No. 20-873

IN THE

Supreme Court of the United States

HERMAN MILLER, INC.,

Petitioner,

v.

BLUMENTHAL DISTRIBUTING, INC. D/B/A OFFICE STAR,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

JEAN-PAUL CIARDULLO
FOLEY & LARDNER LLP
555 South Flower Street, Suite 3000
Los Angeles, CA 90071
(213) 972-4500
jciardullo@foley.com

JONATHAN E. MOSKIN
Counsel of Record
FOLEY & LARDNER LLP
90 Park Avenue
New York, NY 10016
(212) 682-7474
jmoskin@foley.com

Counsel for Petitioner

302074

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

INTRODUCTION

In opposing the petition for certiorari of Herman Miller, Inc. ("Herman Miller"), Blumenthal Distributing, Inc. (d/b/a Office Star, "OSP") simply sidesteps the question presented of whether the Court of Appeals for the Ninth Circuit in this action inappropriately substituted its own findings of fact in place of the jury verdict—particularly where it is undisputed that the jury was properly and precisely instructed as to the applicable law. Certainly, OSP cites no precedent permitting an appellate court to replace a jury's verdict by reweighing the evidence where the jury was properly instructed as to the law, as is conceded here, and where the district court denied a motion under Rule 50(b). Indeed, in overturning the district court's denial of OSP's motion for JMOL, the Ninth Circuit Panel never discussed or analyzed the district court's actual decision and never attempted to reconcile its own review of the facts with the district court decision on the motion for JMOL or the jury verdict.

Instead, OSP simply examines anew the sufficiency of the evidence on the factual question for which the jury entered its verdict in Herman Miller's favor, namely, that the well-known Eames Aluminum Group ("Eames") chair design is "famous" within the meaning of the Lanham Act anti-dilution statute, 15 U.S.C. § 1125(c). OSP does not address the central issue that the jury found the design to be famous by applying an unassailably accurate jury instruction that literally restated the relevant statutory language. Rather, in a manner not unlike the Ninth Circuit panel, it treats the question as simply one for *de novo* review by the appellate court of the *underlying evidence*, rather than *de novo* review of the district court's decision

denying the motion for JMOL.

In so doing, OSP itself raises new factual issues not even considered by the Ninth Circuit, and to justify the Ninth Circuit's 2-1 determination to set aside a jury verdict rendered by applying the literal language of the statute (to which there was no objection) OSP (like the Ninth Circuit) makes no effort to explain why, in hindsight, a new interpretation of the unequivocal statutory language was even permitted much less appropriate.

Finally, OSP does not dispute the Constitutional jury right implicated by the Ninth Circuit decision and makes no effort to show why that right is threatened any less here than in *Google, LLC v. Oracle America, Inc.*, No. 18-956, where the appellate court likewise displaced the jury's factual findings. Hence, this Court should enter an order granting, vacating and remanding in view of the identical or nearly identical question raised in *Google, LLC*.

ARGUMENT

In opposing Herman Miller's petition for certiorari, OSP simply argues that a jury could reasonably have ruled in its favor on the question of the fame of the Eames design, thus starting from the wrong perspective. OSP does not address this Court's precedent that courts reviewing general verdicts must construe all the facts—including all inferences drawn from the evidence—in support of the verdict to determine if a rational jury could have ruled the way it did. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150-151 (2000). The Ninth Circuit likewise only selectively reviewed the facts, and made assumptions outside the record, without ever assessing how a rational jury could have reached the verdict it did. And rather than

attempt to show how the Ninth Circuit decision comports with this Court's guidance that a court must then affirm if a "rational trier of fact" could have reached the jury's conclusion, *id.* at 153, OSP, like the Ninth Circuit Panel, simply inverts the test by arguing that a rational trier of facts could have found against Herman Miller. The Ninth Circuit, in short, improperly "reweigh[ed] the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because [the court] fe[lt] that other results [were] more reasonable." *Tennant v. Peoria & P. U. Ry. Co.*, 321 U.S. 29, 35 (1944).[1]

If this practice became the law, jury verdicts would never have finality, and the Seventh Amendment would be eviscerated.

OSP's error thus mirrors that of the Panel itself, which never analyzed or discussed the district court's denial of OSP's Rule 50(b) motion and never attempted to reconcile its decision with the jury verdict. Instead, it simply decreed that its independent view of the facts warranted a different conclusion.

In so-arguing, OSP also makes a demonstrably incorrect assertion of fact that Herman Miller presented no evidence of how widely seen the chairs were.[2] To the contrary, there was in fact extensive evidence of how widely seen the Eames chairs have been for decades. (Dkt. 17 at 55-56.) The Ninth Circuit Panel itself

---

[1] Ninth Circuit precedent makes clear that it is the grant or denial of a Rule 50(b) motion that is reviewed *de novo*, not the underlying jury verdict. See *Dunlap v. Liberty Natural Products, Inc.*, 878 F.3d 794, 797 (9th Cir. 2017) ("We review *de novo* the district court's denial of a Rule 50(b) renewed motion for judgment as a matter of law. The test is whether the evidence, construed in the light most favorable to the nonmoving party, permits only one reasonable conclusion, and that conclusion is contrary to that of the jury. ...", quoting *Estate of Diaz v. City of Anaheim*, 840 F.3d 592, 604 (9th Cir. 2016).)

[2] OSP also raises an entirely new factual issue that the Ninth Circuit never even addressed, namely, the question of *when* the Eames design became famous.

acknowledged that the Eames chairs had been seen by a large percentage of the population from ubiquitous use in public settings and in popular culture; the Panel simply discounted this evidence entirely by speculating (contrary to the record) that consumers might not associate the design they saw with a single source. 963 F.3d at 871, fn. 4. OSP does not dispute that the Ninth Circuit was in error in speculating that consumers might not associate the shape of the Eames design with a single source; indeed, OSP did not present evidence at trial of any third-party use of the design, such that the jury had no basis to make the assumption cited in the majority decision. For this reason, this case is even more compelling than *Google LLC* for restoring the jury verdict and reaffirming the limited scope of appellate review of jury verdicts.

Further, OSP never addresses whether the Ninth Circuit's statutory construction was appropriate, despite a jury instruction that literally and expressly tracked the unambiguous language of the current statute. Thus, OSP concedes that the Ninth Circuit simply imported its earlier statutory construction of the Federal Trademark Dilution Act ("FTDA") in *Thane Int'l v. Trek Bicycle Corp.*, 305 F.3d 894 (9th Cir. 2002), into the later Trademark Dilution Revision Act ("TDRA"), counter to this Court's guidance that, in construing a statute, courts should avoid guessing at what Congress "likely" intended where the statutory language itself is unambiguous. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 403 (2010) ("We cannot rewrite that to reflect our perception of legislative purpose."). *Accord*, *Lamie v. U.S. Trustee*, 540 U.S. 526, 541-42 (2004); *Exxon Mobil Corp. v. Allapattah*

Servs., Inc., 545 U.S. 546, 568 (2005). Whether or not there is some historical basis to believe Congress might have desired a more restrictive test of fame, the reality is the legislation signed into law sets forth an unambiguous test that was incorporated in its entirety (and without objection) into Jury Instruction 30 (SER 1759). Not even on appeal did OSP argue that the statute was ambiguous and required interpretation or that Jury Instruction 30 was in any respect unclear.

Although OSP also cites precedents more in keeping with the Ninth Circuit's restrictive *Thane* decision[3], it does not dispute that, as shown by Herman Miller's recitation of other precedents, courts are not uniform in how they construe the statute. OSP similarly does not dispute that the Ninth Circuit's construction of the prior statute in *Thane* also failed to follow accepted principles of statutory interpretation.

Likewise, OSP does not disagree that even though the TDRA permits a finding of fame of a product design, the Panel's "household name" test (which Congress' could have adopted but did not) would effectively preclude protection for product designs. No product configuration could ever be a household name. The actual statutory language that Congress adopted, and that the district court incorporated in the relevant Jury Instruction 30, should not have been rejected on appeal on grounds not even raised by OSP.

Similarly, although OSP contends that a consumer survey of fame need not be required, it fails to show how, under the Ninth Circuit's analysis, any trademark

[3] OSP primarily relies on *Avery Dennison Corp. v. Sumpton*, 189 F.3d 868, 875 (9th Cir. 1999), which predated even *Thane* (not to mention the current statute here at issue).

owner (of a design mark or a word mark) could ever prove fame without such a survey.

Finally, the fact that *Google, LLC* raised the virtually identical issue in the context of a jury finding of fair use under the Copyright Act rather than a question of dilution under the Lanham Act is a distinction without a difference given the settled law that there is a Seventh Amendment right to a jury trial in both. *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962). Indeed, if OSP is correct that the copyright fair use question raises equitable issues, that distinction would only strengthen Herman Miller's argument that the Ninth Circuit erred in taking from the jury a case not arising under equity after the jury had rendered its verdict and after that verdict had been affirmed following OSP's Rule 50(b) motion.

CONCLUSION

Herman Miller respectfully requests that the Court grant *certiorari*, vacate the decision of the Ninth Circuit majority and remand to restore the jury verdict of fame and dilution.

Dated: February 11, 2021

Respectfully submitted,

FOLEY & LARDNER LLP

By: /s/ Jonathan Moskin
Jonathan Moskin*
FOLEY & LARDNER LLP 555
90 Park Avenue
New York, NY 10016-1314
Telephone: (212) 682-7474
Fax: (212) 687-2329
jmoskin@foley.com
*Counsel of Record

and

Jean-Paul Ciardullo
FOLEY & LARDNER LLP
S. Flower Street, Suite 3300
Los Angeles, CA 90071-2411
Telephone: (213) 972-4500
Fax: (213) 486-0065
jciardullo@foley.com