.

Pearlman did not feel that he did anything improper. In terms of divining Mr. Pearlman's intent behind the CA Agreement, the Court thus considers this blog to be neutral.

vi. Mr. Pearlman's March 2005 Blog

In another blog posting dated March 9, 2005, Mr. Pearlman wrote that he "wanted to work for the good guys" when he formed his company and that "if some day it is a model [that] no longer works, I would do something else." JEX 22. This blog adds nothing. It is no more probative of deceptive intent than any of the other NGP advertisements at issue in this case.

vii. NGP's Responses to Customer Queries

After Aristotle began its ad campaign to educate the marketplace about this lawsuit, certain customers contacted NGP to inquire about Aristotle's allegations. NGP's main response to such queries was to circulate a statement by Mr. Pearlman to NGP customers. *See* JEX 33; Pearlman, TR I 119–20 (explaining that JEX 33 was forwarded to everyone on NGP's mailing list and that JEX 33 was posted on NGP's website). In relevant part, it states that

[A] small number of non-partisan PACs use a version of our software. Aristotle has focused on this handful of non-partisan PACs, which they conveniently neglect to mention gave a majority of their contributions to Democrats this past cycle, in order to pretend outrage about what Aristotle claims is NGP's impurity.

NGP also forwarded such language to specific customers who contacted NGP to inquire about the allegations. Trevelyan, TR VI 95. Aristotle claims this is further evidence of deceptive intent

because it does not specifically disclose that some PACs were giving more to Republicans than Democrats.²⁸

The Court finds nothing suspicious about this message simply because NGP did not cast itself in the worst light. It does not deny that some of the PACs gave more to Republicans than Democrats, as charged in Aristotle's advertising. Moreover, it explicitly recognizes that bi-partisan PACs use NGP's software, and given the apparently common, well-known, and unpredictable contribution patterns of bi-partisan PACs, to count this message as deceptive intent simply gives NGP's customers far too little credit.

NGP's conversations with specific clients reinforce this conclusion. Interrogatories discussed at trial seem to support the story that when customers contacted NGP to discuss the Aristotle ads, NGP acknowledged the ads, but explained that the entities in question (*i.e.*, Republican Giving PACs) were bipartisan corporate and trade association PACs. DEX 505; Trevelyan, TR V 91–98. They further support the conclusion that upon learning this, the customers' concerns were allayed. In fact, one reporter that contacted NGP was under the impression, after reading Aristotle's ads, that NGP serviced Republican PACs and was surprised to learn that the PACs in question were bipartisan. Trevelyan, TR V 97:10–17. Again, the Court discerns no deceptive intent from such communications.

²⁸ NGP has never explicitly stated in any of its advertising or public messaging that it was permitting its software to be used by PACs which were giving more money to Republicans than to Democrats. Pearlman, TR I 112–16; Pearlman, TR II 126; Trevelyan, TR V 20–21, 28–30, 47; TR V 36–38.

viii. Recent Changes to NGP's Advertising

NGP has dropped the word “only” from the phrase “only Democrats and their allies” from its advertising in about May 2009 along with similar words like “exclusively” and “solely”, although Mr. Pearlman has testified that the change made little difference in the ads’ substantive message. *See* Pearlman, TR I 135–37; Trevelyan, TR V 9:2–4, 16. Second, NGP dropped the word “partisan” from its website in approximately May 2009, although NGP continues to claim that it is “partisan” in its standard customer proposal and in recent advertisements and a recent press release. Trevelyan, TR V 8–9, 12; JEXs 59, 60 p. 2859, 61. Mr. Trevelyan testified that such changes resulted from a routine rewriting of NGP’s marketing language (Trevelyan, TR V 16, 19), but Mr. Trevelyan also suggested that this lawsuit played at least some role in these two specific changes. *Id.* 17–19.

Based on this evidence, it is likely that such changes were at least in some way spurred by this lawsuit. However, that does not necessarily mean it is evidence of deceptive intent or a guilty conscience. NGP made these changes as a part of a revision to its general advertising and website in 2009; it was not a knee-jerk reaction to this lawsuit, filed in 2005. Indeed, if NGP could make such alterations to its advertising and still convey a message that is substantially similar, it would appear to be a cheap gambit to possibly end a long, bitter, and expensive lawsuit. Such changes are minimally probative of deceptive intent.

ix. The “Mosaic” of Deceptive Intent

When considering evidence related to falsity, “[t]he entire mosaic should be viewed rather than each tile separately.” *McNeil-PPC, Inc. v. Pfizer Inc.*, 351 F. Supp. 2d 226, 248 (S.D.N.Y. 2005) (quoting *Avis Rent A Car Sys., Inc. v. Hertz Corp.*, 782 F.2d 381, 385 (2d Cir. 1986)). Even viewing the evidence as a whole, however, Aristotle has not shown that it is more likely than not Mr.

Pearlman was hatching a plot to deceive his customers upon signing the CA Agreement, especially vis-à-vis the PAC and trade association markets. There are too many credible, innocent explanations for NGP's behaviors. The individual pieces of evidence are too weak. The threads between them are too thin. Aristotle simply weaves too delicate a web to support the burden it must bear. The Court therefore cannot find deceptive intent.

3. *Evidence of Likely Market Deception or Confusion*

During this case, Aristotle has tried hard to deploy legal arguments that channel the Court away from considering whether there is credible evidence that consumers were likely confused or deceived by NGP's advertising. The reason for this is simple—the record is almost silent on this issue. In the end, that silence is deafening. Indeed, “[i]n considering charges of false and deceptive advertising, the public's impression is the only true measure of deceptiveness.” *Brown & Williamson*, 778 F.2d at 39–40 (internal quotation marks and citation omitted). Nevertheless, the Court considers what evidence there is below.

a. *Emails Requesting a Refund*

The askngp.com website had a feature where a user could generate an email to NGP, using a stock message that Aristotle provides on the website, expressing concern about the lawsuit and broaching the possibility of a refund to that customer. JEX 265. Congressman Stephen Cohen, a NGP customer, apparently chose to generate one of these emails to NGP. JEX 35. Mr. Trevelyan responded to Mr. Cohen by email, providing the names of some of the Republicans Giving PACs, and also saying that Aristotle's website “misleadingly lists the contributions those PACs made to

Republicans, but not their contributions to your 2008 campaign, and other Democrats.” JEX 203. JEX 246 is an email from Mr. Trevelyan to himself apparently memorializing an oral conversation he had with Mr. Cohen regarding Aristotle’s ads, strongly suggesting he explicitly told Mr. Cohen that some of these PACs did in fact give more to Republicans than Democrats in certain cycles. Both communications indicate that NGP’s explanation of the situation allayed his concerns. *See also* DEX 505 at 7. Mr. Pearlman testified that nobody ever actually requested a refund from NGP based on Aristotle’s allegations in this lawsuit, including Mr. Cohen. Pearlman, TR I 124:17–19; Pearlman, TR II 62:4–5. JEX 264 is another example of this type of email, from a Ms. Estelle Dandrea. Again, there is no evidence that this person ever actually requested a refund or that NGP gave one to her or her organization.

b. The Hamilton Report

The Hamilton Report is another source of purported anecdotal evidence of likely deception. The Hamilton Report summarizes responses from thirteen NGP-client interviewees drawn from Democratic campaigns. JEX 194 at 1. All interviewees had previously been sent a letter from Aristotle, attached as an exhibit to the Hamilton Report. The letter states, among other things, that NGP “quietly sell[s] its software through another company to political organizations that provide significant support to Republicans and GOP interests.” *Id.* (attachment to Hamilton Report). It is unclear whether customers knew that the PACs in questions were bi-partisan, or whether the customers thought the described PACs were ideologically Republican.

The Hamilton Report has two powerful thrusts. First, there is evidence that people remain generally interested in the lawsuit. *See id.* at 8 (“[T]he majority of respondents say they are likely to

follow information around the court case and remain interested in its outcome”).²⁹ Interest in this case is not likely deception, however. Indeed, to suggest that the Court will have evidence of consumer deception only after it issues its opinion is to put the cart before the horse.

Second, the report states that customers were generally unwilling to say they would be entitled to a refund from NGP if the Aristotle letter were true, and that no interviewees had actually requested a refund. *Id.* at 1, 4. The report goes on to say that “there is very limited emotional reaction to the idea that NGP serves both Democrats and Republicans.” *Id.* at 6. The report therefore offers scant evidence of likely consumer deception or confusion.

c. Email from Jan Schneider

JEX 218 is an email from Jan Schneider to John Phillips in response to an Aristotle ad regarding NGP’s Democratic pedigree, indicating that she was “fooled” by NGP’s advertising and “will switch” to Aristotle. JEX 218. However, Ms. Schneider was apparently never a NGP client, nor did she switch to Aristotle’s software in the election cycle post-dating the email. Trevelyan, TR VI 47–49. Thus, the email remains little more than a curiosity.

d. Email Regarding the WSJ Article

JEX 24 is an email from a NGP client who, reacting to the WSJ Article, appeared concerned with the possibility that the NGP-client bipartisan PACs may be viewed as Democratic PACs. *See* Pearlman, TR II 118:4–9. Interestingly, however, the client does not appear concerned that the PACs pollute NGP’s Democrat-only credentials. Indeed, it appears to illustrate that she knew of NGP’s bi-

²⁹ One quoted interviewee stated that the allegations “raise a flag”. *Id.* at 5. Another said he may “follow up” with NGP to hear its take on the lawsuit. *Id.* at 6.

partisan PAC clients all along, and had furthermore never raised such concerns in the past vis-à-vis NGP's regular advertising. The email is, however, somewhat probative that this one person thought the WSJ Article's characterization of NGP was potentially confusing. The Court notes, however, that there is no evidence that any of NGP's bipartisan PACs themselves were ever concerned with the article.

e. NGP's Customer Satisfaction Survey

A 2010 NGP Satisfaction Survey recorded four instances where customers stated one of the reasons they chose NGP was due to its democratic allegiance. JEX 30. Specifically, the customers stated that they chose NGP because of its "Democratic alliance" and because it was "Dem focused". But both of these statements are true—NGP is indisputably a Democratic-focused firm and has an undisputed alliance with Democratic candidates and institutions. Thus, such responses are not specific enough to illustrate that the customers were likely deceived by NGP's indirect sales to the Republican Giving PACs. *See also* JEX 113 p. 1102 (Aristotle record indicating a customer is switching to NGP because, *inter alia*, "they only work with Dem's"). Even if they were evidence of deception, these responses comprise only roughly 5% or less of the total responses. *See* TR I 148–49.

f. Customers Contacting NGP for Clarification

As already discussed, some NGP customers contacted NGP to inquire about Aristotle's ads related to this lawsuit. There is no evidence that, after discussing the issues with NGP, that any such customer took any action evidencing that the customer felt deceived or confused by NGP's advertising. In fact, such a pattern seems just as probative—if not more so—that Aristotle's ads were the ones creating the confusion.

g. Mr. Phillips's Testimony

Mr. Phillips testified that he believed that, as a result of Aristotle's NGP-oriented ad campaign regarding the allegations in this lawsuit, there was "customer movement" away from NGP. TR III 61:2–11. However, the Court has no examples of such movement.³⁰ The Court furthermore has no idea how many customers Mr. Phillips believes left NGP—it could be negligible. Mr. Phillips also testified that persons had told him that, because of Aristotle's ad campaign, that if the allegations in the lawsuit proved true, they would consider themselves deceived. *E.g.*, TR IV 6–7. Again, even if this were true, it is not evidence of likely deception; the Court requires evidence that customers felt deceived without having to tell customers that they were.

h. Conclusion Regarding Likely Deception

"Some confusion and misunderstanding are inevitable in any business relation. The Lanham Act deals only with confusion that exceeds the norm in the human condition." *First Health Group Corp. v. BCE Emergis Corp.*, 269 F.3d 800, 805 (7th Cir. 2001) (citing *Reed-Union Corp. v. Turtle Wax, Inc.*, 77 F.3d 909 (7th Cir. 1996)). The number of persons in the marketplace that must likely be deceived to satisfy this intuitive threshold "has been characterized as appreciable, statistically significant, significant portion, or a substantial portion of the intended audience." MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 27:57 (4th ed. 2006) (internal quotation marks and footnotes omitted). The evidence in this case, even taken as a whole, satisfies neither these nor any reasonable standard proving likely deception among NGP's customers or the marketplace generally.

³⁰ Mr. Phillips may also have been mistaken. He may, for example, have been referencing Ms. Schneider's email, discussed above. *See* Phillips, TR IV 6 (discussing an email in this context that appears to match Ms. Schneider's). Mr. Trevelyan testified that she was not a NGP customer only after Mr. Phillips finished testifying at trial.

No surveys were offered. No experts testified. No customers testified. Aristotle's market perspective remains unproven. What evidence there is at best provides weak anecdotal evidence that a few specific persons might have felt deceived or confused by NGP's ads, but for all the Court knows, Aristotle's obviously slanted advertisements that triggered many such reactions could have been a or the source of that confusion.³¹

Thus, Aristotle has not demonstrated that NGP's advertising is either false or misleading, or likely deceptive. NGP's unclean hands defense is therefore moot, and the Court turns to NGP's counterclaim.

III. Conclusions of Law: NGP's Counterclaim

NGP's counterclaim consisted of five Aristotle advertisements. Only one of these ads remained live after summary judgment. JEX 125. Aristotle sent this advertisement to clients of both companies comparing itself to NGP, shortly before the 2006 elections. In this document, Aristotle contended (1) that NGP did not have "instruction manuals", and (2) that NGP's software cost "approximately the same" as Aristotle's.

A. The Instruction Manuals

At the summary judgment phase the Court found that the only triable issue regarding the "instruction manuals" language was whether the language was misleading. Dkt. No. 116 at 19. The

³¹ Mr. Pearlman is aware of no customer ever saying that they felt misled by NGP's advertising nor has any client left NGP because of this issue. TR II 15-16.

claim fails for the same reasons as Aristotle's claims failed. NGP offered no credible evidence of deceptive intent related to this ad, and no evidence that customers were likely deceived or confused by it. The Court quickly finds, therefore, that Aristotle prevails on this issue.

B. The Pricing Issue

The Court's summary judgment opinion left unresolved whether this language was false or misleading. It is undisputed that since before the time of advertisement, Aristotle's sales policy has been that in direct competition with NGP for a prospective customer Aristotle will match or beat NGP's sales price. Stoll, TR IV 24–25, 64; Phillips, TR II 153. The language therefore, is not literally false. There is furthermore no evidence of deceptive intent on Aristotle's part regarding the language, and again NGP has offered no evidence that consumers were likely deceived or confused by this statement. Aristotle must therefore prevail on this issue as well.

IV. Attorneys' Fees

Both parties have asked the Court to award them attorneys' fees pursuant to Section 35(a) of the Lanham Act. 15 U.S.C. § 1117(a) ("The court in exceptional cases may award reasonable attorney fees to the prevailing party."). The Court perceives nothing "exceptional" regarding this case as to warrant granting either party attorney fees. Such requests will therefore be denied.

