

No. 23-194

In the Supreme Court of the United States

TRENDILY FURNITURE, LLC, ET AL., PETITIONERS

v.

JASON SCOTT COLLECTION, INC.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether evidence of intentional copying of a trade dress is a relevant, but not determinative, factor in the multifactor, factbound analysis of whether the trade dress has acquired secondary meaning (as ten circuits, including the Ninth Circuit, hold).

**PARTIES TO THE PROCEEDING, RELATED
PROCEEDINGS, AND RULE 29.6 STATEMENT**

Petitioners' lists of the parties to the proceeding and directly related proceedings are complete and correct. Respondent Jason Scott Collection, Inc., has no parent corporation, and no publicly held company owns 10% or more of its stock.

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INTRODUCTION

This case doesn't warrant review. The question presented involves just one factor in a multifactor, factbound analysis reviewed for clear error. There is a 10–1 split over the application of that one factor—ten courts of appeals, including the Ninth Circuit, agree that it is a relevant, but not determinative, factor; the Fourth Circuit alone holds that intentional copying creates a rebuttable presumption of secondary meaning. But this case doesn't implicate that stale split, and is a poor vehicle, because Respondent Jason Scott Collection, Inc. (JSC), won even without that presumption. And the court of appeals reached the correct result.

JSC sued Petitioners (Trendily) for infringing its trade dress, *i.e.*, the design of a product. JSC designs high-end furniture, and Trendily intentionally copied some of JSC's designs. As relevant here, liability for trade-dress infringement turns on whether the trade dress has “secondary meaning”—shorthand for the idea that the public connects the trade dress to the product's source rather than the product itself. Whether a trade dress has secondary meaning is an inherently factual inquiry, so courts consider both direct and indirect evidence, sometimes analyzing as many as eleven factors.

Here, the district court found, after trial and based on the totality of the circumstances, that JSC's trade dress had acquired secondary meaning. It based that factual finding on several factors. For instance, the court relied on the fact that Trendily intentionally copied certain JSC products. The court also relied on “several other indicators of secondary meaning,” App. 5a, including “evidence of the exclusivity,

manner, and length of use of [JSC's] trade dress; advertising and display at trade shows; [JSC's] established place in the high-end furniture market; and recognition of the trade dress by retail and end customers of high-end furniture," App. 44a.

The court of appeals affirmed, holding that the "district court did not clearly err in finding that JSC established secondary meaning." App. 12a. The court of appeals held that there is "ample" evidence that Trendily "intentionally copied the JSC Pieces," App. 13a, and that such copying "supports a strong inference of secondary meaning," App. 14a. The court also held that there is "a substantial amount of indirect evidence," separate from the "proof of copying," "indicating that JSC's work was recognizable by both retailers and consumers in the high-end furniture market." App. 18a.

Trendily now argues that the district court clearly erred in placing too much weight on the evidence of intentional copying, and that the court of appeals' precedent allowing the district court to give strong, but not conclusive, weight to that evidence conflicts with precedent from other circuits. Trendily asserts that the Ninth Circuit, unlike other courts of appeals, holds that evidence of intentional copying supports a strong inference of secondary meaning even if the defendant did not intend to confuse consumers. *See* Pet. 3-4. Trendily also claims that nearly every court of appeals is implicated in the conflict, and that the circuits have split "*five* different ways." Pet. 9. That is incorrect.

Ten circuits agree that secondary meaning is a factbound issue that necessarily turns on the totality of the circumstances. Ten circuits agree that evidence

of intentional copying is probative of secondary meaning. Ten circuits agree that intentional copying alone cannot establish secondary meaning. This consensus shows that the courts of appeals are not, as Trendily contends, “divided at least five different ways.” Pet. 30. To borrow from Judge Kethledge’s logic, when a party claims that there is a circuit split going five different ways and implicating nearly every court of appeals, that usually means no such split exists. *Cf. Fifth Third Mortgage Co. v. Chicago Title Insurance Co.*, 692 F.3d 507, 509 (6th Cir. 2012).

Secondary meaning is a factbound question, and applying a multifactor test unsurprisingly results in varying outcomes. Varying fact-dependent outcomes don’t create a conflict warranting this Court’s review, even if, as Trendily argues, it is unclear whether the relevance of intentional copying turns on whether the defendant intended to confuse consumers. Although the Ninth Circuit does not apply such an intent-to-confuse requirement, it agrees with the rationale underpinning that requirement: namely, that intentional copying is not *always* indicative of secondary meaning. *See Fuddruckers, Inc. v. Doc’s B.R. Others, Inc.*, 826 F.2d 837, 844-45 (9th Cir. 1987). Again, ten circuits agree on that point.

The Fourth Circuit is the outlier: while it applies a multifactor test to determine whether a trade dress has secondary meaning, it also holds, separate from its multifactor test, that intentional copying creates a rebuttable presumption of secondary meaning. *See International Bancorp, LLC v. Societe des Bains de Mer et du Cercle des Etrangers a Monaco*, 329 F.3d 359, 371 (4th Cir. 2003). But this case doesn’t implicate any disagreement on that point, because JSC won even without the presumption and would have won in the

Fourth Circuit. What's more, the Fourth Circuit has not applied its presumption in two decades.

Fourth Circuit aside, even assuming there is some disagreement among the remaining courts of appeals, this case is a poor vehicle because the question presented is not outcome-determinative anyway. The record contains *several* indicators of secondary meaning, so the district court would have found that JSC's trade dress had acquired secondary meaning even if it gave too much weight to the evidence of intentional copying. Put differently, when all the evidence is considered together, it cannot be said that the district court *clearly erred* in finding secondary meaning.

Lastly, the decision below is correct. Again, the outcome would not have changed given the "several ... indicators of secondary meaning." App. 5a. Moreover, the district court did not give too much weight to the evidence of intentional copying, because there is nothing in the record showing that Trendily copied JSC's trade dress for any reason other than "to realize upon a secondary meaning." App. 13a. Thus, with no evidence of a non-secondary-meaning reason for the copying, the district court did not clearly err in finding that Trendily's intentional copying strongly supported an inference of secondary meaning.

The Court should deny the petition.

STATEMENT

A. Legal background

The Lanham Act defines a "trademark" to include "any word, name, symbol, or device, or any combination thereof," that a producer uses "to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to

indicate the source of the goods.” 15 U.S.C. § 1127. Marks come in several forms. They can be “words (think ‘Google’), graphic designs (Nike’s swoosh), [or] so-called trade dress, the overall appearance of a product and its packaging (a Hershey’s Kiss, in its silver wrapper).” *Jack Daniel’s Properties, Inc. v. VIP Products LLC*, 599 U.S. 140, 145 (2023). The appearance of a product—*i.e.*, its trade dress—includes “the design of a product.” *Wal-Mart Stores, Inc. v. Samara Brothers*, 529 U.S. 205, 209 (2000).

Producers can sue for trade-dress infringement. See 15 U.S.C. § 1125(a)(1), (3). To prevail, the producer must show that the trade dress is not “functional” and that the defendant’s product “is likely to cause confusion with the product for which protection is sought.” *Wal-Mart*, 529 U.S. at 210 (citing 15 U.S.C. § 1125(a)(1)(A), (a)(3)). The producer must also show that the trade dress is “distinctive.” *Id.* As relevant here, “a mark has acquired distinctiveness ... if it has developed secondary meaning, which occurs when, ‘in the minds of the public, the primary significance of a mark is to identify the source of the product rather than the product itself.’” *Id.* at 211 (alteration adopted; citation omitted).

“Secondary meaning is a question of fact” that can be shown by direct evidence, indirect evidence, or both. 1 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 8:8.50 (5th ed.) (*McCarthy*). Direct evidence includes consumer testimony. 2 *McCarthy* § 15:30. Indirect evidence includes, among other things, the producer’s “length of use,” the producer’s “size,” the “amount and type of advertising,” the “amount of sales and number and type of customers,” “recognition by the trade, by the media and by potential customers,” and “copying” of the

trade dress. *Id.* “Instances of actual confusion can [also] be evidence from which to infer the existence of a secondary meaning.” *Id.* § 15:37. And while secondary meaning is focused on consumers’ minds, “if the relevant buyer class consists of *both* dealers and ultimate consumers, then the state of mind of the dealers is obviously important,” *id.* § 15:46, and thus “is admissible proof of secondary meaning,” *id.* § 15:39.

Notably, “there is no fixed rule as to the sufficiency of evidence required to establish [secondary meaning].” 1 *McCarthy* § 8:8.50; *see also* 2 *McCarthy* § 15:33. And because “secondary meaning is a question of fact, not an issue of law,” a court’s finding on secondary meaning must be upheld absent clear error. 2 *McCarthy* § 15:29; *see also* App. 7a.

B. Factual background

1. The “Jason Scott story” began in 1998, when Jason Scott Forsberg (Jason Scott) started creating hand-carved, high-end furniture out of reclaimed teak in a small Indonesian village. App. 2a. That village—the source of the teak, labor, and inspiration—is an essential part of the “Jason Scott story.” Jason Scott started his family there; he helped fund a school for and provide electricity to the village; and JSC became the village’s largest employer. *Id.* High-end furniture retailers thus told the “Jason Scott story,” emphasizing the connection to the small Indonesian village, when marketing JSC products. App. 15a-16a. For example, some retailers “played a video of the ‘Jason Scott story’—which depicted Jason Scott working with the villagers in Indonesia—on repeat in their showrooms.” App. 16a.

2. This case concerns three pieces of the “Jason Scott Collection”: the Sacred Heart Table, the Iron

Star Desk, and the Borgota Buffet (the JSC Pieces). See App. 3a, 34a-36a. The JSC Pieces are known for their “weathered-teak’ appearance, metal designs, and ornately carved legs.” App. 11a; *see also* App. 38a (highlighting the “intricate wood carvings and decorative metal”).

a. Jason Scott designed the JSC Pieces in 2003, and since 2004 JSC has sold them exclusively to authorized retailers. App. 3a. JSC’s largest market is Texas and two of its main retailers are Brumbaugh’s Furniture and Hill Country Interiors. App. 3a, 13a. “JSC’s products make up 80 percent of the showroom at Brumbaugh’s and 40 percent of the showroom at Hill Country.” App. 13a. JSC agreed to restrict supply of the JSC Pieces to these retailers in their respective regions; the retailers, in exchange, agreed to restrict sales to end-consumers. App. 3a.

JSC advertised the JSC Pieces extensively: “they were prominently displayed at trade shows; were featured in various retailers’ magazines, social media, and email advertisements; and were the subject of numerous presentations Jason Scott made to customers at retail stores, which were advertised beforehand under JSC’s mark and with photographs of the furniture.” App. 15a. Jason Scott also won several awards, “including Master of the Southwest, a designation *Phoenix Home & Garden* gives to leaders in Southwest design.” App. 16a.

This “national and regional” presence made the JSC Pieces recognizable in the high-end furniture market, *id.*, a market in which “specialized distributors” “functionally operate as consumers” given that they hand-select their products—“expensive investments that take up significant real estate in a

showroom” for a significant period of time, App. 19a. “Various retailers and sales representatives,” for example, “recognized JSC’s furniture pieces as unique and distinctive, and specifically recognized the JSC Pieces as clearly associated with that distinctive look.” App. 16a. The same goes for consumers, who would “often ask for [JSC] by name.” *Id.*

b. “Trendily admits that it intentionally copied the JSC Pieces.” App. 13a. In 2016, Trendily’s owner and operator (Rahul Malhotra) instructed a factory in India to manufacture “a set of nearly identical imitations of the JSC Pieces.” App. 3a; *see* App. 13a. Trendily sold its imitation furniture (the Trendily Pieces) to Western Heritage Furniture, among other retailers. *See* App. 3a, App. 13a.

People noticed when the Trendily Pieces hit the high-end furniture market, but they associated those pieces with JSC, not Trendily. For instance, the co-owner of Brumbaugh Furniture saw the Trendily Pieces at Western Heritage and, believing that they were the JSC Pieces, accused Jason Scott of selling the JSC Pieces to Brumbaugh Furniture’s competitor in violation of the exclusivity agreement. *See* App. 3a-4a. “The Trendily Pieces were so convincing that even Jason Scott initially mistook the furniture as his own.” App. 4a.

c. In 2017, after registering the JSC Pieces for copyright protection, Jason Scott (through his counsel) sent Trendily two cease-and-desist letters. *Id.* In response, Trendily doubled down, continuing to pitch and sell the Trendily Pieces and display them in its showroom. *Id.* Trendily made 18 Trendily Pieces and sold 15 of them. App. 4a-5a.

C. Procedural background

1. JSC sued Trendily for copyright and trade-dress infringement, and unfair competition. App. 5a. The district court granted summary judgment for JSC on the copyright claim, ordering Trendily to destroy the unsold Trendily Pieces, permanently enjoining Trendily from selling other imitations, and awarding JSC damages equal to Trendily's profits from the infringing sales, roughly \$20,000. *Id.* The court also dismissed the unfair competition claim as moot. App. 59a. It then held a bench trial on the trade-dress claim, because a genuine issue of material fact existed "as to whether the JSC Pieces had acquired secondary meaning." App. 5a.

After trial, the district court ruled for JSC on the trade-dress claim, specifically finding, based on the totality of the evidence, that the JSC Pieces had acquired secondary meaning and that the Trendily Pieces were likely to cause confusion with the JSC Pieces. *See* App. 40a-48a. The court supported its factual finding on secondary meaning with several pieces of evidence, consistent with the established rule that secondary meaning "can be established in many ways." App. 40a-41a. It relied on the fact that Trendily intentionally copied the JSC Pieces, reasoning that such "copying strongly supports an inference of secondary meaning." App. 41a. The court also relied on "several other indicators of secondary meaning," App. 5a, including "evidence of the exclusivity, manner, and length of use of [JSC's] trade dress; advertising and display at trade shows; [JSC's] established place in the high-end furniture market; and recognition of the trade dress by retail and end customers of high-end furniture," App. 44a.

The district court found the following evidence (excluding evidence of intentional copying) to be “proof of secondary meaning.” *Id.*

- “JSC Pieces have a unique look, have been continuously manufactured and sold since 2004 under [JSC’s] mark, and have been prominently displayed at trade shows.” *Id.*
- Jason Scott “has made numerous presentations to customers at retail stores, and the presentations were advertised under [JSC’s] mark with photographs of the furniture.” *Id.*
- “Retailers have ... used the JSC Pieces in social media and e-mail blasts, identifying it by [JSC’s] mark.” *Id.*
- Jason Scott “has won numerous design awards for his furniture, including Master of the Southwest.” *Id.*
- “The retailers and sales representatives who testified ... all recognized [JSC’s] furniture pieces by their look.” *Id.*
- “Retailers ... testified that end customers often ask for [JSC’s] furniture by name.” App. 45a.
- Trendily “produced no convincing evidence that knowledgeable customers in [JSC’s] market of high-end furniture cannot identify the furniture by its look.” *Id.*
- JSC’s “mark is widely associated with [the ‘Jason Scott story’],” including the fact “that he met his wife in Indonesia and their son was born there; the furniture is hand-carved in a small Indonesian village; [JSC] is the largest employer in the village ... ; and [Jason Scott]

has funded a school and provided electricity to the village.” *Id.*

On the “likelihood of consumer confusion” question, *see Wal-Mart*, 529 U.S. at 210, the district court found that it was “not a close call” given the precise similarity between the JSC Pieces and Trendily Pieces. App. 47a. Indeed, the court noted that “this dispute began with *actual confusion* among retailers in the high-end furniture business.” *Id.* (emphasis added).

2. The court of appeals affirmed, holding that the “district court did not clearly err in finding that JSC established secondary meaning.” App. 12a. The court determined that there is “ample” evidence supporting the district court’s finding that Trendily “intentionally copied the JSC Pieces,” App. 13a, and the court agreed that such copying “supports a strong inference of secondary meaning,” App. 14a. The court also determined that there is “a substantial amount of indirect evidence,” separate from the “proof of copying,” “indicating that JSC’s work was recognizable by both retailers and consumers in the high-end furniture market.” App. 18a.

As to the “several other indicators of secondary meaning,” App. 5a, the court of appeals reviewed the same evidence that the district court relied on, *see supra* pp. 10-11, holding that the district court “properly considered” that evidence and that its factual finding of secondary meaning based on that evidence was not clearly erroneous, App. 15a. For example, the court of appeals pointed to the fact that “the JSC Pieces were continuously manufactured and sold since 2004.” App. 15a. “Proof of substantial and continuous use of a mark in commerce for five years,” the court

explained, “is *prima facie* evidence of secondary meaning.” *Id.* (citing 15 U.S.C. § 1052(f)). The court of appeals also noted how high-end furniture consumers would “often ask for JSC by name,” and how retailers would use the “Jason Scott story” to associate the JSC Pieces with their source: Jason Scott and the Indonesian village. App. 15a-16a (alteration adopted). In short, because secondary meaning “can be established in a variety of ways,” App. 12a, and because there were “several ... indicators of secondary meaning,” including but not limited to evidence of copying, App. 5a, the court of appeals affirmed the district court’s factual finding under “the highly deferential standard of review,” App. 16a.

REASONS FOR DENYING THE PETITION

This case doesn’t implicate any split over whether evidence of intentional copying of a trade dress is probative of secondary meaning. Ten circuits apply a multifactor test to determine whether a trade dress has acquired secondary meaning, and evidence of intentional copying is a relevant, but not conclusive, factor in each of those circuits. Given this consensus, the circuits are not, as Trendily claims, “intractably divided at least five different ways.” Pet. 30. Secondary meaning is a factbound question, and application of a multifactor test unsurprisingly results in varying outcomes. But varying factbound outcomes don’t create a conflict warranting this Court’s review. While some circuits deem evidence of intentional copying relevant only when a defendant intended to confuse consumers, and while the Ninth Circuit does not apply such an intent-to-confuse requirement, the Ninth Circuit *agrees* with the rationale underpinning that requirement: namely, that intentional copying is not

always indicative of secondary meaning. *Fuddruckers*, 826 F.3d at 844-45. Given this agreement in reasoning, certiorari is unwarranted.

To be sure, the Fourth Circuit has applied an outlier rule, that intentional copying creates a rebuttable presumption of secondary meaning. But this case doesn't implicate that stale, now 10–1 split, which wouldn't warrant review even if it did. JSC didn't need the Fourth Circuit's presumption to win; Trendily simply would have lost faster. Moreover, in the two decades since the Fourth Circuit has applied its rule, the consensus among other courts of appeals has grown to 10 circuits. The Fourth Circuit, not this Court, should be the first to reevaluate its approach in an appropriate case.

This case is a poor vehicle. Fourth Circuit aside, even if there is some disagreement among the other courts of appeals, it's not outcome-determinative here. The record contains "several ... indicators of secondary meaning," including but not limited to the evidence of intentional copying. App. 5a. When all the evidence is considered together, it cannot be said that the district court *clearly erred* in finding that the JSC Pieces had acquired secondary meaning. That's true even if the district court erred in giving too much weight to the evidence of Trendily's intentional copying of the JSC Pieces. And given the "several other indicators of secondary meaning" that the district court expressly relied on, *id.*, Trendily's assertion that the "district court's express finding of secondary meaning was based on intentional copying *alone*," Pet. 32 (emphasis added), is demonstrably untrue.

The decision below is correct. The court of appeals correctly held that the district court did not clearly err

in finding that the JSC Pieces has acquired secondary meaning given the “several ... indicators of secondary meaning.” App. 5a. Moreover, the district court didn’t give the evidence of intentional copying too much weight, because there is nothing in the record showing that Trendily intentionally copied the JSC Pieces for any reason other than “to realize upon a secondary meaning.” App. 13a. Thus, without a non-secondary-meaning reason for the copying, the district court did not clearly err in finding that evidence of Trendily’s copying strongly supported an inference of secondary meaning.

I. This case doesn’t implicate any split—and there is no certworthy split—over whether evidence of intentional copying of a trade dress is probative of secondary meaning.

Ten circuits agree that secondary meaning is a factbound issue that turns on the totality of the circumstances. Ten circuits agree that evidence of intentional copying is probative of secondary meaning. And ten circuits agree that intentional copying alone cannot establish secondary meaning. This consensus shows that the courts of appeals are *not* “intractably divided at least five different ways.” Pet. 30. Because the Ninth Circuit is part of this consensus, Trendily wrongly claims that the decision below is at odds with precedent from other circuits. And this is not the case to address the Fourth Circuit’s outlier rule, because applying that rule would make no difference here.

A. Ten circuits, including the Ninth Circuit, apply a holistic, multifactor test to determine whether a trade dress has acquired secondary meaning, and evidence of intentional copying is a relevant factor in those circuits.

1. Ten courts of appeals agree that the existence of secondary meaning is intensely factual and must be analyzed based on the totality of the circumstances. Each of those circuits holds that evidence of intentional copying is probative of secondary meaning. Moreover, those circuits agree that while intentional copying is a relevant consideration, it is neither necessary nor sufficient to establish that a trade dress has acquired secondary meaning.

a. The Ninth Circuit holds “that evidence of deliberate copying is relevant to a determination of secondary meaning.” *Fuddruckers*, 826 F.2d at 844. And “in appropriate circumstances, deliberate copying may suffice to support an inference of secondary meaning.” *Id.* But even in those “appropriate circumstances,” *id.*, where “copying strongly supports an inference of secondary meaning,” App. 12a, the Ninth Circuit does not view copying in isolation. It instead analyzes “many factors to determine whether secondary meaning exists,” because “the secondary meaning inquiry” is “intensely factual.” *P & P Imports LLC v. Johnson Enterprises, LLC*, 46 F.4th 953, 961 (9th Cir. 2022); *see also* App. 12a (“Secondary meaning can be established in a variety of ways.”)

Consistent with first principles of secondary meaning, *see supra* pp. 5-6, the Ninth Circuit looks for direct and indirect evidence, “including ‘direct consumer testimony; survey evidence; exclusivity,

manner, and length of use of mark; amount and manner of advertising; amount of sales and number of customers; established place in the market; and proof of intentional copying by the defendant.” App. 12a (quoting *P & P Imports*, 46 F.4th at 961). For example, *P & P Imports* relied on a consumer survey (direct evidence) and intentional copying (indirect evidence) to hold that there was “a triable issue of fact about secondary meaning.” 46 F.4th at 961. The consumer survey carried the most weight, of course, because such direct evidence is “the most persuasive evidence of secondary meaning.” *Vision Sports, Inc. v. Melville Corp.*, 888 F.2d 609, 615 (9th Cir. 1989).

This case is another example of the Ninth Circuit’s holistic, factbound approach to secondary meaning. As explained, the district court and court of appeals each relied on not just the indisputable evidence of Trendily’s intentional copying, but also the “several other indicators of secondary meaning,” App. 5a, including but not limited to “evidence of the exclusivity, manner, and length of use of [JSC’s] trade dress; advertising and display at trade shows; [JSC’s] established place in the high-end furniture market; and recognition of the trade dress by retail and end customers of high-end furniture,” App. 44a; *see supra* pp. 10-11. As the court of appeals put it, there is “a substantial amount of indirect evidence” of secondary meaning, excluding the “proof of copying.” App. 18a. Given *all* the evidence of secondary meaning, coupled with “the highly deferential standard of review,” the court of appeals (correctly) held that “the district court did not clearly err in finding [that the] JSC’s pieces had acquired secondary meaning.” App. 2a, 16a.

Fuddruckers confirms that secondary meaning in the Ninth Circuit turns on the totality of the

circumstances; copying alone is not enough. *Fuddruckers* expressly rejected the argument “that evidence of deliberate copying shifts the burden of proof on the issue of secondary meaning.” 826 F.2d at 844. The reason: “Competitors may intentionally copy product features for a variety of reasons. They may, for example, choose to copy wholly functional features that they perceive as lacking any secondary meaning because of those features’ intrinsic economic benefits.” *Id.* at 844-45. Applying *Fuddruckers*, the Ninth Circuit has reversed a ruling on secondary meaning that gave “dispositive weight” to evidence of intentional copying even though it was “undisputed” that the defendant had intentionally copied the trade dress at issue. *Oregon Arms, Inc. v. Oregon Arms Ltd.*, 246 F.3d 675, 2000 WL 1763249, at *2-3 (9th Cir. 2000).

In sum, when it comes to secondary meaning, it has long been the rule in the Ninth Circuit that intentional copying is neither necessary nor sufficient—it simply is “relevant,” and in “appropriate circumstances,” it “may suffice to support an inference of secondary meaning.” *Fuddruckers*, 826 F.2d at 844.

b. The Sixth Circuit “applies a seven-factor test to determine whether secondary meaning exists in a trade dress.” *DayCab Co. v. Prairie Technology, LLC*, 67 F.4th 837, 850 (6th Cir. 2023). “No single factor is determinative and every one need not be proven.” *Herman Miller, Inc. v. Palazzetti Imports & Exports, Inc.*, 270 F.3d 298, 312 (6th Cir. 2001). The factors are: “(1) direct consumer testimony; (2) consumer surveys; (3) exclusivity, length, and manner of use; (4) amount and manner of advertising; (5) amount of sales and number of customers; (6) established place in the market; and (7) proof of intentional copying.” *Id.* at 311-12.

The Sixth Circuit has made clear that intentional copying “is relevant, but not determinative, to the issue of secondary meaning.” *General Motors Corp. v. Lanard Toys, Inc.*, 468 F.3d 405, 419 (6th Cir. 2006). Thus, although intentional copying may, in some circumstances, be a “strong” indication of secondary meaning, *DayCab*, 67 F.4th at 850, it “is only one of many considerations ... and does not alone establish secondary meaning,” *General Motors*, 468 F.3d at 419. Intentional copying may even be insufficient when it is combined with other evidence of secondary meaning. Take *Ward v. Knox County Board of Education*, 612 F. App’x 269 (6th Cir. 2015). There, even though the plaintiff established that it had “used the trade dress in commerce exclusively and consistently for over 15 years,” “regularly received media attention and advertising,” and made “well over 2,300,000” sales, and even though the court was willing “to assume that [the defendant] intentionally copied [the plaintiff’s] trade dress”— a potentially “strong” indication of secondary meaning, *DayCab*, 67 F.4th at 850—the Sixth Circuit nevertheless held that the plaintiff had “failed to establish” secondary meaning. *Ward*, 612 F. App’x at 276-77.

c. The Second Circuit also analyzes secondary meaning based on the totality of the circumstances, specifically consulting “six factors.” *Car-Freshner Corp. v. American Covers, LLC*, 980 F.3d 314, 329 (2d Cir. 2020). “In assessing the existence of secondary meaning, no ‘single factor is determinative,’ and every element need not be proved.” *Thompson Medical Co. v. Pfizer Inc.*, 753 F.2d 208, 217 (2d Cir. 1985) (internal citation omitted). The factors are: “advertising expenditures, consumer studies linking the mark to a source, unsolicited media coverage of the product,

sales success, attempts to plagiarize the mark, and the length and exclusivity of the mark's use." *Car-Freshner*, 980 F.3d at 329.

The Second Circuit has long held that intentional copying, what it calls "imitative intent," "does not necessarily mandate" a finding of secondary meaning. *Bristol-Myers Squibb Co. v. McNeil-P.P.C., Inc.*, 973 F.2d 1033, 1042 (2d Cir. 1992). Thus, while imitative intent can be "persuasive evidence" "in an appropriate case," *Kaufman & Fisher Wish Co. v. F.A.O. Schwarz*, 184 F. Supp. 2d 311, 319-20 (S.D.N.Y. 2001) (quoting *Coach Leatherware Co. v. AnnTaylor, Inc.*, 933 F.2d 162, 169 (2d Cir. 1991)), it "alone does not establish secondary meaning," *Coach Leatherware*, 933 F.2d at 169. Put differently, a court is "not bound to find" secondary meaning simply because a plaintiff establishes intentional copying. *Bristol-Myers Squibb*, 973 F.2d at 1042. That is especially true in "cases involving product design" (*i.e.*, trade dress), where "the 'value of evidence of intentional copying is particularly limited'" given that "the copier may very well be exploiting a particularly desirable feature, rather than seeking to confuse consumers as to the source of the product." *Easy Spirit, LLC v. Skechers U.S.A., Inc.*, 515 F. Supp. 3d 47, 67 (S.D.N.Y. 2021).

Consider *Coach Leatherware*, for example, a case involving a trade-dress claim. The plaintiff sought to establish secondary meaning with a consumer survey and evidence of intentional copying. *See* 933 F.2d at 168-69. Even though surveys are "direct evidence" of secondary meaning, and even though copying can be "persuasive evidence" of secondary meaning, the Second Circuit nevertheless held that the plaintiff had failed to carry its burden of proof. *Id.*

d. The Fifth Circuit analyzes “seven factors” when “determining whether secondary meaning has been shown.” *Beatriz Ball, L.L.C. v. Barbagallo Co.*, 40 F.4th 308, 317 (5th Cir. 2022). A “combination” of these factors is required, because “none ... alone will prove secondary meaning.” *Nola Spice Designs, L.L.C. v. Haydel Enterprises, Inc.*, 783 F.3d 527, 544 (5th Cir. 2015). The factors are: “(1) length and manner of use ... , (2) volume of sales, (3) amount and manner of advertising, (4) nature of use of the mark or trade dress in newspapers and magazines, (5) consumer survey evidence, (6) direct consumer testimony, and (7) the defendant’s intent in copying the trade dress.” *Beatriz Ball*, 40 F.4th at 317. “The authorities are in agreement that survey evidence is the most direct and persuasive way of establishing secondary meaning.” *Sno-Wizard Manufacturing, Inc. v. Eisemann Products Co.*, 791 F.2d 423, 427 (5th Cir. 1986).

The Fifth Circuit has recognized that “evidence of deliberate copying can be a weighty factor if it appears the copying attempted to benefit from the perceived secondary meaning.” *Beatriz Ball*, 40 F.4th at 320. But such weighty evidence is “merely one factor in a multifactor analysis,” Pet. 24, because, as the Fifth Circuit has made clear, “none of [the seven] factors alone will prove secondary meaning, *Nola Spice Designs*, 783 F.3d at 544

e. The Eighth Circuit also uses a totality-of-the-circumstances approach. “Although direct evidence such as consumer testimony or surveys are most probative of secondary meaning, it can also be proven by circumstantial evidence.” *Frosty Treats Inc. v. Sony Computer Entertainment America Inc.*, 426 F.3d 1001, 1005 (8th Cir. 2005). Circumstantial evidence includes “the exclusivity, length and manner of use of

the mark; the amount and manner of advertising; the amount of sales and number of customers; the plaintiff's established place in the market; and the existence of intentional copying." *Id.* at 1005-06.

The Eighth Circuit has made clear, just like the Ninth Circuit and others, that although evidence of intentional copying "is a relevant factor to be considered," it "is not conclusive." *Co-Rect Products, Inc. v. Marvy! Advertising Photography, Inc.*, 780 F.2d 1324, 1332 (8th Cir. 1985). That's because secondary meaning turns on a holistic assessment of several factors. *Frosty Treats*, 426 F.3d at 1005. In *Co-Rect Products*, for example, the court held that "no secondary meaning exists" after considering "the length of time that [the] mark [was] used," the plaintiff's "advertising effort[s]," evidence of "intentional copying," and "the evidence of [actual consumer] confusion." 780 F.2d at 1332-33. Similarly, *Aromatique, Inc. v. Gold Seal, Inc.*, 28 F.3d 863, 871-73 (8th Cir. 1994), held that the plaintiff failed to establish secondary meaning even though it submitted several forms of evidence, including but not limited to advertising evidence, testimonial letters from retailers, evidence of substantial sales, and evidence of intentional copying.

f. The Third Circuit has "identified an eleven-item, non-exhaustive list of factors relevant to the factual determination whether a term has acquired secondary meaning." *E.T. Browne Drug Co. v. Cococare Products, Inc.*, 538 F.3d 185, 199 (3d Cir. 2008). The factors include "the extent of sales and advertising leading to buyer association, length of use, exclusivity of use, the fact of copying, customer surveys, customer testimony, the use of the mark in trade journals, the size of the company, the number of sales, the number of customers, and actual confusion." *Ford*

Motor Co. v. Summit Motor Products, Inc., 930 F.2d 277, 292 (3d Cir. 1991).

Naturally, application of these non-exhaustive eleven factors is case-specific. In *Ford Motor Co.*, for example, the Third Circuit held that “secondary meaning was clearly established” given the “considerable amount of ... evidence on the issue.” *Id.* at 296-97. Evidence of copying, the court explained, was a “vital important factor.” *Id.* at 297. The Third Circuit applied similar logic in *Ideal Toy Corp. v. Plawner Toy Manufacturing Corp.*, 685 F.2d 78, 82 (3d Cir. 1982), reasoning that the evidence of intentional copying was “itself persuasive evidence of secondary meaning.” However, because secondary meaning is a question of fact that necessarily differs in every case, the Third Circuit, like the Ninth Circuit and others, considers evidence of intentional copying to be persuasive only in appropriate circumstances. For example, *Commerce National Insurance Services, Inc. v. Commerce Insurance Agency, Inc.*, 214 F.3d 432, 440 (3d Cir. 2000), explained that the evidence of copying was “minimally probative,” because it was unclear whether the defendant “intended to leach off the goodwill of [the plaintiff] by appropriating its mark.” Similarly, *Duraco Products, Inc. v. Joy Plastic Enterprises, Ltd.*, 40 F.3d 1431, 1453 (3d Cir. 1994), reasoned that evidence of intentional copying is particularly weak when the “copier takes conspicuous steps—whether in packaging, trademark, marketing techniques, or otherwise—to distinguish its product from its competitor’s.”

g. The Eleventh Circuit applies a multifactor test to determine whether secondary meaning exists. “In the absence of consumer survey evidence” (*i.e.*, direct evidence), “four factors can be considered in

determining whether a particular mark has acquired a secondary meaning.” *Coach House Restaurant, Inc. v. Coach & Six Restaurants, Inc.*, 934 F.2d 1551, 1560 (11th Cir. 1991). The indirect-evidence factors are: (1) the “length and nature” of the use, (2) the “nature and extent of advertising and promotion,” (3) the “efforts of the proprietor to promote a conscious connection between the [mark] and the business,” and (4) the “degree of actual recognition by the public that the [mark] designates the proprietor’s product or service.” *Tartell v. South Florida Sinus & Allergy Center, Inc.*, 790 F.3d 1253, 1257 (11th Cir. 2015).

Although the Eleventh Circuit’s multifactor test does not expressly include intentionally copying, the Eleventh Circuit holds “that proof of intentional copying is probative evidence on the secondary meaning issue.” *Brooks Shoe Manufacturing Co. v. Suave Shoe Corp.*, 716 F.2d 854, 860 (11th Cir. 1983). Such evidence, “by itself,” however, is insufficient to establish secondary meaning. *Id.* at 859. Thus, consistent with the Ninth Circuit and others, a plaintiff in the Eleventh Circuit must establish “more than just intentional copying in order to be relieved of the burden of proving secondary meaning.” *Id.* For example, *FN Herstal SA v. Clyde Armory Inc.*, 838 F.3d 1071, 1085-86 (11th Cir. 2016), held that the district court did not clearly err in finding that the mark at issue had acquired secondary meaning, relying not just on evidence that the defendant had “intentionally copied the ... mark,” but also on evidence that “consumers actually identified” the mark with the plaintiff and that the plaintiff had used the mark exclusively for nearly two years, among other things.

h. The Seventh Circuit considers at least seven factors when reviewing a secondary-meaning finding.

Two factors are direct evidence: “consumer testimony” and “consumer surveys.” *Echo Travel, Inc. v. Travel Associates, Inc.*, 870 F.2d 1264, 1267 (7th Cir. 1989). Five factors are indirect evidence: “exclusivity, length, and manner of use”; “amount and manner of advertising”; “amount of sales and number of customers”; “established place in the market”; and “proof of intentional copying.” *Id.*; see also *Packman v. Chicago Tribune Co.*, 267 F.3d 628, 641 (7th Cir. 2001).

In the Seventh Circuit, as in the Ninth Circuit and others, intentional copying is just one consideration in the multifactor analysis and “alone does not establish secondary meaning.” *Keystone Camera Products Corp. v. Ansco Photo-Optical Products Corp.*, 667 F. Supp. 1221, 1231 (N.D. Ill. 1987). But the Seventh Circuit holds that “proof of intentional copying is probative evidence of ‘secondary meaning.’” *Schwinn Bicycle Co. v. Ross Bicycles, Inc.*, 870 F.2d 1176, 1182 n.13 (7th Cir. 1989). Such proof can, in appropriate circumstances, “put[] heavy, if not determinative, evidentiary weight on intentional copying for two of the three elements necessary to prove trade dress infringement (i.e., secondary meaning and consumer confusion).” *Id.* at 1184 n.16. Those appropriate circumstances appear to be where “the defendant’s intent in copying is to confuse consumers and pass off his product as the plaintiff’s.” *Thomas & Betts Corp. v. Panduit Corp.*, 65 F.3d 654, 663 (7th Cir. 1995).

i. The First Circuit likewise analyzes secondary meaning based on the totality of the circumstances. A plaintiff can demonstrate secondary meaning “through the use of direct evidence, such as consumer surveys or testimony from consumers, or through the use of circumstantial evidence.” *Flynn v. AK Peters, Ltd.*, 377 F.3d 13, 20 (1st Cir. 2004). Indirect evidence

that a mark has acquired secondary meaning can include: “the length and manner of its use”; “the nature and extent of advertising and promotion of the mark”; “the efforts made in the direction of promoting a conscious connection, in the public’s mind, between the name or mark and a particular product or venture”; “advertising expenditures”; “media coverage”; and “attempts to copy the mark.” *Id.*; see also *I.P. Lund Trading ApS v. Kohler Co.*, 163 F.3d 27, 42 (1st Cir. 1998).

In *Yankee Candle Co., Inc. v. Bridgewater Candle Co.*, 259 F.3d 25, 45 (1st Cir. 2001), the First Circuit affirmed a finding of no secondary meaning, because none of the proffered evidence “was sufficiently probative.” The court of appeals gave the evidence of copying little weight given that the defendant had “prominently displayed *its* trade name on its candles,” which suggested that it did not seek to “pass off” the copied product as that of another. *Id.* (emphasis added). *Yankee Candle* appears to be the only First Circuit decision construing evidence of intentional copying in this manner.

j. Lastly, the Tenth Circuit also applies a multi-factor test to determine whether secondary meaning exists. “To show secondary meaning, parties can present both ‘direct evidence, such as consumer surveys or testimony from consumers, and circumstantial evidence.’” *Craft Smith, LLC v. EC Design, LLC*, 969 F.3d 1092, 1107 (10th Cir. 2020). Circumstantial evidence can include: (1) “the length and manner of the trade dress’s use”; (2) “the nature and extent of advertising and promotion of the trade dress”; (3) “the efforts made in the direction of promoting a conscious connection, in the public’s mind, between the trade dress and a particular product or venture”; (4) “actual consumer

confusion”; (5) “proof of intentional copying”; and (6) “evidence of sales volume.” *Id.*

Under this holistic approach, the Tenth Circuit considers intentional copying to be a relevant, but not conclusive, indicator of secondary meaning. For example, *Craft Smith* rejected the argument that evidence of intentional copying, when coupled with evidence of sales volume, “alone” creates a genuine issue of material fact as to secondary meaning. *Id.* at 1109-10. Despite declining “to adopt [that] per se rule,” *id.* at 1109, *Craft Smith* did not suggest, much less hold, that intentional copying is less probative than any of the other pieces of circumstantial evidence. To the contrary, the Tenth Circuit made clear that “[o]nly one piece of circumstantial evidence is necessary to create a genuine issue of material fact that the trade dress serves as a source identifier, if combined with other circumstantial evidence—like ... intentional copying.” *Id.* at 1111. Because none of the circumstantial evidence in *Craft Smith*, when coupled with the evidence of intentional copying, created a genuine issue of material fact as to secondary meaning, the Tenth Circuit affirmed the district court’s grant of summary judgment for the defendant on the trade-dress-infringement claim. *See id.* at 1110-13.

2. As the foregoing discussion shows, ten courts of appeals apply a multifactor test to determine whether a trade dress has acquired secondary meaning, and in each of those circuits evidence of intentional copying is a relevant, but not determinative, indicator of secondary meaning. True, not every totality-of-the-circumstances test is exactly the same. For instance, while the Sixth Circuit “applies a seven-factor test,” *DayCab*, 67 F.4th at 850, the Third Circuit consults “an eleven-item, non-exhaustive list of

factors,” *E.T. Browne Drug Co.*, 538 F.3d at 199. But the faint daylight between these multifactor approaches is not certworthy. Indeed, even Trendily does not argue that the Court should grant review to resolve how many factors are pertinent to the secondary meaning question. Trendily instead homes in on a single factor: evidence of intentional copying. But that factor doesn’t implicate a certworthy split, either. Again, ten circuits, including the Ninth Circuit, hold that while evidence of intentional copying is a relevant consideration, it is neither necessary nor sufficient to establish secondary meaning.

This broad consensus deflates Trendily’s contention that the courts of appeals “are intractably divided at least five different ways.” Pet. 30. Ten circuits *agree* that secondary meaning is a factbound issue that turns on the totality of the circumstances. Ten circuits *agree* that evidence of intentional copying is probative of secondary meaning. And ten circuits *agree* that intentional copying alone is not enough to establish secondary meaning. *Supra* pp. 15-26.

The fact that some circuits in some circumstances consider intentional copying to be a strong, persuasive, or weighty indicator of secondary meaning (*see, e.g.*, App. 12a-13a; *DayCab*, 67 F.4th at 850; *Beatriz Ball*, 40 F.4th at 320), whereas other circuits in other circumstances consider intentional copying to be less probative of secondary meaning (*see, e.g.*, *Yankee Candle*, 259 F.3d at 45; *Commerce National Insurance Services*, 214 F.3d at 440), does not warrant this Court’s review. For one thing, that variation simply reflects the reality of applying a multifactor standard to a factbound question. Take the Third Circuit, where, depending on the circumstances, evidence of intentionally copying can either be a “vitally

important factor,” *Ford Motor Co.*, 930 F.2d at 297, or “minimally probative,” *Commerce National Insurance Services*, 214 F.3d at 440. The Court need not police this case-dependent analysis.

Indeed, the Court should not grant cert every time one circuit, when applying a multifactor test, uses an adverb that another does not. Take the multifactor test at issue here. Courts agree that the “amount and type of advertising” is probative of secondary meaning. 2 *McCarthy* § 15:30; *see supra* pp. 15-26. The Tenth Circuit has said “that advertising can be *strongly* probative.” *Forney Industries, Inc. v. Daco of Missouri, Inc.*, 835 F.3d 1238, 1253 (10th Cir. 2016) (emphasis added). If another circuit in a particular case were to describe advertising as “somewhat probative,” surely that would not suffice to merit this Court’s intervention. But that’s precisely what Trendily seeks here.

Lastly, Trendily overstates the assertion that the courts of appeals are split over whether a defendant must have intended to confuse consumers for any evidence of intentional copying to be probative of secondary meaning. *See* Pet. 3-4, 9-30. Circuits that look for an intent to confuse, Trendily explains, have reasoned that a competitor “may very well be exploiting a particularly desirable feature, rather than seeking to confuse consumers as to the source,” and that such copying is not indicative of secondary meaning. Pet. 11 (quoting *Thomas & Betts*, 65 F.3d at 663). Or, as the Tenth Circuit has put it, “when a competitor copies a product’s design, its purpose is not necessarily to confuse consumers, but to copy the aspects of that product that make it more functional.” *Craft Smith*, 969 F.3d at 1106. While the Ninth Circuit may not expressly apply an intent-to-confuse

requirement, *see* App. 14a, it does recognize the rationale underpinning that requirement. As explained, *Fuddruckers* reasoned, just like *Craft Smith* and *Thomas & Betts*, that “[c]ompetitors may intentionally copy product features for a variety of reasons. They may, for example, choose to copy wholly functional features that they perceive as lacking any secondary meaning because of those features’ intrinsic economic benefits.” 826 F.2d at 844-45. That’s the same logic employed by the circuits that Trendily claims are “directly at odds with Ninth Circuit authority.” Pet. 10. This near-identical reasoning belies Trendily’s claim that the circuits are “wildly fractured.” Pet. 9.

B. The Fourth Circuit alone holds that copying creates a presumption of secondary meaning.

1. The Fourth Circuit applies a multifactor test to determine whether a trade dress has acquired secondary meaning. The “variety of factors” include: “advertising expenditures”; “consumer studies linking the mark to a source”; “sales success”; “unsolicited media coverage of the product”; “attempts to plagiarize the mark”; and “the length and exclusivity of the mark’s use.” *International Bancorp*, 329 F.3d at 370.

2. a. The Fourth Circuit also holds, apart from its multifactor test, that evidence of intentional copying creates a rebuttable presumption of secondary meaning. *Id.* at 371. The Fourth Circuit first issued that holding in *M. Kramer Manufacturing Co. v. Andrews*, 783 F.2d 421, 448 (4th Cir. 1986): “evidence of intentional, direct copying establishes a *prima facie* case of secondary meaning sufficient to shift the burden of persuasion to the defendant on that issue.” *M.*

Kramer Manufacturing involved a trade-dress-infringement claim, and the court of appeals extended the presumption of secondary meaning to trademark-infringement claims in *Larsen v. Terk Technologies Corp.*, 151 F.3d 140, 148-49 (4th Cir. 1998). The Fourth Circuit appears to have applied the presumption of secondary meaning only once since *M. Kramer Manufacturing* and *Larsen*, and that was in *International Bancorp* (in 2003), a case involving a trademark-infringement claim. See 329 F.3d at 371.

b. The Fourth Circuit’s presumption of secondary meaning is an outlier, but it doesn’t warrant this Court’s review. Ten other courts of appeals, including the Ninth Circuit, have rejected such a presumption, reasoning that evidence of intentional copying is not *always* indicative of secondary meaning. See *Fuddruckers*, 826 F.3d at 844-45; *supra* pp. 15-26. But this case doesn’t implicate that 10–1 split, because JSC showed that JSC’s trade dress had acquired secondary meaning even under the Ninth Circuit’s more difficult test. Simply put, JSC would have won more easily in the Fourth Circuit.

What’s more, the split is lopsided and stale. The Fourth Circuit last applied its presumption 20 years ago. This Court should not intervene to address circuit conflict that hasn’t arisen for two decades, that doesn’t make a difference in this case, and that the Fourth Circuit may wish to reconsider en banc given the circuit consensus.

II. This case is a poor vehicle, because the question presented is not outcome-determinative.

This case likewise doesn’t implicate any supposed adverbial disagreement among the courts of appeals

about how much weight to give evidence of intentional copying. *See supra* pp. 26-29. Given that the record contains several indicators of secondary meaning, the district court would have found that the JSC Pieces had acquired secondary meaning even if it gave less weight to the evidence of intentional copying. Thus, the supposed circuit disagreement is not outcome-determinative, and Trendily cannot prove otherwise.

A. Because ten circuits agree that evidence of intentional copying is probative of secondary meaning, the district court could not have clearly erred in giving weight to the undisputed fact that Trendily “intentionally copied the JSC Pieces.” App. 13a. Moreover, because ten circuits agree that intentional copying alone is not enough to establish secondary meaning, the district court could not have clearly erred in supporting its secondary-meaning finding with other circumstantial evidence. *See* App. 44a-45a. And even assuming the district court clearly erred in giving *too much* weight to the evidence of intentional copying, *see* App. 41a (noting that “copying strongly supports an inference of secondary meaning”), the outcome would still have been the same: the JSC Pieces had acquired secondary meaning given the totality of the circumstances.

As explained (at 10-12), there were “several ... indicators of secondary meaning,” including but not limited to the evidence of intentional copying. App. 5a. The district court found the following evidence (excluding evidence of intentional copying) probative of secondary meaning.

- “JSC Pieces have a unique look, have been continuously manufactured and sold since 2004 under [JSC’s] mark, and have been

prominently displayed at trade shows.” App. 44a.

- Jason Scott “has made numerous presentations to customers at retail stores, and the presentations were advertised under [JSC’s] mark with photographs of the furniture.” *Id.*
- “Retailers have ... used the JSC Pieces in social media and e-mail blasts, identifying it by [JSC’s] mark.” *Id.*
- Jason Scott “has won numerous design awards for his furniture, including Master of the Southwest.” *Id.*
- “The retailers and sales representatives who testified ... all recognized [JSC’s] furniture pieces by their look.” *Id.*
- “Retailers ... testified that end customers often ask for [JSC’s] furniture by name.” App. 45a.
- Trendily “produced no convincing evidence that knowledgeable customers in [JSC’s] market of high-end furniture cannot identify the furniture by its look.” *Id.*
- JSC’s “mark is widely associated with [the ‘Jason Scott story’],” including the fact “that he met his wife in Indonesia and their son was born there; the furniture is hand-carved in a small Indonesian village; [JSC] is the largest employer in the village ...; and [Jason Scott] has funded a school and provided electricity to the village.” *Id.*

Given all this, the record makes clear that the district court would have found that the JSC Pieces had acquired secondary meaning even if it gave too much

weight to the evidence of intentional copying. The supposed split is thus not outcome-determinative.

B. Trendily asserts that the “district court’s express finding of secondary meaning was based on intentional copying *alone*.” Pet. 32 (emphasis added). But the record shows just the opposite. Trendily wrongly ignores (and asks the Court to ignore) the “several other indicators of secondary meaning” on which the district court based its decision. App. 5a.

Trendily also argues that the district court’s factual finding “necessarily fails” if the evidence of intentional copying “is *removed* from the combination.” Pet. 33 (emphasis added). But *every circuit agrees* that evidence of intentional copying is a relevant consideration. So the vehicle question is whether the district court gave the evidence of intentional copying *too much* weight, rather than *any* weight at all. And again, even if the district court clearly erred on that narrow point, the record shows that the court still would have found that the JSC Pieces had acquired secondary meaning.

III. The court of appeals’ decision is correct.

The court of appeals correctly held that the district court did not clearly err in finding that the JSC Pieces has acquired secondary meaning, and that the evidence of Trendily’s intentional copying strongly supported that secondary-meaning finding.

The district court’s finding of secondary meaning is not clearly erroneous given the “several ... indicators of secondary meaning,” App. 5a, outlined above (at 10-11 and 31-32). Thus, even if the district court should have given less weight to the evidence of intentional copying, the court of appeals’ conclusion that the district court didn’t clearly err in finding that the

JSC Pieces had acquired secondary meaning would still be correct.

And the district court *didn't* give that evidence too much weight. A competitor like Trendily may intentionally copy a trade dress in “an attempt to realize upon a secondary meaning.” App. 13a. At the same time, a competitor “may intentionally copy product features for a variety of reasons’—for example, they may ‘choose to copy wholly functional features that they perceive as lacking any secondary meaning because of those features’ intrinsic economic benefits.” App. 14a (quoting *Fuddruckers*, 826 F.2d at 844-45). Here, there is nothing in the record suggesting that Trendily copied the JSC Pieces for a non-secondary-meaning reason. For instance, because Trendily stipulated that “JSC’s trade dress is non-functional,” App. 9a (alteration adopted), it simply could not have copied “*wholly functional features* that [it] perceive[d] as lacking any secondary meaning,” App. 14a (emphasis added). Without a non-secondary-meaning reason for the copying, the district court did not clearly err in finding that evidence strongly supported an inference of secondary meaning.

Trendily may point to its owner’s testimony that “it is common practice in the furniture industry to copy furniture designs.” App. 42a; *see* Pet. 6. But Malhotra made that assertion not to offer a non-secondary-meaning reason for the intentionally copying, but rather to claim that Trendily did not intentionally copy the JSC pieces in the first place. *See* App. 42a. But Trendily now “admits that it intentionally copied the JSC Pieces.” App. 13a. There is thus nothing in the record showing that Trendily intentionally copied the JSC Pieces for a reason other than “to

realize upon a secondary meaning that is in existence.” App. 13a.

CONCLUSION

The petition should be denied.

Respectfully submitted.

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December 13, 2023