

No. _____

In the
Supreme Court of the United States

CIRRUS DESIGN CORPORATION,

Petitioner,

v.

GREAT WESTERN AIR, LLC
dba CIRRUS AVIATION SERVICES, LLC,

Respondent.

**On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The decision below entrenches an acknowledged split that derives (at best) from misreading this Court's decision in *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962), and (at worst) from ignoring it altogether. *Dairy Queen* held that the Seventh Amendment entitled the "owners of [a] trademark" to a jury trial in an infringement action seeking "an accounting" of profits. *Id.* at 473-78. That the "claim" was "cast in terms of an 'accounting,' rather than in terms of an action for ... 'damages,'" made no difference. *Id.* at 477. Despite *Dairy Queen*'s clear holding, four circuits now hold the opposite, i.e., that trademark owners have a jury-trial right only if they seek to recover damages, and lose their jury-trial right on both infringement and the amount of recovery by exercising their statutory right to recover the infringer's "profits" in lieu of their own "damages." That decision defies this Court's precedent, neglects centuries of common-law practice, and forces trademark owners to sacrifice their constitutional rights in order to exercise their statutory right to recover "profits," a particularly apposite remedy for the most egregious trademark infringement. Put simply, the decision below flouts this Court's precedent, creates perverse incentives, and puts the Ninth Circuit on the wrong side of a deep split in authority.

The question presented is:

Whether, as this Court held in *Dairy Queen*, the Seventh Amendment jury-trial right applies in trademark-infringement actions seeking monetary relief in the form of the infringer's profits.

PARTIES TO THE PROCEEDING

Petitioner Cirrus Design Corporation was the defendant/counter-claimant and appellant below.

Respondent Great Western Air, LLC d/b/a Cirrus Aviation Services, LLC, was the plaintiff/counter-defendant and appellee below.

CORPORATE DISCLOSURE STATEMENT

Petitioner Cirrus Design is a wholly owned subsidiary of Cirrus Industries, Inc. Cirrus Industries, Inc., is a wholly owned subsidiary of Cirrus Aircraft Limited, a Cayman Islands corporation publicly traded on the Hong Kong Stock Exchange.

STATEMENT OF RELATED PROCEEDINGS

This case arises from and is related to the following proceedings in the United States Court of Appeals for the Ninth Circuit and the United States District Court for the District of Nevada:

- *Great Western Air, LLC dba Cirrus Aviation Services v. Cirrus Design Corporation*, No. 2:16-cv-02656-DJA (D. Nev.), judgment entered January 6, 2023, Rule 52 and 59 motions denied on August 23, 2023.
- *Cirrus Design Corporation v. Great Western Air, LLC dba Cirrus Aviation Services*, No. 23-15157 (9th Cir.), judgment entered December 17, 2024, rehearing denied January 30, 2025.

There are no other proceedings in state or federal trial or appellate courts directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

TABLE OF CONTENTS

QUESTION PRESENTED.....	i
PARTIES TO THE PROCEEDING	ii
CORPORATE DISCLOSURE STATEMENT.....	iii
STATEMENT OF RELATED PROCEEDINGS.....	iv
TABLE OF AUTHORITIES.....	viii
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS AND ORDERS BELOW	3
JURISDICTION	4
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	4
STATEMENT OF THE CASE	4
A. Legal Background	4
B. Factual Background	8
C. Procedural Background.....	10
REASONS FOR GRANTING THE PETITION.....	11
I. The Decision Below Conflicts With This Court’s Decision In <i>Dairy Queen</i> And Entrenches An Acknowledged Circuit Split.....	13
A. This Court Decides <i>Dairy Queen</i>	13
B. Post- <i>Dairy Queen</i> , A Consensus Emerges That Infringement Claims Seeking Profits May Be Tried Before a Jury.....	16
C. Multiple Circuits Split From That Consensus and Deny the Jury Right	20
II. The Decision Below Is Wrong	23
A. An Infringement Action Under the Lanham Act Asserts a Legal Claim.....	23

B. The Profits Remedy Under the Lanham Act Seeks Legal Relief.....	28
C. The Decision Below Egregiously Misapplied the Seventh Amendment	30
III. The Question Presented Is Important, And This Case Is An Ideal Vehicle To Resolve It	32
CONCLUSION	35
APPENDIX	
Appendix A	
Memorandum Opinion, United States Court of Appeals for the Ninth Circuit, <i>Great Western Air, LLC v. Cirrus Design Corp.</i> , No. 23-15157 (Dec. 17, 2024).....	App-1
Appendix B	
Order, United States Court of Appeals for the Ninth Circuit, <i>Great Western Air, LLC v. Cirrus Design Corp.</i> , No. 23-15157 (Jan. 30, 2025)	App-4
Appendix C	
Excerpts of Transcript of Proceedings Regarding Jury Demand, United States District Court for the District of Nevada, <i>Great Western Air, LLC v. Cirrus Design Corp.</i> , No. 16-cv-02656 (Sept. 9, 2022).....	App-6
Appendix D	
Findings of Fact, Conclusions of Law, and Judgment Following Bench Trial, United States District Court for the District of Nevada, <i>Great Western Air, LLC v. Cirrus Design Corp.</i> , No. 16-cv-02656 (Jan. 6, 2023)	App-25

Appendix E

Order, United States District Court for the District of Nevada, <i>Great Western Air, LLC v. Cirrus Design Corp.</i> , No. 16-cv-02656 (Aug. 23, 2023).....	App-60
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Appendix F

Relevant Constitutional and Statutory Provisions.....	App-68
U.S. Const. amend. VII	App-68
15 U.S.C. §1114	App-68
15 U.S.C. §1117	App-75

TABLE OF AUTHORITIES

Cases

<i>adidas-Am., Inc. v. Payless Shoesource, Inc.</i> , 546 F.Supp.2d 1029 (D. Or. 2008).....	16
<i>Alcan Int’l Ltd. v. S.A. Day Mfg. Co.</i> , 179 F.R.D. 398 (W.D.N.Y. 1998)	16, 17
<i>B&B Hardware, Inc. v. Hargis Indus., Inc.</i> , 575 U.S. 138 (2015).....	4, 26
<i>Beacon Theatres, Inc. v. Westover</i> , 359 U.S. 500 (1959).....	32
<i>Black & Decker Corp. v. Positec USA Inc.</i> , 118 F.Supp.3d 1056 (N.D. Ill. 2015).....	16
<i>Blanchard v. Hill</i> , 26 Eng. Rep. 692 (1749).....	27
<i>Chauffeurs, Teamsters & Helpers v. Terry</i> , 494 U.S. 558 (1990).....	29
<i>Dairy Queen, Inc. v. Wood</i> , 369 U.S. 469 (1962).....	1, 13, 14, 15, 17, 19, 21, 28
<i>Daisy Grp., Ltd. v. Newport News, Inc.</i> , 999 F.Supp. 548 (S.D.N.Y. 1998)	16, 17
<i>Dimick v. Schiedt</i> , 293 U.S. 474 (1935).....	32
<i>Feltner v. Columbia Pictures Television, Inc.</i> , 523 U.S. 340 (1998).....	1, 8, 23
<i>Ferrari S.P.A. v. Roberts</i> , 944 F.2d 1235 (6th Cir. 1991).....	22
<i>Fifty-Six Hope Road Music, Ltd.</i> <i>v. A.V.E.L.A., Inc.</i> , 778 F.3d 1059 (9th Cir. 2015).....	11, 20, 21, 31

<i>Granfinanciera, S.A. v. Nordberg</i> , 492 U.S. 33 (1989).....	8, 27, 28
<i>Great-West Life & Annuity Ins. Co.</i> <i>v. Knudson</i> , 534 U.S. 204 (2002).....	29
<i>Grove Fresh Distribs., Inc.</i> <i>v. New England Apple Prods. Co.</i> , 1991 WL 3928 (N.D. Ill. Jan. 11, 1991)	17
<i>Gucci Am., Inc. v. Accents</i> , 994 F.Supp. 538 (S.D.N.Y. 1998)	16
<i>Hamilton-Brown Shoe Co.</i> <i>v. Wolf Bros. & Co.</i> , 240 U.S. 251 (1916).....	30
<i>Hana Fin., Inc. v. Hana Bank</i> , 574 U.S. 418 (2015).....	33
<i>Hard Candy, LLC</i> <i>v. Anastasia Beverly Hills, Inc.</i> , 921 F.3d 1343 (11th Cir. 2019).....	21
<i>Holiday Inns of Am., Inc. v. Lussi</i> , 42 F.R.D. 27 (N.D.N.Y. 1967)	17
<i>Hunting World Inc. v. Reboans Inc.</i> , 1994 WL 763408 (N.D. Cal. Oct. 26, 1994).....	17
<i>Ideal World Mktg. v. Duracell, Inc.</i> , 997 F.Supp. 334 (E.D.N.Y. 1998)	16
<i>In re Trade-Mark Cases</i> , 100 U.S. 82 (1879).....	26
<i>Inwood Labs., Inc. v. Ives Labs., Inc.</i> , 456 U.S. 844 (1982).....	26
<i>Jack Daniel's Props., Inc. v. VIP Prods. LLC</i> , 599 U.S. 140 (2023).....	6, 33

<i>JL Beverage Co., LLC</i> <i>v. Jim Beam Brands Co.,</i> 815 F.App'x 110 (9th Cir. 2020)	21
<i>Kennedy v. Lakso Co.,</i> 414 F.2d 1249 (3d Cir. 1969)	19, 29
<i>L.L. Bean, Inc. v. Drake Publishers, Inc.,</i> 629 F.Supp. 644 (D. Me. 1986)	17
<i>Matal v. Tam,</i> 582 U.S. 218 (2017).....	6, 25
<i>McCullough v. Dairy Queen,</i> 194 F.Supp. 686 (E.D. Pa. 1961)	14, 21
<i>Nat'l Presto Indus., Inc.</i> <i>v. U.S. Merchs. Fin. Grp., Inc.,</i> 121 F.4th 671 (8th Cir. 2024)	22
<i>NordicTrack, Inc. v. Consumer Direct, Inc.,</i> 158 F.R.D. 415 (D. Minn. 1994)	16, 17
<i>Oxford Indus., Inc. v. Hartmarx Corp.,</i> 1990 WL 65792 (N.D. Ill. May 2, 1990)	17
<i>Parsons v. Bedford,</i> 28 U.S. (3 Pet.) 433 (1830).....	7
<i>Perttu v. Richards,</i> --- S.Ct. ----, 2025 WL 1698783 (U.S. June 18, 2025)	15, 32
<i>Petrella v. Metro-Goldwyn-Mayer, Inc.,</i> 572 U.S. 663 (2014).....	30
<i>Root v. Ry. Co.,</i> 105 U.S. 189 (1881).....	30
<i>S.C. Johnson & Son v. Johnson,</i> 175 F.2d 176 (2d Cir. 1949)	5

<i>SEC v. Jarkesy</i> , 603 U.S. 109 (2024).....	1, 7, 8, 32
<i>Sheldon v. Metro-Goldwyn Pictures Corp.</i> , 309 U.S. 390 (1940).....	8
<i>Sid & Marty Krofft Television Prods., Inc.</i> <i>v. McDonald’s Corp.</i> , 562 F.2d 1157 (9th Cir. 1977).....	20
<i>Singleton v. Bolton</i> , 99 Eng. Rep. 661 (1783).....	25
<i>Southern v. How</i> , 79 Eng. Rep. 1243 (1618).....	25
<i>Swofford v. B & W, Inc.</i> , 336 F.2d 406 (5th Cir. 1964).....	18, 19, 30
<i>Tandy Corp. v. Malone & Hyde, Inc.</i> , 769 F.2d 362 (6th Cir. 1985).....	17, 22
<i>Tull v. United States</i> , 481 U.S. 412 (1987).....	8, 29
<i>Vidal v. Elster</i> , 602 U.S. 286 (2024).....	5, 25, 26
Constitutional Provision	
U.S. Const. amend VII	7
Statutes	
15 U.S.C. §1114(1)(a).....	6
15 U.S.C. §1116(a)	7
15 U.S.C. §1117(a)	6, 7, 33
15 U.S.C. §1127	6
17 U.S.C. §504	33
17 U.S.C. §504(a)	7
Pub. L. No. 79-489, 60 Stat. 427 (1946).....	5

Rules

Fed. R. Civ. P. 38(a).....	3
Sup. Ct. R. 10(a)	13

Other Authorities

Lionel Bently, <i>The First Trademark Case at Common Law?</i> , 47 U.C. Davis L. Rev. 969 (2014).....	25
William Blackstone, <i>Commentaries on the Laws of England</i> (1765).....	7
John Comyns, <i>A Digest of the Laws of England</i> (1780)	26
Grafton D. Cushing, <i>On Certain Cases Analogous to Trade-Marks</i> , 4 Harv. L. Rev. 321 (1891).....	27
Sidney A. Diamond, <i>The Historical Development of Trademarks</i> , 65 Trademark Rep. 265 (1975).....	27
Dan B. Dobbs, <i>Law of Remedies: Damages—Equity—Restitution</i> (2d ed. 1993)	18
Joel Eichengrun, <i>Remedying the Remedy of Accounting</i> , 60 Ind. L.J. 463 (1984)	29
13 Geo. I, c. 26, §XXX (1726).....	25
Gilson on Trademarks (2018).....	24
James M. Koelema, Jr., <i>A Practical Guide to Monetary Relief in Trademark Infringement Cases</i> , 85 Trademark Rep. 263 (1995).....	18
C.C. Langdell, <i>A Brief Survey of Equity Jurisdiction</i> (2d ed. 1908).....	29

John Mallory, <i>Modern Entries, in English</i> (4th ed. 1791)	25
McCarthy on Trademarks and Unfair Competition (5th ed. 2025)	5, 6
Beverly Pattishall, <i>Two Hundred Years of American Trademark Law</i> , 68 Trademark Rep. 121 (1978)	5
César Ramirez-Montes, <i>A Re-Examination of the Original Foundations of Anglo- American Trademark Law</i> , 14 Marq. Intell. Prop. L. Rev. 91 (2010)	5
Restatement (Third) of Unfair Competition (1995)	4, 6
Gary M. Ropski, <i>The Federal Trademark Jury Trial Right—Awakening of a Dormant Constitutional Right</i> , 70 Trademark Rep. 177 (1980)	27
Frank I. Schechter, <i>The Historical Foundations of the Law Relating to Trade-Marks</i> (1925)	26
Frank I. Schechter, <i>The Rational Basis of Trademark Protection</i> , 60 Trademark Rep. 334 (1970)	26
Bruce S. Sperling, <i>The Right to Jury Trial in a Federal Action for Trademark Infringement or Unfair Competition</i> , 62 Trademark Rep. 58 (1972)	30
Keith M. Stolte, <i>How Early Did Anglo- American Trademark Law Begin?</i> , 88 Trademark Rep. 564 (1998)	24, 25

Mark A. Thurmon, <i>Ending the Seventh Amendment Confusion: A Critical Analysis of the Right to a Jury in Trademark Cases</i> , 11 Tex. Intell. Prop. L.J. 1 (2002)	13, 16, 20
Charles Alan Wright & Arthur R. Miller, <i>Federal Practice and Procedure</i> (4th ed. 2025)	18, 29

PETITION FOR WRIT OF CERTIORARI

The decision below entrenches a circuit split on an important and recurring issue of federal law—all over whether this Court meant what it said six decades ago. In *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962), this Court appeared to squarely hold that when “owners of [a] trademark” bring an “infringement” claim seeking “a money judgment,” the “claim ... is unquestionably legal,” which means the Seventh Amendment applies regardless of whether “their complaint is cast in terms of an ‘accounting,’ rather than in terms of an action for ‘debt’ or ‘damages.’” *Id.* at 473-78. For decades, lower courts embraced that straightforward reading; indeed, the question was deemed sufficiently settled that it almost never reached appellate courts. This Court likewise seemed to view the issue as open-and-shut: *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998), cited *Dairy Queen* for the proposition that “actual damages *and profits* ... constitute legal relief” that trigger the Seventh Amendment jury-trial right in infringement actions. *Id.* at 346 (emphasis added).

More recently, however, four circuits have adopted a narrow (mis)reading of *Dairy Queen*. According to the Sixth, Eighth, Ninth, and Eleventh Circuits, the Seventh Amendment does not apply when the relief sought in a trademark-infringement action is “profits” rather than “damages.” That revisionist view conflicts with the majority view that prevailed in *Dairy Queen*’s immediate wake, and it just as clearly departs from this Court’s most recent precedents emphasizing the central importance of preserving the Seventh Amendment jury-trial right. See, e.g., *SEC v. Jarkesy*, 603 U.S. 109, 121-22 (2024).

This case cleanly presents the question of whether *Dairy Queen* means what it says (as the majority view holds) or whether the new, seek-profits-lose-your-jury-trial-right view is correct. That question cries out for resolution, which only this Court can provide.

The need for plenary review is particularly acute, moreover, as the most recent cases are deeply flawed, even beyond their failure to follow *Dairy Queen*. The test for determining whether a statutory claim triggers the jury-trial right looks to historical practice in 1791. Ample evidence demonstrates not only that trademark-infringement actions were available *at law* in England, but that such actions were *not* brought in equity until decades into the nineteenth century, long after the Framers enshrined the right in the Seventh Amendment. History likewise shows that the remedy asserted here (profits for trademark infringement) is best considered legal rather than equitable. Simply put, the Ninth Circuit erred by denying a jury, and the other circuits on its side of the split are in need of correction.

Adding insult to injury, the decision below frustrates Congress' explicit decision to give victims of trademark infringement the option of recovering the infringer's illicit profits, by making the price of exercising that statutory right the sacrifice of the constitutional jury-trial right. The Lanham Act allows victims to obtain profits, damages, or both as a monetary remedy for infringement. The profits remedy is particularly useful in targeting the most egregious infringement, such as when the infringer sells an inferior product with far lower production and marketing costs than the real McCoy. In such cases,

calculating damages based on the victim's own lost profits from sales of the superior (and more-costly-to-produce-and-market) article will underestimate the true harm caused. No one doubts that plaintiffs that content themselves with the out-of-pocket damages remedy retain their Seventh Amendment rights as to both infringement and the amount of damages. Yet under the Ninth Circuit's rule, plaintiffs who seek the most apposite remedy for targeting the most egregious infringement will need to sacrifice their Seventh Amendment right, even as to infringement. That makes no sense, and it underscores the serious consequences of failing to faithfully apply *Dairy Queen* and Rule 38's promise that jury-trial rights are "inviolable." See Fed. R. Civ. P. 38(a).

In short, the question presented is critically important, and this case is the right vehicle to resolve it, as the issues were preserved and presented to the district and appellate courts and an opinion reversing on the Seventh Amendment issue would result in a new trial. More important, such a decision would reaffirm juries' enduring role in our constitutional republic. The Court should grant the petition.

OPINIONS AND ORDERS BELOW

The Ninth Circuit's decision, 2024 WL 5134351, is reproduced at App.1-3; its order denying rehearing en banc is reproduced at App.4-5. The district court's order striking petitioner's jury-trial demand is reproduced at App.6-24; its findings of fact and conclusions of law, 649 F.Supp.3d 965, are reproduced at App.25-59; and its order denying petitioner's post-judgment motion is reproduced at App.60-67.

JURISDICTION

The Ninth Circuit issued its opinion on December 17, 2024, App.1, and denied a timely rehearing petition on January 30, 2025, App.4. On April 21, 2025, Justice Kagan extended the time for filing a petition to May 30. On May 20, Justice Kagan extended the time for filing a petition to June 27. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Seventh Amendment to the United States Constitution is reproduced at App.68. Sections 32 and 35 of the Lanham Act, 15 U.S.C. §§1114, 1117, are reproduced at App.68-78.

STATEMENT OF THE CASE

A. Legal Background

1. The use of trademarks to identify the source of goods has ancient roots, “going back at least to Roman times.” *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 142 (2015). “[T]he first widespread use of trademarks” arose out of “the guild system of medieval England.” Restatement (Third) of Unfair Competition §9 cmt. b (1995). The purpose of such markings at first “was primarily regulatory since the marks fixed responsibility for defective merchandise.” *Id.* As markets became more sophisticated, guilds used the marks “to identify the source of the goods to prospective purchasers who could then make their selections based upon the reputation, not merely of the immediate vendor, but also of the manufacturer.” *Id.*

Inevitably, the burgeoning use of trademarks gave rise to trademark infringement. To combat that

malicious practice, law courts began recognizing legal protections for those marks. The common law empowered aggrieved mark holders to bring actions against other producers that had appropriated their mark to mislead consumers about the source of the product and to capitalize on the mark holder's reputation. See 1 McCarthy on Trademarks and Unfair Competition §5:2 (5th ed. 2025). That legal action derived from the tort of "deceit," and it required the mark holder to prove that the defendant pirated the mark with the fraudulent intent to deceive the public. César Ramirez-Montes, *A Re-Examination of the Original Foundations of Anglo-American Trademark Law*, 14 Marq. Intell. Prop. L. Rev. 91, 100-02 (2010).

America inherited that tradition and likewise enforced trademark rights at common law. See *Vidal v. Elster*, 602 U.S. 286, 296 (2024). State and federal courts developed trademark law through actions in courts of law in the early years of the Republic. When infringement became sufficiently pervasive to justify a national solution, Congress (after some early, ill-fated reforms) enacted the Act of July 5, 1946, Pub. L. No. 79-489, 60 Stat. 427, known as the Lanham Act.

The Lanham Act achieved "major innovative improvements in statutory law," Beverly Pattishall, *Two Hundred Years of American Trademark Law*, 68 Trademark Rep. 121, 139 (1978), and at last "put federal trade-mark law upon a new footing," *S.C. Johnson & Son v. Johnson*, 175 F.2d 176, 178 (2d Cir. 1949) (Hand, J.). Harkening back to marks' source-identifying function during the era of medieval guilds, the Act encourages the registration and use of marks

to help customers’ ability to confidently “select ‘the goods and services that they wish to purchase, as well as those they want to avoid.’” *Jack Daniel’s Props., Inc. v. VIP Prods. LLC*, 599 U.S. 140, 146 (2023) (quoting *Matal v. Tam*, 582 U.S. 218, 224 (2017)).

To safeguard the source-identifying purpose of trademarks, Congress gave trademark holders a right of action against “the deceptive and misleading use of marks.” 15 U.S.C. §1127. So whenever someone impermissibly “use[s]” the mark “in commerce” to sell goods or services in a manner that deceives or misleads the public, that person “shall be liable in a civil action by the registrant for the remedies hereinafter provided.” *Id.* §1114(1)(a). The “keystone” for liability is whether the infringing use will likely cause consumer confusion about the source of a good or service. *Jack Daniel’s Props.*, 599 U.S. at 147.

At the remedial stage, the Lanham Act gives the injured plaintiff multiple options in seeking monetary relief. She can “recover (1) defendant’s profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action.” 15 U.S.C. §1117(a). The profits remedy—also referred to as an “accounting of profits”—authorizes the trademark owner to collect the infringer’s ill-gotten gains from the infringing use of the mark. 4 McCarthy on Trademarks and Unfair Competition §30:59 (5th ed. 2025). The profits remedy recognizes that, in cases of egregious infringement, the illicit profits earned by the seller of an inferior knock-off may exceed the damages suffered by the plaintiff from the lost sales of a superior (and more-expensive-to-produce) genuine article. Restatement (Third) of Unfair Competition §36 cmt. c (1995). To

provide a complete remedy in such circumstances, the Lanham Act (like the Copyright Act) thus gives plaintiffs the right “to recover” not only “any damages sustained” from the infringement, but also the “defendant’s profits.” 15 U.S.C. §1117(a); *see* 17 U.S.C. §504(a) (“an infringer of copyright is liable for ... the copyright owner’s actual damages and any additional profits of the infringer”). On top of those monetary remedies, trademark registrants may also seek injunctive relief to prevent ongoing or future harm from trademark infringement. 15 U.S.C. §1116(a).

2. Who decides whether a right has been violated, and the proper remedy for the violation, can often be as important (if not more so) than any substantive issue. That, at least, was the view of our Founding Fathers. Blackstone described the right to a jury as “the glory of the English law,” 3 William Blackstone, *Commentaries on the Laws of England* 379 (1765), and “American colonists” likewise “prized” the jury-trial right so much so that they championed it in the Declaration of Independence and enshrined it in the Bill of Rights, *Jarkesy*, 603 U.S. at 121.

To that end, the Seventh Amendment guarantees “the right of trial by jury” in “Suits at common law.” U.S. Const. amend VII. “As Justice Story explained, the Framers used the term ‘common law’ in the Amendment ‘in contradistinction to equity, and admiralty, and maritime jurisprudence.’” *Jarkesy*, 603 U.S. at 122 (quoting *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 446 (1830)). It is thus long settled that the Amendment is not limited to common-law claims, but extends to statutory claims that are legal in nature. *Id.* Equally settled is the right’s enduring

importance; “every encroachment upon it” must be “watched with great jealousy.” *Id.*

To determine whether the right attaches to statutory actions, courts first “compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity,” and then “examine the remedy sought and determine whether it is legal or equitable in nature.” *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 (1989). As relevant here, most money judgments were (and thus are) legal in nature. “A court in equity,” to be sure, “was empowered to provide monetary awards that were incidental to or intertwined with injunctive relief.” *Tull v. United States*, 481 U.S. 412, 424 (1987). But usually only to that extent: As this Court explained in *Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U.S. 390 (1940), “recovery of profits ... had been allowed in equity both in copyright and patent cases” in the pre-merger era, but only “as appropriate equitable relief incident to a decree for an injunction.” *Id.* at 399; *see also Feltnner*, 523 U.S. at 346 (noting that “actual damages and profits” under the Copyright Act “generally are thought to constitute legal relief”).

B. Factual Background

1. Headquartered on the shores of Lake Superior, petitioner Cirrus Design manufactures aircraft and provides aviation services. The company was founded by two brothers, Alan and Dale Klapmeier, who were inspired to name their business “Cirrus” after the telltale sign of smooth flying weather: cirrus clouds.

The brothers built their company around the Cirrus mark for almost forty years. After first using the moniker at a tradeshow in the 1980s, the brothers

successfully registered the “CIRRUS” mark in 1995. App.29; CA9.Dkt.34-11.at.2. In the following years, petitioner obtained additional service marks and trademarks for “CIRRUS” and the word “CIRRUS” followed by other words, like “Cirrus Vision” and “Cirrus Certified.” *See, e.g.*, CA9.Dkt.34-11.at.5, 7, 9, 19. With those registered marks in hand, the brothers devoted their careers to making the Cirrus brand one that consumers came to know and trust.

They accomplished all that and more. The Cirrus Design fleet includes the world’s best-selling single-engine aircraft. *See* CA9.Dkt.34-9.at.129. The company designed and sold a parachute system that has saved hundreds of lives. CA9.Dkt.34-9.at.129. Cirrus also provides many aviation services, ranging from flight training and aircraft maintenance to concierge and acquisition-related offerings. *See* CA9.Dkt.34-6.at.140; CA9.Dkt.34-9.at.130. Simply put, petitioner is one of the preeminent brands in the personal-aviation industry, and it boasts an expansive domestic and international footprint.

2. But after investing untold time and resources into its business, petitioner discovered that another company was exploiting the Cirrus trademark: respondent Cirrus Aviation Services. Like petitioner, respondent operates in the personal-aviation industry, offering charter and other “aircraft management and acquisition services.” CA9.Dkt.34-9.at.124. After uncovering respondent’s infringing use of its mark, petitioner sent multiple cease-and-desist letters. *See* CA9.Dkt.34-9.at.134. Respondent answered by filing suit.

C. Procedural Background

1. Respondent filed a declaratory judgment action in the U.S. District Court for the District of Nevada, seeking a declaration of non-infringement. Petitioner answered with a counter-claim for trademark infringement under §1114 of the Lanham Act. CA9.Dkt.34-10.at.47. As remedies, petitioner requested the respondent's profits and injunctive relief. CA9.Dkt.34-10.at.49-51. Both parties demanded a jury trial. CA9.Dkt.34-10.at.51; CA9.Dkt.34-10.at.104.

Shortly before the jury trial was scheduled to begin, respondent withdrew its own jury demand and moved to strike petitioner's. *See* CA9.Dkt.34-8.at.101. Respondent argued that petitioner's request for the monetary remedy of profits is equitable and carries no jury-trial right. CA9.Dkt.34-8.at.101-07. The district court agreed and struck petitioner's jury demand. App.23.

Its reasoning for that decision was terse. The district court, relying on Ninth Circuit precedent, concluded that "the Seventh Amendment does not afford the right to a jury calculation of profits because disgorgement is an equitable remedy, and the specific issues of profit determination cannot be said to be traditionally tried ... to a jury." App.21. Although petitioner requested a jury trial on "*all* issues so triable," CA9.Dkt.34-10.at.51 (emphasis added)—including liability—the court's reasoning focused on the profits remedy, *see* App.21.

The trademark claims proceeded to a four-day bench trial, which culminated in the district court entering judgment for the respondent. App.26. After

judgment, petitioner moved for a new trial on the basis that the district court wrongly decided disputed factual questions without a jury. The court denied that motion, App.61, and petitioner timely appealed.

2. The Ninth Circuit affirmed. App.2. The court devoted a single paragraph to the Seventh Amendment question, relying on an earlier circuit decision, *Fifty-Six Hope Road Music, Ltd. v. A.V.E.L.A., Inc.*, 778 F.3d 1059 (9th Cir. 2015), holding “that the Seventh Amendment’s jury-trial right for ‘suits at common law’ does not apply to trademark claims seeking disgorgement of profits because those claims are equitable, not legal, in nature.” App.2. The panel believed that *Fifty-Six* “squarely govern[ed] this trademark case”—even though in *Fifty-Six* (unlike here) the liability question *was* tried to a jury, *see* 778 F.3d at 1074—so it upheld the district court’s order striking petitioner’s jury demand. App.3.

The full court denied rehearing en banc. App.4-5.

REASONS FOR GRANTING THE PETITION

This trademark-infringement action should have been tried before a jury. That much should have been clear in light of *Dairy Queen*—and, for decades, it would have been. Court after court in the 1960s, ’70s, and ’80s read *Dairy Queen* to mean what it says and to hold that infringement claims seeking monetary relief are legal for Seventh Amendment purposes, no matter what form of monetary relief was sought. Indeed, the Ninth Circuit itself held as much in a *copyright* case in 1977. But in recent years, even as this Court has reaffirmed the Seventh Amendment’s importance, circuits have departed from *Dairy Queen* and limited the jury-trial right to trademark plaintiffs

seeking to recover their own damages, rather than the infringer's profits. The decision below is emblematic of that new, rights-denying trend, and it entrenches a deep division of authority across circuits and closely related statutory schemes.

The approach taken by the Ninth Circuit (and three other circuits) defies not only *Dairy Queen* but history and first principles. Trademark-infringement actions were actions at law at the Framing, and the notion that a litigant would lose that jury-trial right based on its choice of monetary remedy makes no sense. No one doubts that a victim of trademark infringement who seeks to recover its own damages has a right to a jury trial on both liability and damages. And no one doubts that, in cases involving egregious infringement, the infringer's illicit profits may outstrip the plaintiffs' out-of-pocket damages. In other infringement cases, profits may simply be easier to prove than damages. In either event, it makes little sense to force the victim to settle for a damages remedy in order to preserve its constitutional right to a jury trial.

Recent decisions of this Court have reaffirmed the critical importance of safeguarding the Seventh Amendment right. Recent decisions of the courts of appeals have gone in the opposite direction and cut back on Seventh Amendment rights and eroded the clear import of this Court's decision in *Dairy Queen*. The decision below exemplifies that misguided trend and turns vertical stare decisis upside down. This petition provides the Court with a clean vehicle for resolving an entrenched split and reaffirming the

enduring role of the jury in resolving legal disputes. The Court should grant certiorari.

I. The Decision Below Conflicts With This Court’s Decision In *Dairy Queen* And Entrenches An Acknowledged Circuit Split.

The decision below contradicts this Court’s decision in *Dairy Queen*, which is reason enough for this Court to grant review. *See* Sup. Ct. R. 10(a). But the decision below is, unfortunately, not an isolated anomaly. There is an acknowledged “split in the courts concerning the holding in *Dairy Queen*”—specifically, whether *Dairy Queen* meant it when it explicitly held that the owner of a trademark is entitled to a jury trial on an infringement claim seeking “an accounting.” Mark A. Thurmon, *Ending the Seventh Amendment Confusion: A Critical Analysis of the Right to a Jury in Trademark Cases*, 11 Tex. Intell. Prop. L.J. 1, 21 n.76 (2002); *see Dairy Queen*, 369 U.S. at 475-79. This Court should grant certiorari to resolve that split and restore the Seventh Amendment’s proper role in trademark-infringement suits (and beyond).

A. This Court Decides *Dairy Queen*.

This Court held in *Dairy Queen* that the Seventh Amendment provides a right to a jury trial in trademark-infringement actions seeking “accounting” as the remedy no less than in trademark-infringement actions seeking “damages.” 369 U.S. at 477-78. The decision below squarely conflicts with that decision.

1. The dispute in *Dairy Queen* centered on whether the defendant had unlawfully used the “Dairy Queen” trademark. *Id.* at 473. The parties entered a licensing agreement allowing the defendant to use

that mark, *id.*, but the defendant defaulted on payments, and the plaintiff trademark owner argued that breach rendered the defendant's continued use of the mark infringement, *id.* at 474-75. To remedy those violations, the plaintiff sought "an accounting of profits illegally obtained by the defendant," as well as an injunction, *McCullough v. Dairy Queen*, 194 F.Supp. 686, 687 (E.D. Pa. 1961), and demanded a jury trial, *see Dairy Queen*, 369 U.S. at 470. The district court struck the jury-trial demand because it believed the case raised primarily equitable issues, and the Third Circuit declined to issue mandamus. *Id.*

This Court granted review despite the mandamus posture and reversed, holding that the complaint sought a legal remedy for the invasion of a legal right, triggering the Seventh Amendment. To begin, the Court noted that the complaint was unclear about whether the relief sought was for damages from breach of contract or for trademark infringement. *Id.* at 476-77. But the Court found it "unnecessary to resolve th[at] ambiguity" because, either way, the claim was "wholly legal in its nature." *Id.* at 477. If the complaint brought an action for damages based on breach of contract, "it would be difficult to conceive of an action of a more traditionally legal character." *Id.* "And as an action for damages based upon a charge of trademark infringement, it would be no less subject to cognizance by a court of law." *Id.* Thus, the Seventh Amendment jury-trial right attached.¹

¹ The Court held that the Seventh Amendment applied for the additional and alternative reason that both "the legal and equitable claims"—i.e., the claim for monetary relief and the claim for an injunction—"depended on 'common' factual issues."

As is true in this case, the party seeking a bench trial in *Dairy Queen* tried to circumvent the Seventh Amendment by focusing on the complaint’s request for an “accounting” rather than “damages.” *Id.* The Court brushed that aside as irrelevant wordplay. *See id.* at 477-78. The plaintiff in *Dairy Queen* was not bringing “a suit for an *equitable* accounting” because the plaintiff lacked the essential prerequisite for such a purely equitable suit: “the absence of an adequate remedy at law.” *Id.* at 478 (emphasis added). Instead, the plaintiff had an adequate legal remedy without regard to whether the claim was for a contractual breach or trademark infringement or sought the infringer’s profits or the plaintiff’s own out-of-pocket damages. *See id.* Whatever recovery theory the complaint advanced—whether “breach of contract,” “trademark infringement,” or “both”—the plaintiff’s request for money damages via an accounting sought a “legal remedy” for the invasion of a legal right, *viz.* trademark protection. *Id.* at 479. That the precise “measure of damages may necessitate a look into [defendant’s] business records,” as factfinders usually do when calculating the profits remedy, did not transform the legal action into an equitable one. *Id.*

2. The decision below simply cannot be reconciled with *Dairy Queen*. In both cases, the plaintiff sued for trademark infringement. While the *Dairy Queen* plaintiff also brought a breach-of-contract claim, the Court could not have been clearer that its decision did not turn on that factor. And in both cases, the plaintiff sought to recover the defendant’s illicit profits as its

Perttu v. Richards, --- S.Ct. ---, 2025 WL 1698783, at *6 (U.S. June 18, 2025) (quoting *Dairy Queen*, 369 U.S. at 479).

measure of monetary relief. That is the factor that the lower courts in *Dairy Queen* and in this case seized upon to deny the plaintiff its jury-trial right. That was mandamusable error in *Dairy Queen*, and the error here is even clearer given that *Dairy Queen* is on the books. That alone would justify this Court’s review, but, unfortunately, the decision below does not stand alone, and is part of a much deeper conflict.

B. Post-*Dairy Queen*, A Consensus Emerges That Infringement Claims Seeking Profits May Be Tried Before a Jury.

The lesson of *Dairy Queen*—a decision issued unanimously and in a mandamus posture—seemed pellucidly clear. Unsurprisingly, “[t]he majority of courts” post-*Dairy Queen* “held that an accounting for defendant’s profits in a trademark case is a legal remedy” that triggers the jury right “unless the issues are extraordinarily complex.” Thurmon, *supra*, at 81.

Following *Dairy Queen*’s clear marching orders, district courts nationwide held that Lanham Act claims trigger the jury-trial right even when the relief sought is “profits” rather than “damages.” *See, e.g., Black & Decker Corp. v. Positec USA Inc.*, 118 F.Supp.3d 1056 (N.D. Ill. 2015); *adidas-Am., Inc. v. Payless Shoesource, Inc.*, 546 F.Supp.2d 1029, 1086-88 (D. Or. 2008); *Alcan Int’l Ltd. v. S.A. Day Mfg. Co.*, 179 F.R.D. 398, 400-02 (W.D.N.Y. 1998); *Daisy Grp., Ltd. v. Newport News, Inc.*, 999 F.Supp. 548, 549-52 (S.D.N.Y. 1998); *Ideal World Mktg. v. Duracell, Inc.*, 997 F.Supp. 334, 337-40 (E.D.N.Y. 1998); *Gucci Am., Inc. v. Accents*, 994 F.Supp. 538, 539-40 (S.D.N.Y. 1998); *NordicTrack, Inc. v. Consumer Direct, Inc.*, 158 F.R.D. 415, 422-23 (D. Minn. 1994); *Hunting World*

Inc. v. Reboans Inc., 1994 WL 763408, at *1-3 (N.D. Cal. Oct. 26, 1994); *Grove Fresh Distribs., Inc. v. New England Apple Prods. Co.*, 1991 WL 3928, at *3 (N.D. Ill. Jan. 11, 1991); *Oxford Indus., Inc. v. Hartmarx Corp.*, 1990 WL 65792, at *2-8 (N.D. Ill. May 2, 1990); *L.L. Bean, Inc. v. Drake Publishers, Inc.*, 629 F.Supp. 644, 645-46 (D. Me. 1986); *Holiday Inns of Am., Inc. v. Lussi*, 42 F.R.D. 27, 30-32 (N.D.N.Y. 1967). These opinions treat *Dairy Queen* as “controlling” the Seventh Amendment question. *E.g.*, *Alcan Int’l*, 179 F.R.D. at 401; *Daisy Grp.*, 999 F.Supp. at 551; *see also NordicTrack*, 158 F.R.D. at 422.

The issue seemed so open-and-shut that Seventh Amendment disputes in the trademark context rarely found their way to the circuit courts. That is no surprise given that *Dairy Queen* not only upheld a jury-trial right in a case seeking an accounting, but treated the failure to honor the plaintiff’s jury-trial right in such a case as *mandamusable error*. *See* 369 U.S. at 470. Thus, even though the Sixth Circuit in *Tandy Corp. v. Malone & Hyde, Inc.*, 769 F.2d 362 (6th Cir. 1985), (erroneously) perceived a “pervasive equity background” behind suits to recover monetary relief for trademark infringement, it recognized that, under *Dairy Queen*, “the damages or accounting aspect of trademark infringement actions are considered legal actions for purposes of the jury trial clause of the Seventh Amendment.” *Id.* at 364. The *Tandy* court thus (correctly) viewed *Dairy Queen* as settling the matter.

Courts from coast to coast thus agreed that it was settled that trademark-infringement claims trigger the Seventh Amendment right even when an

“accounting” was sought rather than “damages.” Scholars recognized the obvious import of *Dairy Queen* as well. See, e.g., James M. Koelemay, Jr., *A Practical Guide to Monetary Relief in Trademark Infringement Cases*, 85 Trademark Rep. 263, 307 (1995); 9 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* §2312 (4th ed. 2025) (“Wright & Miller”); Dan B. Dobbs, *Law of Remedies: Damages—Equity—Restitution* §2.6(3) (2d ed. 1993). The real battleground instead focused on whether *Dairy Queen*’s reasoning applied to the *other* federal intellectual-property statutes, which like the Lanham Act give infringement victims a menu of monetary remedies to fully vindicate their rights.

Shortly after *Dairy Queen*, three circuits relied on that decision to uphold the Seventh Amendment right in patent- and copyright-infringement suits seeking profits. The first was *Swofford v. B & W, Inc.*, 336 F.2d 406 (5th Cir. 1964), a patent suit. The plaintiffs “requested a preliminary and final injunction against infringement by the defendant, an accounting for profits, damages,” and “costs.” *Id.* at 408. The district court held that the plaintiffs were entitled to a jury trial. *Id.* The Fifth Circuit affirmed. As the court explained, the notion that a request for an “accounting” put a case into the equity courts got history all wrong. The pre-merger “rule allowing an accounting for profits” in courts of equity “was adopted, not for the purpose of acquiring jurisdiction, but, for the purpose of awarding a substitute for damages at the option of the complainant in cases where, having jurisdiction to grant equitable relief, the court was not permitted by the principles and practice in equity to award damages.” *Id.* at 411. That

was clear to the Fifth Circuit not only from history, but from *Dairy Queen*, which the Fifth Circuit read as “holding” that “a request for accounting” in the trademark context presented a “legal issue” that triggered the jury-trial right. *Id.* at 410 & n.7.

The Third Circuit—having been reversed in *Dairy Queen*—similarly got the message of that decision loud and clear and also extended it into the patent context in *Kennedy v. Lakso Co.*, 414 F.2d 1249 (3d Cir. 1969). The plaintiffs in *Kennedy* brought a patent-infringement suit seeking an injunction, an accounting, and damages. *Id.* at 1250-51. The district court struck “the plaintiffs’ demand for [a] jury trial.” *Id.* at 1251. The Third Circuit, declining to repeat its error in *Dairy Queen*, reversed. Just like the Fifth Circuit in *Swofford*, the Third Circuit acknowledged that “equity traditionally has had jurisdiction in actions for an accounting,” but emphasized that “it has always been recognized that there may be a suit for accounting at law.” *Id.* at 1253. “The claim for an accounting, therefore, does not ... destroy the right to a jury trial” *Id.* at 1253-54; *see also id.* at 1254 n.16 (discussing *Dairy Queen*, 369 U.S. at 477-78). No matter the remedy, “the underlying issue” in the action “remains essentially the same—infringement.” *Id.* at 1253. And on *that* issue, the Third Circuit explained, *Dairy Queen* made clear that the right to a jury trial could not be frustrated simply because the plaintiff requested remedies that might also be available in equity, such as an injunction or profits. *See id.* at 1252-54 & n.16; *see Dairy Queen*, 369 U.S. at 478-79.

Finally (and ironically in light of the decision below), the Ninth Circuit held the same in the copyright context a few years later in *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*, 562 F.2d 1157 (9th Cir. 1977), *overruled on other grounds by Skidmore v. Led Zeppelin*, 952 F.3d 1051 (9th Cir. 2020) (en banc). On “[t]he issue whether an accounting of profits in an infringement action is legal or equitable,” the Ninth Circuit “agree[d]” with the Fifth Circuit in “*Swofford*,” which “held that *Dairy Queen* controlled,” and thus held the plaintiffs “had a right to a jury trial” on their claim for “profits.” *Id.* at 1175.²

C. Multiple Circuits Split From That Consensus and Deny the Jury Right.

Within the past decade, as lower-court memories of *Dairy Queen* have apparently begun to fade, courts of appeals have started to feel themselves free to consider the issue *de novo* and to split from that earlier consensus. In a sharp break from the above “majority” view, four circuits now hold that litigants are not entitled to have a jury decide infringement actions seeking profits. Thurmon, *supra*, at 81.

1. The Ninth Circuit did so in *Fifty-Six Hope Road Music v. A.V.E.L.A., Inc.*, 778 F.3d 1059. The plaintiff sued for trademark infringement under the Lanham Act and sought profits under §1117. “A jury” decided infringement, but “the trial judge” ruled that determining “profits” was an issue for it, not the jury,

² That said, because the record made clear that “the parties did not intend the jury to consider profits,” the court affirmed. *Sid & Marty*, 562 F.2d at 1175.

to resolve. *Id.* at 1074. Breaking from its earlier precedent in *Sid & Marty*, the Ninth Circuit affirmed, holding that “the determination of profits under” the Lanham Act need not go to a jury. *Id.* at 1076; *see JL Beverage Co., LLC v. Jim Beam Brands Co.*, 815 F.App’x 110, 114 (9th Cir. 2020) (Friedland, J., concurring) (“highlight[ing] the tension between *Fifty-Six* ... and *Sid & Marty*”). The court reached that conclusion because it viewed a claim for profits to be “equitable, not legal.” *Fifty-Six*, 778 F.3d at 1075. In so holding, the court brushed aside *Dairy Queen*, reading it as involving a claim for *damages* rather than one for profits. *Id.* *But see Dairy Queen*, 369 U.S. at 475; 194 F.Supp. at 687 (*Dairy Queen* district court noting that the complaint sought “an accounting of profits illegally obtained by the defendant”).

The Eleventh Circuit soon followed suit in *Hard Candy, LLC v. Anastasia Beverly Hills, Inc.*, 921 F.3d 1343 (11th Cir. 2019). It reasoned that “[t]he remedy of an accounting and disgorgement of profits for trademark infringement is equitable in nature,” and thus held that “a plaintiff seeking the defendant’s profits in lieu of actual damages is not entitled to a jury trial.” *Id.* at 1348. The Eleventh Circuit “[did] not read *Dairy Queen* as holding that the accounting and disgorgement of profits was a legal remedy, since that isn’t what the plaintiff had sought.” *Id.* at 1358. It did not mention that the district court in *Dairy Queen* explicitly noted that the plaintiff sought “an accounting of profits,” or that this Court explicitly held that there would be a jury trial right no matter whether the complaint asserted damages for breach of contract or an accounting of profits for trademark infringement. *See* pp.14-15, *supra*.

Most recently, the Eighth Circuit agreed that profits claims under the Lanham Act must be decided by courts rather than juries. *See Nat'l Presto Indus., Inc. v. U.S. Merchs. Fin. Grp., Inc.*, 121 F.4th 671, 677-80 (8th Cir. 2024). Its analysis largely tracks the Eleventh Circuit's reasoning in *Hard Candy*, including its dismissive treatment of *Dairy Queen*. *See id.*

Finally, a Sixth Circuit panel held that the defendant had no right to a jury on the claims seeking an injunction and profits under the Lanham Act. *Ferrari S.P.A. v. Roberts*, 944 F.2d 1235, 1248 (6th Cir. 1991). It did so, however, in a conclusory manner without mentioning either *Dairy Queen* or its earlier decision in *Tandy*, which considered an accounting for profits a “legal action for purposes of the jury trial clause of the Seventh Amendment.” *Tandy*, 769 F.2d at 364; *see* p.17, *supra*.

2. These decisions have created a split of authority that is both intractable and inexplicable in light of *Dairy Queen*. In the majority of circuits, district courts continue to honor the jury-trial rights of victims of trademark infringement whether they seek monetary relief in the form of damages or profits (or both). While not all those circuits have addressed the issue at the appellate level, that simply reflects the clarity of *Dairy Queen* and courts' understandable interest in avoiding the repetition of mandamusable error. And, in at least two circuits—the Third and Fifth—the rule of *Dairy Queen* has been extended beyond the trademark context. The Eleventh and Eighth Circuits, by contrast, refuse to apply *Dairy Queen* even in the trademark context. And the Ninth and Sixth Circuits

are in a category of their own. The Ninth Circuit paradoxically applies *Dairy Queen* in the copyright context, but not in the trademark context. And the Sixth Circuit is on both sides of the split—having treated *Dairy Queen* as controlling in *Tandy* only to come out the other way without mentioning *Tandy* or *Dairy Queen* in *Ferrari*. In short, the decision below conflicts with this Court’s decision in *Dairy Queen*, and the lower courts are hopelessly in conflict with each other. These conflicts cry out for this Court’s review.

II. The Decision Below Is Wrong.

Even if considered on a clean slate, the decision below would be egregiously wrong. Under the modern framework for deciding whether the Seventh Amendment right attaches to statutory claims, what this Court already held in *Dairy Queen* is exactly right: Actions for trademark infringement plainly trigger Seventh Amendment protections even when the plaintiff seeks the infringer’s profits as a remedy.

A. An Infringement Action Under the Lanham Act Asserts a Legal Claim.

Infringement actions under the Lanham Act resemble legal claims tried before juries in 18th-century England. Because those claims have a “close analo[g]” at common law that did not sound in equity, the jury right applies. *Feltner*, 523 U.S. at 348.

1. Before the Seventh Amendment, the common law granted trademark owners actions on the case for infringement that were tried in courts of law.

That common-law tradition traces back at least to 1584 with *Sandforth’s Case*. There, a clothier alleged

that he had spent over a decade manufacturing high-quality cloth to sell in England and overseas. See Keith M. Stolte, *How Early Did Anglo-American Trademark Law Begin?*, 88 Trademark Rep. 564, 585 (1998). He marked those cloths with the letters “J.G.” and a distinctive mark called a “tucker’s handle.” *Id.* Thanks to his trusted reputation, the clothier “obtained and acquired much gain and profit.” *Id.* at 586.

That commercial success got the attention of competing merchants. As alleged by the clothier, one merchant schemed “to hinder the [clothier] in selling such cloths of his and to take away and worsen the opinion and esteem which the aforesaid merchants and subjects had concerning the cloths of the same [clothier].” *Id.* The merchant executed that scheme by using the letters “J.G.” and the distinctive “tucker’s handle” on cloths that were “ill, insufficient and unmerchantable.” *Id.* The trademark piracy had devastating effect: After customers bought the knock-off goods bearing the clothier’s mark, they “reversed the opinion and esteem which they had previously had of the same cloths but also gave notice to many other merchants and subjects of the deceitful and insufficient making of the ... cloths.” *Id.* at 586-87.

The clothier had a viable action at law with “remarkable parallels to a twentieth-century case of intentional trademark infringement.” 1 Gilson on Trademarks §1.06[2] (2018). As one report from the trial recounted, the aggrieved clothier “brought an action on the case” against the infringer. Stolte, *supra*, at 588 n.117. The court agreed “that an action on the case lies by the custom of London for

counterfeiting another’s mark.” *Id.* at 590 n.130. A later opinion, when discussing the case, agreed “that the action [did] well lie” against the defendant that had “used the [clothier’s] mark to his ill-made cloth on purpose to deceive him.” *Southern v. How*, 79 Eng. Rep. 1243, 1244 (1618).

Legislative protections for marks soon followed. Parliament enacted a law in 1726 that made it “lawful to and for every trader, dealer and weaver of linen manufacture, to weave his name, or fix some known mark, in any piece of linen manufacture by him made.” 13 Geo. I, c. 26, §XXX (1726). And if someone sold a product under another person’s mark, they could be held liable in courts of law for fraud. *See id.*; *Vidal*, 602 U.S. at 296 (citing this law).

By 1783, the law was sufficiently clear that Lord Mansfield could pronounce that, “if the defendant had sold a medicine of his own under the plaintiff’s name or mark, that would be a fraud for which an action would lie.” *Singleton v. Bolton*, 99 Eng. Rep. 661, 661 (1783); *see Vidal*, 602 U.S. at 296; *see also* Lionel Bently, *The First Trademark Case at Common Law?*, 47 U.C. Davis L. Rev. 969, 983-84 (2014). That view was corroborated by 18th century practice guides, which instructed that an action at law “lies against a tradesman for putting another’s mark to his own commodities.” 1 John Mallory, *Modern Entries, in English* *418 (4th ed. 1791).

Building on that tradition, American common-law courts likewise permitted actions for trademark infringement in the nation’s formative years. *See Tam*, 582 U.S. at 224 (collecting authorities). Although trademark law in the United States

“developed slowly,” *Vidal*, 602 U.S. 296, it was nonetheless understood from the Founding that a trademark confers a “property right for the violation of which damages may be recovered in an action at law,” *In re Trade-Mark Cases*, 100 U.S. 82, 92 (1879). The Lanham Act transferred that old common-law soil into its new statutory regime, “codify[ing] and unify[ing] the common law of unfair competition and trademark protection.” *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 861 n.2 (1982) (White, J., concurring in the result).

Accordingly, the essence of an infringement action under the Lanham Act matches the English common-law actions available for trademark infringement. At common law, “the proper ... action for trade-mark infringement [was] an action in deceit.” Frank I. Schechter, *The Historical Foundations of the Law Relating to Trade-Marks* 143 (1925); see, e.g., 1 John Comyns, *A Digest of the Laws of England* 166 (1780). The deceit perpetrated by the defendant was misleading the public into thinking that his goods belonged to the plaintiff. See Frank I. Schechter, *The Rational Basis of Trademark Protection*, 60 Trademark Rep. 334, 338 (1970). Similarly, the Lanham Act “creates a federal cause of action for trademark infringement” that imposes liability when the defendant’s use of the plaintiff’s mark “‘is likely to cause confusion, or to cause mistake, or to deceive’ with regards to the plaintiff’s mark.” *B&B Hardware*, 575 U.S. at 144. In both actions, the key to liability is the defendant’s deceptive use of the plaintiff’s mark. And both actions allow the aggrieved mark owner to bring a suit at law to hold the defendant responsible for infringement.

2. Chancery courts, by contrast, at first refused to provide relief in trademark-infringement actions. Equity did not intervene in such disputes until *after* the Seventh Amendment's ratification in 1791.

Blanchard v. Hill, 26 Eng. Rep. 692 (1749), exemplifies equity's initial hesitation to wade into trademark disputes. There, a plaintiff sought an injunction to restrain a competitor from using his proprietary mark on playing cards. Lord Hardwicke refused to issue an injunction, explaining: "Every particular trader has some particular mark or stamp; but I do not know any instance of granting an injunction here, to restrain one trader from using the same mark with another; and I think it would be of mischievous consequence to do it." *Id.* at 693. The chancery court then encouraged the plaintiff to pursue the legal remedies available at common law. *See id.*

Tellingly, it was not until decades *after* 1791 that equity intervened in trademark actions. Arguably the first case of a chancellor issuing an injunction in trademark dates to 1816. *See* Grafton D. Cushing, *On Certain Cases Analogous to Trade-Marks*, 4 Harv. L. Rev. 321, 321 (1891) (*Day v. Day*). But many scholars believe that practice did not begin until 1838. *See, e.g.*, Gary M. Ropski, *The Federal Trademark Jury Trial Right—Awakening of a Dormant Constitutional Right*, 70 Trademark Rep. 177, 181 (1980); Sidney A. Diamond, *The Historical Development of Trademarks*, 65 Trademark Rep. 265, 288 (1975).

History thus does not establish that actions vindicating trademark rights "were typically or indeed *ever* entertained by English courts of equity when the Seventh Amendment was adopted." *Granfinanciera*,

492 U.S. at 44 (emphasis added). Moreover, that chancery courts *sometimes* intervened post-ratification obviously does not prove that a trademark-infringement action involves “equitable rights *alone*.” See *id.* at 43-44. The common-law history described above puts that notion conclusively to rest.

B. The Profits Remedy Under the Lanham Act Seeks Legal Relief.

The remedy that petitioner seeks should not be enough to deprive it of a Seventh Amendment right to have trademark-infringement liability determined by a jury, but in reality the remedy sought here—a fixed-sum award of money damages in the form of respondent’s profits—actually bolsters the conclusion that the right at issue is legal rather than equitable. That much is clear from this Court’s precedents, as well as the history and purposes of the profits remedy.

1. As explained above, *Dairy Queen* resolved this issue over 60 years ago. The defendant in *Dairy Queen* tried to evade a jury by focusing on the complaint’s request for an “accounting” rather than “damages.” 369 U.S. at 477. But as the Court made clear, the plaintiff’s request for money relief via an accounting sought a “legal remedy.” *Id.* at 478-79. The fact that the “measure of damages may necessitate a look into [defendant’s] business records,” as typically happens when determining a defendant’s profits, did not transform that “legal remedy” into an equitable one. *Id.* at 479; see p.15, *supra*.

2. Nothing has changed since *Dairy Queen*. To be sure, this Court has at times described “an accounting for profits” as “a form of equitable restitution.” *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204,

214 n.2 (2002); *see also* *Chauffeurs, Teamsters & Helpers v. Terry*, 494 U.S. 558, 570 (1990); *Tull*, 481 U.S. at 424. But recent scholarship confirms that, at least in this context, the profits remedy was always a legal remedy, not an equitable one—and thus that *Dairy Queen* was right.

The “common law action of account was created in the twelfth or thirteenth century in response to the need for a mechanism to allow recovery” of money in another’s possession. Joel Eichengrun, *Remedying the Remedy of Accounting*, 60 Ind. L.J. 463, 464 (1984). It arose because feudal landlords needed a way to recover rent from agents that effectively managed the property yet refused to remit the profits. *See id.* So the common law recognized “an action whose sole object was the enforcement of obligations to account.” C.C. Langdell, *A Brief Survey of Equity Jurisdiction* 83 (2d ed. 1908). The remedy in such actions “was a money judgment for the income or profit earned from plaintiff’s property.” Eichengrun, *supra*, at 464.

Over time, the accounting remedy expanded to “other situations where an owner of real or personal property delivered it to another to be used or employed for the owner’s benefit.” *Id.* at 466. But the “obligation to render an account” was nonetheless “created by law,” Langdell, *supra*, at 75, and enforced in common-law courts, *see id.* at 83; Wright & Miller, *supra*, §2310 (“Historically, an action for an accounting was available in the common law courts from the earliest times.”); *Kennedy*, 414 F.2d at 1253 (“it has always been recognized that there may be a suit for accounting at law”). Indeed, the common law “has always treated an action solely for ... profits as an

action in the ‘law’ courts with all factual issues being determined by a jury.” Bruce S. Sperling, *The Right to Jury Trial in a Federal Action for Trademark Infringement or Unfair Competition*, 62 Trademark Rep. 58, 59 (1972). That explains why this Court, in the related context of copyright infringement, has distinguished the “equitable” remedy of “an injunction” from the “legal remedies” of “actual damages and ... profits of the infringer.” *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 663 (2014).

Although chancery courts did provide relief in actions for accounting, that does not make the remedy requested here equitable. Equity would not hear a claim “for a naked account of profits and damages against an infringer” because “such relief ordinarily is incidental to some other equity.” *Root v. Ry. Co.*, 105 U.S. 189, 215-16 (1881) (patent dispute). For a chancery court to order an accounting for profits in trademark disputes, “the jurisdiction must be rested upon some other equitable ground”—usually an injunction. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 259 (1916). Even then, the court exercised jurisdiction over an accounting claim only as a matter of convenience to “avoid multiplicity of suits and not because the jury lacked competence” to decide the issues raised by the profits remedy. *Swofford*, 336 F.2d at 411. But as this Court has made clear, that rationale no longer holds water in the post-merger era. See p.32, *infra*; see also p.14 n.1, *supra*.

C. The Decision Below Egregiously Misapplied the Seventh Amendment.

The Ninth Circuit’s contrary holding that petitioner was not entitled to a jury trial on *any*

factual issues—neither for liability nor the remedy—defies historical tradition and this Court’s precedent.

The decision below never undertook the historical analysis the Seventh Amendment requires. Instead, it turned to another Ninth Circuit decision, *Fifty-Six*, which it believed settled the issue. App.2. That decision involved a jury trial on the infringement issue, 778 F.3d at 1075-76, and falls short at each step of the constitutional analysis.

The Ninth Circuit’s holding that the profits remedy should be decided by the judge rests on misconceptions about the relevant history. The court correctly acknowledged that “[l]itigants filed trademark-like actions in ‘deceit’ prior to 1791,” but it then dismissed those actions as rare. *Id.* at 1075. That improperly discounts the legal significance of *Sandforth’s Case* (1584) and *Singleton* (1783). See pp.23-25, *supra*. Regardless, relative scarcity is beside the point; “rare” or not, the common law unquestionably gave trademark owners a cause of action to remedy infringement.

As for the profits remedy, the court hastily concluded that it was equitable in nature without meaningfully considering that remedy’s history. An account for profits derived from the common law. See pp.28-30, *supra*. And in this context, it would not be issued absent some independent basis on which a court of equity could rest its jurisdiction. The court breezed by those historical facts and instead focused on how (it thought) “current law” treats “actions for disgorgement of improper profits [as] equitable.” *Fifty-Six*, 778 F.3d at 1075. Whether true or not, the appropriate Seventh Amendment scrutiny considers

the remedy from a historical perspective. So the claim that current law considers profits equitable (even if true) does not move the needle on the constitutional question.

Furthermore, the Ninth Circuit’s unthinking extension of *Fifty-Six* in the decision below—from a holding that there was no right to have a jury fix the amount of profits *after the jury decided infringement*, to holding here that there was no right to have a jury decide infringement *at all*—flouts the long-settled rule that “factual disputes regarding the merits of a legal claim go to the jury, even if that means a judge must let a jury decide questions he could ordinarily decide on his own.” *Perttu v. Richards*, --- S.Ct. ----, 2025 WL 1698783, at *5 (U.S. June 18, 2025); see *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510-11 (1959). Under that rule, a jury must be available to decide infringement even assuming (as *Fifty-Six* incorrectly held) that the question of profits is equitable and thus beyond the jury’s ken.

III. The Question Presented Is Important, And This Case Is An Ideal Vehicle To Resolve It.

This case is an ideal vehicle for the Court to settle an important constitutional question that shapes how cases are litigated under the Lanham Act specifically, and intellectual-property statutes more generally.

The importance of the Seventh Amendment jury-trial right needs little elaboration. It “is ‘of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right’ has always been and ‘should be scrutinized with the utmost care.’” *Jarkesy*, 603 U.S. at 121 (quoting *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935)).

The erosion of the constitutional right to a jury is especially pernicious in the trademark context. Infringement actions often turn on factual disputes about whether consumers are being misled about the source of a product. *See Jack Daniel's Props.*, 599 U.S. at 147. Questions about how consumers perceive marks “falls comfortably within the ken of a jury.” *Hana Fin., Inc. v. Hana Bank*, 574 U.S. 418, 422 (2015). Indeed, the Court has affirmed in this very context that “the jury is generally the decisionmaker that ought to provide the fact-intensive answer.” *Id.*

The importance of the issue is magnified by the perverse incentives and cruel dilemmas created by the decision below. In the Lanham Act, Congress made a deliberate decision to give victims of infringement a range of monetary remedies—their out-of-pocket losses and/or recovery of the infringer’s illicit profits. *See* 15 U.S.C. §1117(a). Congress gave victims the same options in cases of copyright infringement. *See* 17 U.S.C. §504; p.7, *supra*. The reason for empowering victims with this choice is obvious: The infringer does not bear the cost of innovation and, especially in the trademark context, often markets an inferior product that is cheaper to produce. Thus, in many cases the illicit profits of the infringer will outstrip the victim’s damages from lost profits of lost sales of the superior (and more-costly-to-produce) genuine article. In other cases, the infringer’s profits may be easier to prove than victim’s damages or can avoid adding insult to injury by giving the copyist access to the victim’s business records in discovery. For all those reasons, Congress has given the victims of infringement the choice of monetary remedies. No one doubts that a victim that contents itself with a damages remedy is

entitled to a jury trial on both infringement and the amount of monetary relief. But under the decision below, the price of exercising the statutory remedy of profits is to lose the constitutional entitlement to a jury trial. That defies common sense and congressional design, and creates an unacceptable dynamic that fully justifies this Court's review.

Finally, this case presents the legal issue squarely and cleanly. There is no dispute that profits were the only monetary remedy petitioner sought. Both parties initially requested a jury trial, only for respondent to withdraw its own demand on the eve of jury trial and move to strike petitioner's demand. App.20. The case has now been litigated to final judgment, and reversal on the Seventh Amendment question would result in a new trial, this time before a jury—a remedy that mattered to the Framers and matters to petitioner's efforts to vindicate its trademark rights under the Lanham Act.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

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June 27, 2025

APPENDIX

TABLE OF APPENDICES

Appendix A

Memorandum Opinion, United States
Court of Appeals for the Ninth Circuit,
*Great Western Air, LLC v. Cirrus Design
Corp.*, No. 23-15157 (Dec. 17, 2024)..... App-1

Appendix B

Order, United States Court of Appeals for
the Ninth Circuit, *Great Western Air, LLC
v. Cirrus Design Corp.*, No. 23-15157
(Jan. 30, 2025) App-4

Appendix C

Excerpts of Transcript of Proceedings
Regarding Jury Demand, United States
District Court for the District of Nevada,
*Great Western Air, LLC v. Cirrus Design
Corp.*, No. 16-cv-02656 (Sept. 9, 2022)..... App-6

Appendix D

Findings of Fact, Conclusions of Law,
and Judgment Following Bench Trial,
United States District Court for
the District of Nevada, *Great Western
Air, LLC v. Cirrus Design Corp.*,
No. 16-cv-02656 (Jan. 6, 2023)..... App-25

Appendix E

Order, United States District Court
for the District of Nevada, *Great Western
Air, LLC v. Cirrus Design Corp.*,
No. 16-cv-02656 (Aug. 23, 2023) App-60

Appendix F

Relevant Constitutional and Statutory Provisions.....	App-68
U.S. Const. amend. VII	App-68
15 U.S.C. §1114	App-68
15 U.S.C. §1117	App-75

App-1

Appendix A

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

No. 23-15157

GREAT WESTERN AIR, LLC, dba CIRRUS AVIATION
SERVICES, LLC,

*Plaintiff-counter-
defendant-Appellee,*

v.

CIRRUS DESIGN CORPORATION,

*Defendant-counter-
claimant-Appellant.*

Argued and Submitted: Nov. 5, 2024
Filed: Dec. 17, 2024

Before: Hawkins, Tashima, and Owens,
Circuit Judges.

MEMORANDUM*

Cirrus Design Corporation, d/b/a Cirrus Aircraft
("Appellant"), appeals from the district court's order
denying relief on Appellant's claims of trademark

* This disposition is not appropriate for publication and is not
precedent except as provided by Ninth Circuit Rule 36-3.

infringement and unfair competition under the Lanham Act, the Nevada Deceptive Trade Practices Act, and common law. Appellant also appeals from the district court's decision granting Great Western Air's ("Appellee") motion to strike Appellant's demand for a jury trial. As the parties are familiar with the facts, we do not recount them here. We affirm.

1. The district court did not err in granting Appellee's motion to strike Appellant's jury demand. *See* Fed. R. Civ. P. 39(a)(2) (providing that a jury must try all issues for which a jury demand has been made unless "the court, on motion or on its own, finds that on some or all of those issues there is no federal right to a jury trial"). In *Fifty-Six Hope Road Music, Ltd. v. A.V.E.L.A., Inc.*, this court held that the Seventh Amendment's jury-trial right for "suits at common law" does not apply to trademark claims seeking disgorgement of profits because those claims are equitable, not legal, in nature. 778 F.3d 1059, 1074-76 (9th Cir. 2015). Notwithstanding *Sid & Marty Krofft TV Products v. McDonald's Corp.*, 562 F.2d 1157 (9th Cir. 1977), *overruled on other grounds by Skidmore v. Led Zeppelin*, 952 F.3d 1051 (9th Cir. 2020), which dealt with the jury-trial right in the copyright context, *Fifty-Six Hope Road* squarely governs this trademark case.

2. The district court did not err in concluding that Appellant's claims failed because Appellant did not establish a likelihood of consumer confusion. Appellant principally contends that the district court improperly excluded certain types of confusion from its analysis. *See* 15 U.S.C. § 1125(a)(1)(A) (providing that the Lanham Act protects against "the use[] in

commerce” of any mark “likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association . . . or as to the origin, sponsorship, or approval of [a person’s] goods, services, or commercial activities by another person”). The district court considered confusion as to (1) source or origin; (2) sponsorship; (3) association; and (4) affiliation. This is not a case where the district court “assumed that likelihood of confusion exists only when consumers are confused as to the source of a product.” *Brookfield Commc’ns, Inc. v. W. Coast Ent. Corp.*, 174 F.3d 1036, 1057 (9th Cir. 1999). Rather, the district court’s analysis accords with this court’s understanding that the likelihood-of-confusion inquiry is a flexible one. *See Network Automation, Inc. v. Advanced Sys. Concepts, Inc.*, 638 F.3d 1137, 1145, 1147, 1149 (9th Cir. 2011).

Nor does the district court’s well-reasoned analysis of the likelihood-of-confusion factors or its weighing of those factors evince clear error. *See AMF, Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348-49 (9th Cir. 1979) (laying out the trademark infringement factors); *Pom Wonderful LLC v. Hubbard*, 775 F.3d 1118, 1123 (9th Cir. 2014) (providing that this court reviews for clear error a district court’s likelihood of confusion determination). As the district court correctly determined that Appellant failed to carry its burden of proving its claims, the district court did not err in denying Appellant injunctive relief.

AFFIRMED.

App-4

Appendix B

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

No. 23-15157

GREAT WESTERN AIR, LLC, dba CIRRUS AVIATION
SERVICES, LLC,

*Plaintiff-counter-
defendant-Appellee,*

v.

CIRRUS DESIGN CORPORATION,

*Defendant-counter-
claimant-Appellant.*

Filed: Jan. 30, 2025

Before: Hawkins, Tashima, and Owens,
Circuit Judges.

ORDER

Judge Owens voted to deny the petition for rehearing en banc, and Judges Hawkins and Tashima so recommend. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 40.

App-5

The petition for rehearing en banc is therefore
DENIED.

App-6

Appendix C

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

No. 16-cv-02656

GREAT WESTERN AIR, LLC, dba CIRRUS AVIATION
SERVICES, LLC,

Plaintiff,

v.

CIRRUS DESIGN CORPORATION,

Defendant.

Hearing Date: Sept. 9, 2022

**EXCERPTS OF PROCEEDING TRANSCRIPT
RE: JURY DEMAND**

* * *

[31] [Court] circumstances in this case.

And so, I'm going to deny the plaintiff's, Aviation's motion to supplement the pleadings found at No. 142. And this transcript will be the record of the order.

All right. So that brings us to Cirrus Aviation's motion to strike its jury demand, seeking to proceed before this Court to a bench trial, arguing that there is no right to a jury trial under the (indiscernible) or the Nevada Trade Practices Act, and that there's no

App-7

right under common law or the Seventh Amendment that would create a right to a jury trial.

And case law, as Cirrus Aviation argues, is such that disgorgement of profits is essentially injunctive relief along with the injunctive relief that's requested. And recovery of the fees and costs and all of that being equitable in nature, there's no basis for a jury trial.

Of course, Cirrus Aircraft opposes that and wants its jury trial, says that they've been relying for better part of four years or maybe more on a—on a jury trial, and to pull that out from under them at this stage—and those are my words, not yours—would be prejudicial and that we should have a jury trial.

You know, Ms. Bevilacqua, are you going to argue this one, as well, or Mr. Peek?

So—and you can either argue from table or come up to the—but I wanted to direct my—my initial questions to [32] you, because here's what I'm struggling with on this. The cases that you've cited and that I—I've seen as it relates to the detrimental reliance seem to all have an underlying basis for the jury trial, meaning it was either statutorily created or otherwise.

And so, you know, for instance, where, say, in the cases of—and I'm just using this now by way of example. I'm not citing a specific case.

But where the plaintiff requested the jury trial, the defendant didn't, then the plaintiff withdrew it, and the defendant said, Well, I relied because there was a basis for the jury trial, not just the reliance itself, how do you—if you don't have a basis here to begin with, is—is your detrimental reliance enough?

Mr. Peek: Your Honor, yes, it is, because we have—we have proceeded along, Your Honor, from the beginning—and the—and the Court knows, as a—as a trial lawyer itself—the benefits of a jury versus a bench trial, importance of a jury versus a bench trial.

And we think that this should be a case tried to a jury because, one, they asked for it from day one and repeatedly throughout the course of the proceeding asked for a jury. So we have been looking, Your Honor, and thinking about and planning for a jury trial.

Now we have to have this little paradigm shift, if [33] you will, Your Honor, not to—I'm not trying to criticize the Court, but—but certainly, a jury brings something different into the—into the mix, as the Court knows.

So we have been preparing with proposed jury instructions. We have been preparing with instructions to the—the special questions to the jury. We have been preparing, Your Honor, with motions in limine. Typically, you wouldn't file motions in limine unless there were a jury.

So we have expended a significant amount of resources, Your Honor. We have our jury instructions prepared, ready to submit. We have our special verdict forms prepared and ready to submit as per the Court's rule. That's what we were going to talk about today.

So we have—we have, certainly, Your Honor, detrimentally relied with the expenditure of significant amounts of time and resources to prepare for a jury trial.

And no less than, what, eight or more times Cirrus Aviation has said jury trial, jury trial, jury

trial, demanded a jury trial. In the pretrial order last year.

The Court: No question.

Mr. Peek: Yeah.

The Court: But I keep struggling with, is that enough if there isn't a--a legal basis for it?

And the fact that--and look, the other thing, I know, is a trial order, and it just seems to be the way it is. [34] And I've seen that on the bench is--and probably because the workload and everything else. You can only see so far in front of you. But you don't start really preparing heavily until couple, two, three months out, if that.

And so, if--if that's the case where the parties prepare and then realize as they're going through this, Hey, wait a minute. Now that we've really looked at this issue--I mean, that's something you guys could have done way back when, as well, saying, you know, even though they asked for a jury trial, we don't really have a right. There isn't a legal basis--

Mr. Peek: But--but even--Your Honor, as you know, the rule provides, under 39, for consent. So we looked at it as a consent to a jury trial under (c)(2), under 39(c)(2). So, even though there may not have been a right to a jury trial, you know, 39(c)(2) talks about you may do it by consent. And so, that's what we are looking at. They consented to a jury.

The Court: Well, so that would be similar, then, to--

Mr. Peek: I said (c)(2)--yeah, (c)(2).

The Court: So that would be similar to that *Ciminelli* case where even though they didn't have a basis – but that—in that case, both parties are agreeing, and now they're not.

Mr. Peek: I know. But they—but they can impliedly consent, Your Honor, and implicitly consent, as we [35] amplify within our—in our briefing that there are many courts that say you can imply the consent. The consent does not have to be expressed. The consent can be by actions.

And here, there's quite a bit of action on the part of the plaintiffs to ask for and seek a jury trial.

So when you say you start preparing for—yes, we do. We started looking at a jury trial. So when I was—when I was retained by Ms. Bevilacqua back in May, the thought was, okay. We have a jury.

What do we have to do to prepare for a jury? What's it look like? What does our venire look like here in Las Vegas? Where is the venire from? Where is it going to come? You know, what's it going to look like?

So we're thinking about the strategies for preparing for a venire here in Las Vegas. It's different in certainly where Ms. Bevilacqua practices in Minnesota. So we think about what that venire would look like. We think about, Okay. What are the jury instructions that we're going to have?

And we're talking about jury instructions. We're preparing those instructions knowing that there's a jury, believing that there's a jury, with no peep from the other side who has known, as well, Your Honor.

When you talk about people knowing whether there's a jury trial, this is pretty established. They

certainly do cite the case law that goes back, I think, to 2015 and even earlier [36] which says, no right to a jury trial.

You knew when you filed that dec relief action whether or not you were entitled to a trial by a jury. You knew when we filed our answer and our counterclaim whether or not you had a right to a trial by jury. But when you asked for it, we consented to it, just like you did. You consented to it. You asked for it.

The Court: So you're saying in the years of that—the years of their position being a jury trial, a jury trial, it essentially rises to the level of the situations where both sides have agreed, even though there isn't a specific statutory basis for it, and so, then, they're given the jury trial and off we go?

Mr. Peek: Yeah. And how many times can you say it before we begin to rely on the fact—

The Court: Right. No, no—

Mr. Peek:—that there's a jury trial?

The Court: So I couldn't, but perhaps you guys could find a—I couldn't find—I don't think the Ninth Circuit has ruled on this under this set of facts—

Mr. Peek: We—

The Court:—which doesn't make any life any easier, but that's why I get paid the medium bucks—

Mr. Peek: But there are cases out of other circuits. The Ninth Circuit hasn't necessarily said you can't go by implied [37] consent.

The Court: No, no. I—I think that's the crux is it's going to be in my discretion, one way or the other.

Mr. Peek: Exactly. It now becomes up to your discretion as to whether or not you think, under 39(c)(2), that they have, by their actions, impliedly consented to a jury trial.

And now—I don’t—and I don’t need to repeat what we said so much in the brief, Your Honor, but there are—even their most recent amended complaint, their supplemental complaint, did also—if you see it attached to—I think it’s Docket 42 or 142. It also asks for a jury trial. So even as recently as when they filed that motion to supplement and attached their draft to supplemental pleading, they asked for a jury trial.

So how much more do you need for implied consent than all of the actions, beginning with the filing of the complaint, the stipulations that they’ve entered into, the fact that Judge Dorsey set it for a jury trial, the fact that when we came before you in March, you gave us time for—okay. This is when I have to have jury instructions. This is when I have to have proposed voir dire questions. This is when I have to have motions in limine, all in anticipation of a motion in limine.

We went to the extent of drafting and filing our motions in limine. We wouldn’t ordinarily—ordinarily do that if there’s not a jury trial because that would be addressed to [38] the sound discretion. The Court can certainly weigh that evidence and hear it and knows the difference between admissible and inadmissible evidence. Doesn’t necessarily have to have motions in limine. Doesn’t necessarily require it. But they’re required in a jury.

So how many times can you say it without us beginning to rely on it and planning for it?

(Indiscernible)—

The Court: 39(c), though, that's that advisory jury where—

Mr. Peek: No. (c)(2), Your Honor, is the one that actually talks about consent.

The Court: But doesn't that mean both parties—

Mr. Peek: It does. And that's what they're saying, you know, the—

The Court: So that's your detrimental reliance, then, flows into that; that they had consented, consented, consented, and then they pull it out—

Mr. Peek: And the case law says you don't necessarily have to have the expressed consent. There can be implied consent—

The Court: All right—

Mr. Peek:—and so that's the cases that we cited to you, Your Honor, that discuss implied consent. And they impliedly consented when they asked for a jury, when they [39] informed the Court they were going to have a jury—

The Court: You've answered that question before. I—

Mr. Peek: So I—I think, under (c)(2), Your Honor—

The Court: Okay.

Mr. Peek:—that that consent has been more than amplified even as recently as their filing of a draft supplemental complaint.

The Court: All right.

Mr. Peek: And I don't know how to answer that one.

The Court: Let me hear from them. And if I need more from you, I'll, of course, ask for it.

Mr. Peek: Thank you, Your Honor.

The Court: Yeah. So, as he's vacating and you're coming up, so, you know, he's got a point. They've been under the impression for all this time.

And, you know, can you—I mean, again, I don't know that there's any cases, but can you, with your, sort of, actions over the course of the many years of this case up to and including probably about three or four weeks ago, when you filed the motion saying no jury trial—I mean, can that be the sort of consent under (c)(2) that I say, You know what? I am going to order the jury trial in this case?

Ms. McCarty: No —

[40] **The Court:** Why not?

Ms. McCarty:—we don't—we don't believe so, Your Honor.

Let me give you a little bit of history of this case that you don't have at this point.

Initially, when they did their initial disclosures, they sought monetary damages and indicated that they would have an expert that would provide the testimony with regard to monetary damages. So when we filed our initial jury demand, that was part of what we were operating under. That didn't happen, and over the course of the case, they have shifted from monetary damages to disgorgement of profits, which you have correctly indicated is entirely equitable relief.

So the idea that, you know, never, never has—we had any reason to seek a jury demand other than we wanted one is just not the case. The case has evolved. Things have changed. And we are now adjusting based on some of those changes.

Contrary to this idea that there's this horrendous detrimental reliance, I would point you to the *JL Beverage* case, which I discovered while we were working on our motions for limine for damages. It is the case that arose here before Judge Du, and coincidentally, the party that represented Jim Beam, which was the party that was seeking to have the jury demand stricken under very similar facts, was Mr. McCue, who is counsel for Cirrus Design Services and who, as you may have noticed, [41] files every pleading in this court.

So the idea that they didn't know this was an issue is simply not the case. Mr. McCue was on the *JL Beverage* case, which is the case that was decided in 2020 by the Ninth Circuit, which is the case that first brought our attention to this very issue.

With regard to consent, you are correct. I certainly could not find anything in the Ninth Circuit that says there is some sort of implicit consent, and if there is complicit consent or implicit consent, then—then you can order a jury trial. There is no right to a jury trial here. We can't waive something we never had a right to.

I will point your attention to a case out of Central District of California, *Hope Medical Enterprises v. Fagron Compounding Services*, that had exactly the situation we have here. Both sides demanded a jury trial. One side then sought to strike it. And the Court

in the *Hope Medical Enterprises* case found that a jury trial is not required if the Court finds that on some or all of the issues, there is no federal right to a jury trial. If you find there's no federal right to a jury trial, there is no reason to go forward with a jury trial.

Additionally, it cites to *Moore's Federal Practice*, which states that parties have a great deal of latitude on the timing of motions to strike a jury, including on the eve of trial.

[42] So I would point to this case as instructive because it is very much on point to where we are today. We came across the case. We looked at it. It's a case here. It was Judge Du's case. And the bell went off, and we advised the Court of it as soon as the earliest opportunity. We made the reference to it in our motion in limine, and at this time, we do not believe they have cited to any—certainly, not binding authority, and really, not persuasive authority, that there is some sort of an implicit consent that now holds us.

The rule applied the parties', plural, consent. We do not consent. We are seeking to have the jury demand withdrawn because there is no right to a jury trial.

If you look at the *Ciminelli* case, the Court ordered bifurcated actions because some of the issues did have a right to a jury trial while the lost wages did not. That's not the case here. There's not a single claim that offers any right to a jury trial.

The Court: Well, and both parties consented in that case, and it wasn't a reliance, you know. They're saying, at least, if I'm understanding Mr. Peek correctly, that you all consented by virtue of your

actions and—and creating the—their belief that you're going to have a jury trial.

And so, the question becomes, is—do I find that that, then, makes you a party who's consenting because of your actions in the last two years? And that's where I think [43] *Ciminelli* is different as both parties said, No. We want the jury.

And so, I do think pretty clearly that if you all said no, we want a jury, and I said, well, it's not really a basis, but if both parties want a jury, I think it's in my discretion to say yes. So—but anyway, go ahead.

Ms. McCarty: Well, and—

The Court: I guess, I'm saying I'm agreeing with your assessment of that one.

Ms. McCarty: Let's talk a little bit about the prejudice since that was such an issue in your last decision, so I definitely want to touch on it here.

Mr. Peek has brought up the issue of jury instructions and motions in limine. Certainly, we have done—been working on those things, as well. Certainly, I don't think there's any detriment for the parties to have put together motions in limine, and there's certainly nothing to preclude you from ruling on them if you so choose because they would certainly narrow the issues, make a clearer path for both parties as they prepare to trial, and create the efficiency.

When we look at bringing in a jury, I don't have to tell you all of the additional layers that having a jury creates, right? You've got to deal with jury services. We've got to empanel them. That's additional time. We've got to go through the effort of dealing with empaneling a jury during COVID. And [44] while

certainly our numbers are way down and we're all thankful for that, there are going to be those individuals who don't want to be here because of that.

Bringing the jury just even in and out of the courtroom increases the time that is spent.

The Court: Oh, I know the logistics.

Ms. McCarty: The logistics are a nightmare. Additionally, what we are talking about here are federal claims involving two sophisticated parties on a very narrow issue of federal law, which most jurors are not going to have any familiarity with. There really is no benefit to having a trier of fact trying to assess the very things that you're trying to assess today, which are very sophisticated areas of the law.

If we don't need a jury, certainly, for judicial and party economy, we shouldn't have a jury. This case would be so much smoother, so much faster, so much easier before Your Honor than it would be before the folks that receive a jury summons and may or may not want to be here.

The Court: All right. I don't have any other questions of you.

Anything else you want to let me know?

Ms. McCarty: I do not. Thank you, Your Honor.

The Court: All right. Mr. Peek, I'll certainly give you the last word, and you were answering, I think, specifically, [45] my questions earlier. If there are other arguments you want to make, of course, please feel free to do that at this time, as well.

Mr. Peek: Your Honor, I—one area that I do want to correct Ms. McCarty on is I—I think that she said to

you that they only decided to ask for a jury when they saw a pleading by us asking for damages?

I called the Court to—Court’s attention to our brief in which we cite, Your Honor, to the times that they made the demand. So when Ms. McCarty says to you, We only made this when we knew that you had asked for damages, that’s not true. In fact, their demand for a jury trial was on their initial complaint for declaratory relief on infringement.

Demand for jury trial, that’s what you see. We see that on page 8. So they’re the ones who started the ball rolling. We’re the ones that just picked up and say, Okay. We like a jury, as well. We’re fine with a jury.

And, Your Honor, I call your attention—and you see this in my briefing and—on the bottom of page 3, where we say, Courts have held that a party has consented to a jury trial when, for example, a party demanded a jury trial, citing to the *Sprint Nextel*. And again, these are cases outside of the Ninth Circuit, I know. Agree to a jury trial in joint status reports.

So those two prongs are met.

Did not object to a jury trial in pretrial orders and [46] schedules.

We have that cited, as well, Your Honor, in a footnote.

Filed motions to exclude experts from jury consideration.

They did that.

And delayed objecting to a jury demand for a prolonged period of time until shortly before trial.

Every one of those is footnoted, Your Honor. Every one of those points is footnoted in 3 and 4, bottom of page 3 and the top of page 4.

And I think, Your Honor, that that should inform the Court that they have impliedly consented. They asked for the jury. We had planned for a jury. We suffered prejudice by not having a jury. And to say that, Oh, gosh, a jury of our peers won't understand this complex litigation, Your Honor, I've been doing jury trials for 50 years in complex litigation, and I think juries get it. They get it very well. They're very smart. They're very informative. We do our job as we're supposed to do as trial lawyers. That jury will certainly understand.

And I've heard Ms. McCarty and Mr. Connot stand—stand before you. They're very smart lawyers. They know how to get this to a jury. Mr. Connot, I know, has had a lot of jury trials, so this is not something that's going to be over the head of a jury.

[47] And to make—make that kind of an argument when you're on the eve of trial, that only informs me that some—for some reason, they woke up and had an epiphany that maybe they don't want a jury for some other reason that we're not quite aware of.

So, Your Honor, I—I would ask for the—the Court to acknowledge the consent impliedly through all of their actions and allow the jury to go forward.

The Court: All right. Thank you.

All right. Under Federal Rule of Civil Procedure 3982, when a jury demand—or a jury is demanded under Rule 38, the trial on all issues must be by a jury, unless the Court, on motion or on its own, finds that

on some or all of those issues, there's no federal right to a jury trial.

To determine whether the party has the right to a jury trial, the Court must first ascertain whether the statutes underlying the parties' claim afford the right to a jury trial. Cite to *JL Beverage Company, LLC v. Beam, Inc.*, which has previously been referenced by the parties. That's our local case here at 217 Westlaw 5158661 at note 1.

The next citing, *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687707, a 1999 case.

Parties agree and it's pretty clear the law on that does not provide for the right to a jury trial. And so, it would have to then be another statute that affords the right to a jury [48] trial. And what the Court must consider then is the Seventh Amendment and whether the Seventh Amendment affords such a right in this case.

In *Fifty-Six Hope Road Music*, the Ninth Circuit concluded that the Seventh Amendment does not afford the right to a jury calculation of profits because disgorgement is an equitable remedy, and the specific issues of profit determination cannot be said to be traditionally tried—or tied to a jury. Again, that's the same cite.

Again, there's an issue of the timeliness of the motion, as Mr. Peek so accurately points out. And given their reliance on the jury request prior in this case and on many, many times, there's less mandatory authority on the issue of timeliness and waiver. However, there's persuasive authority that a motion to strike a jury can be denied for being too late, as Mr.

Peek has pointed out on a number of occasions, both here and in his pleading.

There's some support for the general proposition that a party can waive their rights under Rules 38 and 39 by their behavior and consent. Again, the one example is *Craig v. Atlantic-Richfield Company*, 19 F.3d 372, a Ninth Circuit case of 1994. However, *Craig* stands for the proposition that consent to a jury demand should be unambiguous and determined.

Additionally, under Rule 39(a)(2), the Court may, on its own initiative, remove a case from the jury docket if it [49] finds that the right to a jury trial did not exist under a statute or constitution.

What Mr. Peek is asking and—and his clients are asking me to do is, under 39(c)(2), find that the parties have consented and, while there isn't any statutory or constitutional basis for a jury trial, that I nonetheless order the jury trial because by their actions over the course of the prior years, they have consented to the jury trial, and therefore, with that consent, I should use my discretion and order the jury trial to continue.

And I—and I must say, you know, Mr. Peek—Ms.—Ms. Bevilacqua, you know, I spent my career trying cases in front of juries. I did bench trials. I certainly know the nuances and the differences between them. And I certainly can understand your reliance, as you've outlined, but I just—I—I can't get to the point where I say that—that they have consented by these actions. And—and I—and I—without the case law and something directing me to say that—that those actions show some sort of consent under 39(c)(2), especially in light of the Judge Du case that was cited where her striking the jury demand at that stage was upheld by

the Ninth Circuit, I—it just—it pains me to—to not give you your jury trial right, but I just can't find that what they did rises to the level of consent under that rule.

And so, I'm going to grant their motion to strike the [50] jury demand, and this matter will proceed before the Court, which changes, obviously, the complexion quite a bit of the case.

I have not started looking at the motions in limine, but I'm going to. And I agree on some level with Ms. McCarty that those may very well narrow some of the issues.

I know that in just glancing at them, there are a couple that aren't going to be issues because it was evidence you didn't want the jury to hear. And since there's not going to be a jury, those might not be as important or ones that have much effect on the trial. But the others, I'll take a look at.

The other thing I've considered, Mr. Peek and Ms. Bevilacqua, was I don't know that you have—do you—and I'm not asking you to make a decision at this stage, but is—I don't know if there will be an interlocutory right to appeal this before the trial. It doesn't appear to be because Judge Du's case went forward, and then you'd have to bring that up later.

And so, I guess, the first question would be, is—with this decision, is everybody still prepared and ready to go to trial on the date we have set later this month?

Mr. Connot: From plaintiff's perspective, Cirrus Aviation, yes, Your Honor.

The Court: All right.

App-24

Ms. Bevilacqua: Yes, we are prepared, Your Honor.

The Court: All right. So we're still going to have the--the hearing--well, you know, I'm going to think about ...

* * *

App-25

Appendix D

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

No. 16-cv-02656

GREAT WESTERN AIR, LLC, dba CIRRUS AVIATION
SERVICES, LLC,

Plaintiff,

v.

CIRRUS DESIGN CORPORATION,

Defendant.

Filed: Jan. 6, 2023

**FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND JUDGMENT FOLLOWING BENCH TRIAL**

This is a trademark infringement case arising out of a dispute between a high-end airplane charter company—Great Western Air, LLC dba Cirrus Aviation Services, LLC (“Cirrus Aviation”)—and a personal airplane manufacturer—Cirrus Design Corporation (“Cirrus Aircraft”)—that share the same name. Cirrus Aviation sues Cirrus Aircraft for declaratory relief that its name does not infringe on Cirrus Aircraft’s trademark of the single word CIRRUS and that it has not engaged in unfair competition.

Cirrus Aircraft counterclaims, arguing that Cirrus Aviation has infringed on its trademark and engaged in unfair competition under federal, state, and common law. Cirrus Aircraft also asks the Court to impose a permanent injunction to keep Cirrus Aviation from using the name, to disgorge Cirrus Aviation of profits attributable to its use of the name, and to require Cirrus Aviation to pay Cirrus Aircraft's attorneys' fees. The parties engaged in a four-day bench trial and, based on the testimony presented, the exhibits, and briefing, the Court finds that Cirrus Aircraft has not met its burden of proving its claims by a preponderance of the evidence and thus has not shown it is entitled to damages or injunctive relief. The Court enters judgment in favor of Cirrus Aviation and against Cirrus Aircraft and closes this case.

FINDINGS OF FACT

Cirrus Aviation is a charter airline catering to “the one percent of the one percent.”¹ Passengers aboard a Cirrus Aviation flight experience the lofty luxury of picking when they would like to fly, avoiding the lines and traffic of commercial airlines, having the plane all to themselves, and taking advantage of opulent onboard amenities.² Prices are, fittingly, sky high. Passengers can expect to pay between \$8,000 and \$340,000 per trip.³ Cirrus Aviation even offers to help customers purchase their own plane to keep in Cirrus Aviation's fleet.⁴ Cirrus Aviation provides the

¹ ECF No. 173 at 61:23-62:13.

² *Id.* at 62:16-25, 91:20-92:17, 94:4-96:11.

³ *Id.*

⁴ *Id.* at 63:1-68:8.

pilot, maintenance, management, and storage.⁵ And when the owner is not using the plane, Cirrus Aviation uses it to fly other customers and the owner earns money in return.⁶

Cirrus Aircraft is a successful plane manufacturer. It makes planes for people who love to fly, not as passengers, but as pilots.⁷ It builds three models: the SR20, the SR22, and the Vision Jet.⁸ Its planes seat between four and seven people, cost between \$1 million and over \$3 million, and are the only planes in the industry to include a parachute for the entire plane.⁹ Since their introduction, Cirrus Aircraft's planes have soared in popularity. The SR series has been the most popular single engine aircraft for twenty years and the Vision Jet has been the most-delivered business jet for three years.¹⁰ To encourage non-pilots to consider plane ownership, Cirrus Aviation has created programs through which it finds pilots to fly the owners' planes and teach the owners how to fly.¹¹ It also offers plane management, maintenance, and storage solutions to make plane ownership a breeze.¹²

⁵ *Id.*

⁶ *Id.*

⁷ ECF No. 175 at 190:6-19.

⁸ ECF No. 108 at 3.

⁹ ECF No. 175 at 229:15-21; ECF No. 174 at 64:13-69:12, 73:16-20, 117:20-121:14, 161:18-20; ECF No. 108 at 3.

¹⁰ ECF No. 174 at 125:14-19, 126:11-22.

¹¹ ECF No. 175 at 204:4-205:15; ECF No. 174 at 85:12-88:12, 140:24-142:10, 162:3-15, 175:18-176:14; Exs. 63, 67-76, 78.

¹² ECF No. 174 at 140:24-142:10, 162:3-15, 173:5-14.

The trouble is, both companies have practically the same name. Their shared name—cirrus—is a type of cloud. A high-altitude, wispy looking cloud. The appearance of which indicates calm skies and excellent flying weather. But the little cloud has led to a turbulent relationship between Cirrus Aviation and Cirrus Aircraft.

I. Cirrus Aircraft's history

Midwestern-raised brothers, Alan and Dale Klapmeier, grew up around aviation. Their grandfather owned planes and their uncle was a pilot.¹³ Older brother Alan first caught the aviation bug, and his younger brother Dale followed suit.¹⁴ The brothers' parents even got their own pilots' licenses, deciding that they would not let their sons fly until they knew how to do it first.¹⁵ The brothers learned to fly in their family's plane and eventually began fixing up their own.¹⁶ They later graduated to building kit planes, which are sold unassembled so enthusiasts can put them together themselves.¹⁷

One year, while the brothers were on break from college, they decided to fly from their family farm in Wisconsin to see their grandparents in Chicago.¹⁸ They called the flight service for a weather update and were disappointed to learn that storms were expected,

¹³ *Id.* at 49:11-50:18.

¹⁴ *Id.* at 50:1-14.

¹⁵ *Id.*

¹⁶ *Id.* at 50:20-25, 53:3-22.

¹⁷ *Id.* at 50:20-25, 53:3-22, 55:2-12.

¹⁸ *Id.* at 56:9-57:8.

and flying was not recommended.¹⁹ Their disappointment only grew when, as they were driving to Chicago, they looked up not to see storm clouds, but feathery cirrus clouds against a blue sky.²⁰ It was excellent flying weather. During that begrudging drive, the two decided to create their own aviation company, and to name it after the cirrus clouds that mocked them as they drove.²¹

At the 1987 Oshkosh Air Show, the Klapmeier brothers unveiled their first Cirrus plane: a kit plane that bragged to be the fastest, biggest, and coolest kit plane on the market.²² But the pair quickly learned that, while people loved the design of the plane, not everyone wanted to build their own.²³ So the brothers found a financial backer and began designing their first ready-made airplanes.²⁴ As part of that process, in 1994, Alan applied for a trademark of the name CIRRUS for use in aircraft and structural parts.²⁵ Later, the company would expand the mark for use in avionics, aircraft inspection and repair, flight instruction and training, aircraft financing, aircraft sales and acquisition, aircraft maintenance, aircraft

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 57:10-58:8.

²³ *Id.* at 60:8-17.

²⁴ *Id.* at 60:8-63:5.

²⁵ Ex. 1 at 001.

insurance, and aircraft management, amongst others.²⁶

In 1993, the brothers began marketing their new planes in teaser-style advertisements that hinted at the “Mystery of Hangar X.”²⁷ And at the July 1994 Oshkosh Airshow, they unveiled their ready-made planes, including the mystery plane: the SR20.²⁸ By about 2000, the SR series was a bestseller.²⁹ By 2011, a foreign entity purchased the company.³⁰ And by about 2019, the Vision Jet became the most-delivered turbo jet.³¹ Cirrus Aircraft had taken off.

II. Cirrus Aircraft discovers Cirrus Aviation

Years later, in 2014, Cirrus Aircraft was surprised to learn that another company was using its name. Todd Simmons—Cirrus Aircraft’s executive vice president of sales, marketing, and support—had stumbled across Cirrus Aviation’s website, cirrusav.com.³² Concerned, he sent the website link to others in the company, asking them to investigate.³³

This was not the first time another company had used the name Cirrus. But certain of the other companies were less concerning to Cirrus Aircraft because of their limited offerings and limited

²⁶ Exs. 1, 2; ECF No. 176 at 31:4-14, 32:1-10.

²⁷ ECF No. 174 at 61:5-63:20.

²⁸ *Id.* at 63:2-64:12.

²⁹ *Id.* at 125:12-20.

³⁰ *Id.* at 106:1-3.

³¹ *Id.* at 125:12-20.

³² Ex. 82; ECF No. 174 at 185:9-22.

³³ Ex. 82; ECF No. 174 at 185:9-22.

geographic presences.³⁴ Cirrus Flight Operations, a Minnesota corporation, had been using the name even before Cirrus Aircraft.³⁵ It offered a variety of aviation services from a small airport in Blaine, Minnesota—including operating charter flights—starting in 1978.³⁶ Currently, it offers charter broker services in which it acts as a middleman, connecting charter clients with charter operators.³⁷ Cirrus Aviation, Inc.—with locations in New Jersey and Arizona—buys and sells turbine engines and related equipment.³⁸ Cirrus Aviation, Incorporated—based in Florida—operates a flight training company and pilot shop.³⁹ And an entity in Oregon once called Alan Klapmeier to discuss using the name Cirrus for a flight school.⁴⁰

Unlike these entities, Cirrus Aviation’s use of the name troubled Cirrus Aircraft.⁴¹ So, shortly after discovering the website, Cirrus Aircraft sent a cease-and-desist letter to Cirrus Aviation, asking it to cease using the Cirrus name.⁴² Cirrus Aviation refused.

III. Cirrus Aviation’s history

Cirrus Aviation insists that its use of the Cirrus name began organically and much in the same way

³⁴ ECF No. 176 at 41:8-43:23.

³⁵ ECF No. 175 at 125:25-126:7.

³⁶ *Id.* at 125:17-139:21.

³⁷ ECF No. 173 at 53:22-55:4; ECF No. 175 at 125:25-126:3.

³⁸ Ex. 1208-B at 40:8-11, 42:8-20.

³⁹ Ex. 1208-A at 9:13-15, 10:2-18, 30:9-11.

⁴⁰ ECF No. 175 at 214:15-215:8.

⁴¹ ECF No. 176 at 41:8-43:23, 51:22-52:13.

⁴² Ex. 1015.

that Cirrus Aircraft's did: a fondness for the little cloud that promises good flying weather. The company is family-owned by Milt Woods and his sons, Greg and Mark.⁴³ Milt had been a commercial pilot since the sixties and, in 1994, decided to start his own aircraft management company.⁴⁴ He named his company Cirrus Aviation Services, Inc. after the wispy, promising cloud with which he was no doubt familiar through his commercial piloting career.⁴⁵ At this point, neither Milt, Greg, nor Mark knew about Cirrus Aircraft.⁴⁶

Milt used the company to engage in the charter market a few different ways between 1994 and 2010. He started by operating a Canadian charter company, then became part owner of a Las Vegas-based charter company in the early 2000s.⁴⁷ Neither company operated under the Cirrus name.

Eventually, Milt switched gears and, through Cirrus Aviation Services, Inc., began brokering charter flights.⁴⁸ But brokering charter flights is not the same as offering them. Eventually, joined by his sons, Milt set his sights higher: on becoming a charter operation.⁴⁹

⁴³ Ex. 1000.

⁴⁴ ECF No. 173 at 47:8-16.

⁴⁵ *Id.*

⁴⁶ Ex. 164-A at 41:16-42:21; Ex. 165-A at 51:6-14; ECF No. 173 at 134:11-16.

⁴⁷ ECF No. 173 at 47:8-48:5, 53:6-14, 131:14-22, 209:6-22.

⁴⁸ *Id.* at 53:20-54:2.

⁴⁹ *Id.* at 55:5-7.

Obtaining the certificate—called a Part 135 certificate—required by the Federal Aviation Agency (“FAA”) to operate charter flights is no simple task.⁵⁰ To simplify the process, in 2010, the Woods family decided to purchase a company that already had its Part 135 certificate.⁵¹ The company—named Great Western Air, LLC—was owned by an individual who had multiple companies under the same name.⁵² Because he still had his other companies, Great Western Air’s owner asked the Woods family to choose a different name, to which they agreed.⁵³ The family decided to name the company Cirrus Aviation Services, LLC because Milt was proud of the name, liked the cloud, and wanted to keep it to maintain his customer base.⁵⁴

Before making that decision, Greg looked through the Air Charter Guide to see if any other Part 135 airlines were using the name but did not check whether the name was trademarked.⁵⁵ Greg did not find any other uses of Cirrus by Part 135 operators.⁵⁶ But by 2010, the Woods family was already aware of Cirrus Aircraft.⁵⁷ They simply did not think Cirrus Aircraft’s use of the name was a concern because Cirrus Aircraft made small piston airplanes, rather

⁵⁰ *Id.* at 56:9-18.

⁵¹ *Id.* at 55:12-15.

⁵² *Id.* at 57:19-25.

⁵³ *Id.* at 57:22-58:21.

⁵⁴ *Id.* at 57:22-58:21, 208:11-14.

⁵⁵ *Id.* at 57:22-58:21.

⁵⁶ *Id.* at 207:11-21.

⁵⁷ *Id.*

than the commercial aircraft in which the Woods family was interested.⁵⁸

Having settled on a name, Cirrus Aviation offered its first charter flight in February of 2010.⁵⁹ In 2014, it received Cirrus Aircraft's cease-and-desist letter. And in 2016, Cirrus Aviation sued Cirrus Aircraft, asking the Court to enter declaratory judgment that its name does not infringe on Cirrus Aircraft's mark and that it had not engaged in unfair competition.⁶⁰

CONCLUSIONS OF LAW

I. Theories of liability

Cirrus Aviation asks the Court to issue a declaration that it has not infringed on Cirrus Aircraft's trademark of the word CIRRUS and that Cirrus Aviation's use of that name is not unfair competition. Cirrus Aircraft asks the Court to find that Cirrus Aviation infringed on its trademark and engaged in unfair competition under the Lanham Act, the Nevada Deceptive Trade Practices Act, and common law. The analysis for each theory is the same.⁶¹

The test asks: (1) whether the plaintiff has a protectable ownership interest in the mark; and (2) whether the defendant's use of the mark is likely

⁵⁸ *Id.*

⁵⁹ *Id.* at 133:24-134:1.

⁶⁰ ECF No. 1.

⁶¹ See *M2 Software, Inc. v. Madacy Entertainment*, 421 F.3d 1073, 1080 (9th Cir. 2005); see *New West Corp. v. NYM Co. of Calif., Inc.*, 595 F.2d 1194, 1201 (9th Cir. 1979); see *Mayweather v. Wine Bistro*, No. 2:13-cv-210-JAD-VCF, 2014 WL 6882300, at *6 (D. Nev. Dec. 4, 2014).

to cause consumer confusion.⁶² Here, the parties do not dispute Cirrus Aircraft's protectable interest in the mark. They dispute whether Cirrus Aviation's use of that mark is likely to cause consumer confusion.

Likelihood of confusion in the Ninth Circuit depends on eight factors: (1) strength of the mark; (2) proximity of the goods; (3) similarity of the marks; (4) evidence of actual confusion; (5) marketing channels used; (6) type of goods and the degree of care likely to be exercised by the purchaser; (7) defendant's intent in selecting the mark; and (8) likelihood of expansion of the product lines.⁶³ Not every factor carries equal weight.⁶⁴ The Ninth Circuit has explained that courts should consider the factors together to decide if, under a totality of the circumstances, a likelihood of confusion exists.⁶⁵

Using these factors, Cirrus Aircraft must prove by a preponderance of the evidence that Cirrus Aviation's use of the mark is likely to cause confusion.⁶⁶ The Court finds that Cirrus Aircraft has not met this

⁶² See *Ironhawk Technologies, Inc. v. Dropbox, Inc.*, 2 F.4th 1150, 1159 (9th Cir. 2021).

⁶³ See *AMF, Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348-49 (9th Cir. 1979).

⁶⁴ See *Thane Int'l Inc. v. Trek Bicycle Corp.*, 305 F.3d 894, 901 (9th Cir. 2002).

⁶⁵ See *Ironhawk*, 2 F.4th at 1161.

⁶⁶ See *Stone Creek Incorporated v. Omnia Italian Design Incorporated*, No. cv-13-00688-PHXDLR, 2018 WL 1784689, at *1, n.2 (D. Ariz. April 12, 2018) *aff'd*, 808 F. App'x 459 (9th Cir. 2020); Ninth Circuit Manual of Model of Civil Jury Instructions § 15.6 (2020) (addressing the elements and burden of proof for trademark infringement under 15 U.S.C. § 1114(1)).

burden of proof. It thus enters judgment in favor of Cirrus Aviation.

A. Strength of the mark

Trademark law offers greater protection to marks that are “strong,” meaning, “distinctive.”⁶⁷ Courts in the Ninth Circuit analyze a mark’s strength in terms of conceptual strength and commercial strength.⁶⁸ Conceptual strength depends on the obviousness of a mark’s connection to the good or service to which it refers.⁶⁹ Commercial strength is based on actual marketplace recognition.⁷⁰

1. Conceptual strength

Conceptual strength exists along a spectrum of five categories ranging from strongest to weakest.⁷¹ Generic marks—like “Light Beer”—are not eligible for trademark protection.⁷² Descriptive marks—like “speedy,” “friendly,” or “green”—are not entitled to trademark protection unless they have acquired secondary meaning.⁷³ Suggestive marks—like “Roach

⁶⁷ *Ironhawk*, 2 F.4th at 1162.

⁶⁸ *JL Beverage Company, LLC v. Jim Beam Brands Co.*, 828 F.3d 1098, 1106-1107 (9th Cir. 2015).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² See *Brookfield Communications, Inc. v. West Coast Entertainment Corp.*, 174 F.3d 1036, 1058 n. 19 (9th Cir. 1999); see *Miller Brewing Co. v. G. Heileman Brewing Co.*, 561 F.2d 75 (7th Cir. 1977).

⁷³ See *Zobmondo Entertainment, LLC v. Falls Media, LLC*, 602 F.3d 1108, 1114 (9th Cir. 2010); see *Union Nat’l Bank of Tex.*,

Motel” insect trap—suggest a product’s features and require consumers to exercise some imagination to associate the suggestive mark with the product.⁷⁴ They are thus often entitled to trademark protection.⁷⁵ Arbitrary marks—like “Black and White” scotch whiskey—are made up of words commonly used in the English language but are entitled to federal trademark protection because they serve to identify a particular source of a product.⁷⁶ Fanciful marks—like “Clorox”—are made up terms and are automatically entitled to trademark protection.⁷⁷

In *American Home Products Corp. v. Johnson Chemical Co., Inc.*, the Second Circuit Court of Appeals explained that “Roach Motel” is at least a suggestive mark because it invokes the idea of a “fanciful abode for roaches.”⁷⁸ The image was significant in relation to the design of the product, an open-ended box containing an attractant for bugs and a sticky adhesive to prevent the bug from escaping.⁷⁹ The trap was shaped to prevent the bug from

Laredo, Tex. v. Union Nat’l Bank of Tex., Austin, Tex., 909 F.2d 839, 845 (5th Cir. 1990).

⁷⁴ See *Brookfield Comm.*, 174 F.3d at 1058 n. 19; see *American Home Prods. Corp. v. Johnson Chem. Co.*, 589 F.2d 103 (2d Cir. 1978).

⁷⁵ See *Zobmondo*, 602 F.3d at 1113.

⁷⁶ See *Brookfield Comm.*, 174 F.3d at 1058 n. 19; see *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 314 F.2d 149, 154 (9th Cir. 1963).

⁷⁷ See *Zobmondo*, 602 F.3d at 1113; see *Clorox Chemical Co. v. Chlorit Mfg. Corporation*, 25 F.Supp. 702, 205 (E.D.N.Y. 1938).

⁷⁸ See *American Home Prods.*, 589 F.2d at 107.

⁷⁹ See *id.* at 104.

leaving—even if not stuck on the adhesive—and used the slogan, “Roaches Check In...But They Don’t Check Out,” to reinforce the “motel” theme.⁸⁰

The Ninth Circuit discussed the arbitrary nature of “Black & White” scotch whisky in *Fleischmann Distilling Corp. v. Maier Brewing Co.*⁸¹ It explained that the term was not descriptive of the whisky, nor did the whisky have anything to do with the qualities of black and white.⁸² Having no relation to whisky, the court concluded that, used in the alcoholic beverage industry, the name “Black and White” had come to mean a particular brand of whisky.⁸³

Here, the “Cirrus” mark is on the strong end of the spectrum, falling in between suggestive and arbitrary. Cirrus Aircraft argues that its mark is arbitrary: a common word but identifying a particular source of airplanes. Cirrus Aviation argues that the mark is suggestive: requiring consumers to exercise their imagination to associate a cloud with air travel. The mark falls somewhere in the middle.

The “Cirrus” mark is more than suggestive when compared with “Roach Motel.” “Roach Motel” suggested a trap that bugs would enter through an opening, much as a person might enter a motel through a doorway. The term suggested the single-opening feature of the trap. But Cirrus Aircraft has provided no evidence that “Cirrus” suggests any features of Cirrus Aircraft’s planes. While the term

⁸⁰ *Id.* at 104-105.

⁸¹ *See Fleischmann Distilling Corp.*, 314 F.2d at 153-54.

⁸² *See id.*

⁸³ *See id.*

could suggest that the plane flies amongst cirrus clouds, that suggestion is less obvious than “Roach Motel” insect traps, which were designed and marketed to invoke a motel.

On the other hand, the “Cirrus” mark is not entirely arbitrary to airplanes like “Black & White” is to whisky. While not descriptive of the plane itself, cirrus clouds are indicative of good flying weather. The term “cirrus,” as used in the aviation industry, thus does not *only* mean a particular brand of plane.

Despite falling between two of the spectrum’s guideposts, the mark still falls on the stronger end of the spectrum. The mark is thus conceptually strong. But the Court must still consider that strength in context of the market in which it is used.

2. Commercial strength.

Commercial strength refers to market presence and can be supported by evidence of advertising expenditures, which increase that presence.⁸⁴ Evidence of commercial strength can strengthen an otherwise conceptually weak mark.⁸⁵ But use of similar marks by third-party companies in the relevant industry can weaken it.⁸⁶

Here, other uses of the “Cirrus” mark in the aviation industry broadly, and in the charter industry specifically, weaken the mark in context. In support of its contention that it maintains a strong market presence, Cirrus Aircraft introduced evidence of the

⁸⁴ See *JL Beverage*, 828 F.3d at 1107.

⁸⁵ *Brookfield Comm.*, 174 F.3d at 1058.

⁸⁶ *M2 Software, Inc.*, 421 F.3d at 1087-8.

awards it has won,⁸⁷ articles about its success,⁸⁸ its advertisements,⁸⁹ its founders' induction into the National Aviation Hall of Fame,⁹⁰ and testimony from its president about how certain of its planes have been bestsellers in their categories for years running.⁹¹ It also introduced evidence that it spends up to \$10 million a year in marketing.⁹² But given the testimony at trial that charter flights and personal aircraft attract different types of customers, the Court is not convinced that strength in the personal aircraft market equates entirely to strength in the charter market. It is not clear that charter customers would be interested in the success of a personal aircraft.⁹³ And although Cirrus Aircraft introduced evidence that some charter companies have Cirrus Aircraft planes in their fleets,⁹⁴ it did not offer evidence showing how much of the charter market its planes occupy or what type of advertising it has done in that market.

Additionally, Cirrus Aviation has introduced evidence that three other companies in the aviation

⁸⁷ Ex. 29.

⁸⁸ Ex. 30; Ex. 37.

⁸⁹ Ex. 35; Ex. 39.

⁹⁰ Ex. 36.

⁹¹ ECF No. 174 at 125:12-126:24.

⁹² ECF No. 176 at 87:22-25.

⁹³ *Compare* ECF No. 173 at 62:9-25 (Greg Woods explaining that customers of their charter flights choose to get into the back of an airplane and the efficiency for which they choose to take charter as opposed to commercial flights) *with* ECF No. 175 at 190:6-19 (Alan Klapmeier explaining that the concept of “owner flown” was part of the philosophy and market for Cirrus Aircraft).

⁹⁴ Ex. 152; ECF No. 175 at 32:14-16.

market use the name Cirrus, one of which used it in charter.⁹⁵ Cirrus Aircraft described these companies as geographically limited “mom-and-pop” operations and noted that it is not required to litigate every use of its mark. Even so, evidence of these companies weakens the Cirrus mark’s commercial strength, albeit less so than if they were larger companies. Taking the conceptual strength of the mark together with its commercial weakness, the Court finds that this factor is neutral in the analysis.

B. Proximity of the goods

Goods and services are related when they are complementary, similar in use or function, or sold to the same class of purchasers.⁹⁶ The plaintiff need not establish that the parties are direct competitors.⁹⁷ Instead, the Ninth Circuit has adopted a flexible approach to the notion of competition.⁹⁸ Under that approach, related goods or services are those which would reasonably be thought by the buying public to come from the same source if sold under the same mark.⁹⁹ The proximity of the goods also becomes less important where consumers exercise a great deal of care because, “rather than being misled, the consumer

⁹⁵ ECF No. 175 at 127:22-128:9 (Cirrus Flight Operations); *id.* at 214:15-215:8 (a Cirrus flight school); Ex. 1208-B at 40:8-11, 42:8-20 (Cirrus Aviation, Inc.); Ex. 1208-A at 9:13-15, 10:2-18, 30:9-11 (Cirrus Aviation Incorporated).

⁹⁶ *Ironhawk*, 2 F.4th at 1163.

⁹⁷ *Id.*

⁹⁸ *Rearden LLC v. Rearden Commerce, Inc.*, 683 F.3d 1190, 1212-13 (9th Cir. 2012).

⁹⁹ *Rearden.*, 683 F.3d at 1212-13.

would merely be confronted with choices among similar products.”¹⁰⁰

Here, while Cirrus Aircraft’s planes and Cirrus Aviation’s flights are complementary and similar in use and function, they are not sold to the same class of purchasers. Cirrus Aircraft has produced evidence that its planes and Cirrus Aviation’s flights are complementary by demonstrating that other charter companies have Cirrus Aircraft’s planes in their fleets.¹⁰¹ And on the surface, Cirrus Aircraft’s planes and Cirrus Aviation’s flights are similar in use and function: using aircraft to transport passengers.

But Cirrus Aircraft’s planes and Cirrus Aviation’s flights are sold to different classes of purchasers. Of course, both classes of purchasers are presumably very wealthy. But Cirrus Aircraft’s purchasers largely want to be pilots.¹⁰² And Cirrus Aviation’s purchasers largely want to be passengers.¹⁰³

The difference between the two companies’ class of purchasers weakens the complementary nature of Cirrus Aircraft’s planes and Cirrus Aviation’s flights. Even when Cirrus Aircraft’s planes are part of charter fleets—and thus complementary to the charter service Cirrus Aviation offers—Cirrus Aircraft’s class of purchasers are charter companies, not individuals. Other charter companies are not buying flights from Cirrus Aviation. They are its direct competitors.

¹⁰⁰ *Network Automation, Inc. v. Advanced Systems Concepts, Inc.*, 638 F.3d 1137, 1150 (9th Cir. 2011).

¹⁰¹ Ex. 152 at 1-5.

¹⁰² ECF No. 175 at 190:6-19, 194:5-12.

¹⁰³ ECF No. 173 at 62:16-25.

The difference between the two companies' class of purchasers also weakens the similarity in use and function of Cirrus Aircraft's planes and Cirrus Aviation's flights. While on the surface the two companies both offer a way to fly in a private or semi-private plane, the two companies offer different experiences to purchasers. Cirrus Aviation's typical purchasers prioritize the convenience of charter flights.¹⁰⁴ On the other hand, Cirrus Aircraft's typical purchasers are pilots for whom plane ownership involves significantly more responsibilities, like qualifying to fly the plane, maintaining it, and housing it in an appropriate hangar.¹⁰⁵

The difference between the classes of purchasers also weakens the similarity in use and function of Cirrus Aviation and Cirrus Aircraft's ancillary services. Both companies offer airplane acquisition, airplane maintenance, airplane management, and pilot training services.¹⁰⁶ But both companies only offer these services to existing customers (or in the case of Cirrus Aviation's pilot training, to potential employees) not to the public.

Because the two companies have different classes of purchasers, the complementary nature of their respective planes and flights is lessened, and their use

¹⁰⁴ *Id.*

¹⁰⁵ ECF No. 174 at 31:2-19, 85:16-86:1; 141:11-142-10.

¹⁰⁶ ECF No. 173 at 63:1-66:5 (Cirrus Aviation's aircraft acquisition, management, and maintenance services); *id.* at 110:13-111:10 (Cirrus Aviation's pilot training program); ECF No. 174 at 85:15-86:4 (Cirrus Aircraft's pilot training program); *id.* at 141:3-142:25 (Cirrus Aircraft's airplane management and maintenance program).

and function are more dissimilar. Under the Ninth Circuit's flexible approach, the Court cannot find that Cirrus Aircraft's planes and Cirrus Aviation's flights would reasonably be thought by the buying public to come from the same source. This factor weights in favor of Cirrus Aviation.

C. Similarity of the marks

Similarity of marks is judged by appearance, sounds, and meaning.¹⁰⁷ Similarities are weighed more heavily than differences.¹⁰⁸ The marks must be considered in their entirety and as they appear in the marketplace.¹⁰⁹

Here, the marks' similarities outweigh their differences. The marks are nearly identical in appearance and sound. As Cirrus Aircraft pointed out, the first word is entirely identical, while the second is similar because both start with "a" and pertain to the aviation industry.¹¹⁰ They are also similar in appearance and sound as they appear in the marketplace because Cirrus Aviation often shortens its name on its website and promotional materials to "Cirrus."¹¹¹

On the other hand, there are some differences. The articles about Cirrus Aviation which Cirrus Aircraft uses as evidence of the company using the single word "Cirrus" show that the articles use the

¹⁰⁷ *Ironhawk*, 2 F.4th at 1164-65.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ ECF No. 175 at 65:25-66:24.

¹¹¹ Ex. 159; Ex. 84; Ex. 136; Ex. 163; ECF No. 175 at 66:6-10.

term in context. They initially identify the company as “Cirrus Aviation” and then use the single term “Cirrus” as a shorthand.¹¹² Cirrus Aviation also does not put its logos on or anywhere inside its planes, unlike the way Cirrus Aircraft displays its mark.¹¹³ And while the term “Cirrus” is identical between both companies, the terms that follow imply slight differences. “Aircraft” implies the actual plane, while “aviation” implies something related to flying more generally. Nonetheless, because similarities are weighed more than differences, and because the differences are so slight, this factor weighs in favor of Cirrus Aircraft.

D. Evidence of actual confusion

Evidence of actual confusion is strong evidence of likelihood of confusion.¹¹⁴ Because finding this evidence is hard, the failure to prove actual confusion is not dispositive.¹¹⁵ This factor is heavily weighed only when there is evidence of past confusion or perhaps when the particular circumstances indicate that evidence should have been available such as when two similar marks have coexisted for some time.¹¹⁶ “The test for likelihood of confusion is whether a reasonably prudent consumer in the marketplace is likely to be confused as to the origin of the good or service bearing one of the marks...[t]rademark

¹¹² Ex. 84; Ex. 136; Ex. 163.

¹¹³ ECF No. 173 at 84:12-86:2.

¹¹⁴ *Ironhawk*, 2 F.4th at 1165-66.

¹¹⁵ *Id.*

¹¹⁶ *Id.*; see *Cohn v. Petsmart, Inc.*, 281 F.3d 837, 842-43 (9th Cir. 2002).

infringement protects only against mistaken purchasing decisions and not against confusion generally.”¹¹⁷

The Ninth Circuit’s decision in *Rearden LLC v. Rearden Commerce, Inc.* stands for the proposition that non-consumer confusion is relevant to the likelihood of confusion in three scenarios: (1) if that confusion could turn into actual consumer confusion, like in the case of potential customers; (2) if that confusion could create an inference of consumer confusion by serving as a proxy or substitute for evidence of actual consumer confusion; or (3) if that confusion could contribute to consumer confusion by influencing consumer perception and decision making.¹¹⁸ In *Rearden*, a group of related entertainment, technology, and production companies using “Rearden” in their name (the “Rearden Companies”) sued a concierge company named “Rearden Commerce” for trademark infringement.¹¹⁹ The district court granted summary judgment in favor of Rearden Commerce.¹²⁰ The Ninth Circuit remanded, finding that questions of fact remained, particularly regarding non-consumer evidence of confusion and the “very real possibility that confusion on the part of at least certain non-consumers could”

¹¹⁷ *Rearden*, 683 F.3d at 1213-19 (internal citations and quotations omitted).

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 1195-97.

¹²⁰ *Id.* at 1202.

fall under the three scenarios where that confusion is relevant.¹²¹

In analyzing the Rearden Companies' confusion evidence, the court first acknowledged the Rearden Companies' evidence of consumer confusion.¹²² One instance involved a customer expressing confusion as to which "Reardon" it was conducting business with.¹²³ Others involved emails that Rearden Commerce's customers accidentally sent to the Rearden Companies.¹²⁴

The court then analyzed non-consumer confusion which it asserted could fall into any one of the three categories.¹²⁵ Trade publications had confused the two companies and one article observed that "the main question in the conference hallways [at the PC Forum trade show] was whether the company [Rearden Commerce] had any relationship with [one of the Rearden Companies]..."¹²⁶ A Rearden Commerce employee admitted in his deposition that he was asked "about a dozen times" in a trade show whether the companies were somehow affiliated.¹²⁷ While the court explained that the evidence could fall under any one of the three non-consumer confusion categories, "[i]n particular, it appears that the confusion of presumably knowledgeable and experienced trade

¹²¹ *Id.* at 1216-17.

¹²² *Id.* at 1217.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at 1217-18.

¹²⁶ *Id.*

¹²⁷ *Id.*

journalists and trade show organizers could very well influence the purchasing decisions of consumers.”¹²⁸

Next, the court analyzed evidence of non-consumer confusion from individuals in a position to influence consumers or serve as their proxy.¹²⁹ It noted that prospective employees for the Rearden Companies, a vendor, and even an investor that had previously contracted with Rearden Commerce and was later negotiating with the Rearden Companies had all expressed confusion.¹³⁰ Additionally, sophisticated parties like the Rearden Companies’ auditors and even their patent attorneys had demonstrated confusion.¹³¹ Rearden Commerce’s public relations consultant had even written an email that the existence of the Rearden Companies “might confuse folks in the beginning.”¹³² Ultimately, based on this evidence, the court found that genuine issues of material fact existed with respect to the evidence of actual confusion factor.¹³³

Here, Cirrus Aircraft has not produced strong evidence of actual confusion, despite the thirteen years the two companies have co-existed. And while Cirrus Aircraft has produced evidence of actual confusion, nearly all of it consists of non-consumer confusion. It is not apparent from this evidence that a reasonably prudent consumer in the marketplace is

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* at 1218-19.

likely to be confused about the origin of their charter flight or personal aircraft.

As a preliminary matter, unlike the Reardon Companies' multiple pieces of evidence of consumer confusion, Cirrus Aircraft has only offered two instances of confusion by a consumer, one of which is not clearly confusion. One involved a Cirrus Aircraft customer calling Cirrus Aviation looking for maintenance on their Cirrus Aircraft plane.¹³⁴ This is just like the misdirected customer emails in *Rearden* and is straightforwardly consumer confusion.

The other, however, is not so straightforward. It involved a Cirrus Aircraft customer and influential pilot—Lt. Col. Dan Rooney—posting a picture of his Cirrus Aircraft plane, but tagging Cirrus Aviation's Instagram handle, @cirrusav.¹³⁵ This is not straightforward confusion because neither party submitted evidence showing whether Lt. Col. Rooney was actually confused, made a typo, or intended to tag Cirrus Aviation. And while many of the other social media posts Cirrus Aircraft entered into evidence appear to depict consumers, the Court received no evidence confirming that.¹³⁶

The rest of Cirrus Aircraft's confusion evidence is from non-consumers. But that evidence is weaker than that in *Rearden*. One article included a disclaimer that Cirrus Aviation is not the manufacturer of Cirrus Aircraft's Vision Jet.¹³⁷ But

¹³⁴ ECF No. 175 at 70:24-71:12.

¹³⁵ Ex. 101; ECF No. 176 at 115:8-117:2.

¹³⁶ Exs. 101-129, 131-133.

¹³⁷ Ex. 137.

this is weaker than the evidence of trade publications that confused the two companies in *Rearden*. Although the disclaimer appears intended to prevent confusion, the inference that Cirrus Aircraft asks the Court to draw—that consumers would have been confused without it—is too attenuated. Comedian Rob Riggle kicked off the National Business Aviation Association 2021 event and erroneously referred to Cirrus Aviation as the company that flew him to the event, rather than Cirrus Aircraft.¹³⁸ But while nearly all attendees likely heard this comedian’s jokes, the Court received no evidence that the difference between Cirrus Aviation and Cirrus Aircraft then became “the main question in the conference hallways” like the conferences in *Rearden*. And the Court has received no evidence that Mr. Riggle is knowledgeable and experienced enough to influence the purchasing decision of consumers like the trade show organizers and trade journalists were in *Rearden*.

Cirrus Aircraft’s remaining non-consumer confusion evidence could fall into the last two categories—coming from those in a position to influence customers (social media posts) or serve as their proxy (vendor emails)—but is still weak evidence. Cirrus Aircraft offered multiple social media posts depicting its planes but tagging Cirrus Aviation’s social media handle—@cirrusav—or including hashtags appearing to reference Cirrus Aviation—like #cirrusaviation.¹³⁹ But unlike the court in *Rearden*, which had the benefit of knowing that

¹³⁸ Ex. 139.

¹³⁹ Exs. 101-129, 131-133.

prospective employees, a vendor, an investor, auditors, and attorneys had expressed confusion, here, the Court lacks information about the people making the social media posts. It is unclear what, if any, association these people have with Cirrus Aircraft or if they are even people at all, as opposed to bots.¹⁴⁰ Without more information about these people (or bots) and their intent in using the Cirrus Aviation handle and hashtags, the Court cannot speculate that they were actually confused between the companies. And while people viewing these posts might conceivably become confused, the Court again would have to speculate about this because it has not received any evidence that this has happened, let alone that it has happened to a consumer.

Finally, Cirrus Aircraft has offered evidence of vendor confusion. Keith Baulsir—senior director of global partnerships for the Las Vegas Golden Knights—emailed Ben Kowalski—senior vice president of sales and marketing for Cirrus Aircraft—believing him to be associated with Cirrus Aviation.¹⁴¹ An account executive with Trustpilot also reached out to principals for both companies on the same email, asking if Cirrus Aviation would be interested in using Trustpilot to boost its web traffic.¹⁴² But these two emails, even with the social media posts, are not as strong as the evidence of a vendor, an investor,

¹⁴⁰ A bot is short for “robot” and refers to a computer program that mimics the actions of a person, often to perform malicious actions. *See Bot*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/bot> (last visited January 4, 2022).

¹⁴¹ Ex. 14.

¹⁴² Ex. 12.

auditors, and attorneys who were confused in *Rearden*, particularly considering the thirteen years that Cirrus Aviation and Cirrus Aircraft have co-existed. This factor weighs in favor of Cirrus Aviation.

E. Marketing channels used

This factor asks whether the parties' marketing channels, consumer basis, and how they advertise their products overlap.¹⁴³ The Ninth Circuit has recognized that similar webpages might exacerbate the likelihood of confusion.¹⁴⁴ But on the other hand, "[i]t would be the rare commercial retailer that did not advertise online, and the shared use of a ubiquitous marketing channel does not shed much light on the likelihood of consumer confusion."¹⁴⁵

Cirrus Aircraft and Cirrus Aviation's marketing channels do not appear to significantly overlap. While both parties presented evidence that certain of their marketing is the same type—referrals and websites—the Court is not convinced that these constitute the same channels. Both parties having websites is not enough to demonstrate that they use the same marketing channels, especially because it is not clear that either party relies heavily on its site for sales. Over half of Cirrus Aircraft's sales are attributable to referrals.¹⁴⁶ About 70% of Cirrus Aviation's flights are sold to charter brokers while about 20% are sales controlled through business intermediaries.¹⁴⁷ Thus,

¹⁴³ *Ironhawk*, 2 F.4th at 1166.

¹⁴⁴ *Brookfield Comm.*, 174 F.3d at 1057.

¹⁴⁵ *Network Automation, Inc.*, 638 F.3d at 1151.

¹⁴⁶ ECF No. 176 at 122:8-17.

¹⁴⁷ ECF No. 173 at 87:12-88:7.

while having similarly named and looking websites might result in a person going to the wrong website, the Court is not convinced that the misdirection would result in a mistaken sale. Additionally, given the different things each party offers—a plane ticket versus a plane itself—it is not obvious that their referral networks would overlap. And the Court has not received compelling evidence that they do. Although over a hundred of Cirrus Aircraft and Cirrus Aviation’s customer’s names are similar, the Court has received no evidence that confirms that the Michael Smith on Cirrus Aviation’s customer list is the same person as the Michael Smith on Cirrus Aircraft’s.¹⁴⁸ This factor weighs in favor of Cirrus Aviation.

F. Type of goods and the degree of care likely to be exercised by the purchaser

The sixth *Sleekcraft* factor requires the court to assess the customers’ sophistication and ask whether a reasonably prudent customer would take the time to distinguish between the two product lines.¹⁴⁹ When the goods are expensive, the buyer can be expected to exercise greater care in his purchases.¹⁵⁰ The same is true if the goods are marketed primarily to expert buyers.¹⁵¹

The Court finds this factor to weigh in Cirrus Aviation’s favor because Cirrus Aircraft’s planes and Cirrus Aviation’s flights are both very expensive and

¹⁴⁸ Ex. 157 at 005.

¹⁴⁹ *Ironhawk*, 2 F.4th at 1167.

¹⁵⁰ *Id.* (internal citations and quotations omitted).

¹⁵¹ *Brookfield Comm.*, 174 F.3d at 1060.

marketed to expert buyers. Cirrus Aviation's flights range from about \$8,000 to about \$340,000 per flight.¹⁵² A Cirrus Aircraft plane costs between \$1 million and over \$3 million.¹⁵³ It is unlikely a buyer—particularly the charter brokers or plane enthusiasts to whom Cirrus Aviation and Cirrus Aircraft market—would not second guess a \$3 million plane ticket or \$340,000 plane. People looking to buy a plane—even if they are not experts or enthusiasts—must also consider training, storage, and maintenance, making it unlikely that they would purchase a plane without researching it. Similarly, the charter brokers and travel managers who make up the bulk of Cirrus Aviation's sales have expertise in travel arrangements and often answer to discerning clients. It is difficult to imagine that one of these brokers might accidentally buy their client a plane, instead of a flight. This factor weighs in favor of Cirrus Aviation.

G. Intent in selecting the mark

This factor favors the plaintiff where the alleged infringer adopted his mark with knowledge, actual or constructive, that it was another's trademark.¹⁵⁴ When an alleged infringer knowingly adopts a mark like another's, courts will presume an intent to deceive the public.¹⁵⁵ Absence of malice is no defense.¹⁵⁶ In the

¹⁵² ECF No. 173 at 91:20-92:17, 94:4-6.

¹⁵³ ECF No. 174 at 161:13-20.

¹⁵⁴ *Ironhawk*, 2 F.4th at 1167-68 (citing *JL Beverage*, 828 F.3d at 1111-12).

¹⁵⁵ *JL Beverage*, 828 F.3d at 1111-12.

¹⁵⁶ *Dreamwerks Production Group, Inc. v. SKG Studio*, 142 F.3d 1127, 1132 n.12 (9th Cir. 1998).

case of forward confusion—where consumers believe that goods or services bearing the junior mark came from or were sponsored by the senior mark holder—the court asks whether the defendant, in adopting its mark, intended to capitalize on the plaintiff's goodwill.¹⁵⁷

This factor favors Cirrus Aviation. Cirrus Aircraft asks the Court to narrowly focus on 2010, when the Woods family bought Great Western Air and began operating it under the new entity and plaintiff in this matter, Cirrus Aviation Services, LLC.¹⁵⁸ By 2010, Cirrus Aircraft had been producing its SR20 and SR22 planes for about ten years—which planes enjoyed significant popularity—and had already announced its intent to develop the Vision Jet.¹⁵⁹ And by 2010, the Woods family was aware of Cirrus Aircraft.¹⁶⁰

But Cirrus Aircraft oversimplifies the story. While Cirrus Aviation, LLC officially adopted its name in 2010, Milt Woods had adopted the Cirrus name for his other company in 1994.¹⁶¹ This was before Cirrus Aircraft obtained its first FAA certification and before Cirrus Aircraft's trademark registration was approved.¹⁶² Milt, Mark, and Greg Woods each

¹⁵⁷ *Marketquest Group, Inc. v. BIC Corp.*, 862 F.3d 927, 932, 934 (9th Cir. 2017).

¹⁵⁸ ECF No. 173 at 204:5-205:22.

¹⁵⁹ ECF No. 108 at 3; ECF No. 174 at 125:14-19.

¹⁶⁰ ECF No. 173 at 207:14-21, 210:9-16; Ex. 164 at 41:16-42:21; Ex. 165 at 51:6-52:6.

¹⁶¹ Ex. 1003.

¹⁶² Ex. 164 at 41:16-42:21; Ex. 165 at 51:6-14; ECF No. 173 at 134:11-16; ECF No. 175 at 185:2-13, 187:9-14; ECF No. 108 at 3.

testified that, when Milt Woods first began using the Cirrus name in 1994, none of them had heard of Cirrus Aircraft.¹⁶³ Arguably, Cirrus Aviation adopted the Cirrus mark in 1994, without knowledge of Cirrus Aircraft's trademark.

But even if the Court accepts Cirrus Aircraft's argument that the only adoption that counts is when Cirrus Aviation adopted the name in 2010, Cirrus Aviation has advanced reasonable arguments that it did not intend to capitalize on Cirrus Aircraft's goodwill. Greg Woods explained that his family picked the name because his father liked the name, was proud of it, and wanted to keep using it.¹⁶⁴ Given the history of the Woods family's use of the name, the Court finds that explanation to be credible. And because Cirrus Aircraft only offered its SR20 and SR22 models—single-engine propeller aircrafts with four or five seats¹⁶⁵—in 2010, it is not clear to the Court that Cirrus Aviation's fledgling charter operation would have benefited from being associated with Cirrus Aircraft. This factor weighs in favor of Cirrus Aviation.

H. Likelihood of expansion of the product lines

In the context of non-competing goods, a “strong possibility” that either party may expand his business to compete with the other will weigh in favor of finding

¹⁶³ Ex. 164 at 41:16-42:21, Ex. 165 at 51:6-14; ECF No. 173 at 134:11-16.

¹⁶⁴ ECF No. 173 at 58:12-21.

¹⁶⁵ ECF No. 108 at 3.

that the present use is infringing.¹⁶⁶ Concrete evidence of an expansion plan is relevant to this factor.¹⁶⁷ Expressing interest in expanding is insufficient because “mere speculation is not evidence.”¹⁶⁸

As a preliminary matter, the Court does not find Cirrus Aircraft and Cirrus Aviation to be competitors. As discussed more fully above, the companies sell to different classes of purchasers and offer their ancillary services only to their customers. Cirrus Aircraft sells planes to people who want to pilot their own planes. Cirrus Aviation sells plane tickets to people who want to be passengers. And even though the two offer identical ancillary services of acquisition, maintenance, management, and pilot training services, because neither company offers them to the public, these services are not competitive.

The Court also is not convinced that either company will expand to compete with the other. The Court has received no evidence that Cirrus Aviation intends to manufacture aircraft. And Cirrus Aircraft, because of its foreign ownership, cannot legally hold the Part 135 certificate required under FAA regulations to operate charter flights.¹⁶⁹

¹⁶⁶ *Ironhawk*, 2 F.4th at 1168.

¹⁶⁷ *Survivor Media, Inc. v. Survivor Production*, 406 F.3d 625, 634 (9th Cir. 2005).

¹⁶⁸ *Id.*

¹⁶⁹ ECF No. 174 at 104:21-106:3; 14 C.F.R. § 119.33 (providing that air carriers operating under Part 135 must be citizens of the United States).

Cirrus Aircraft nonetheless argues that it has always had an interest in entering the charter market, as evidenced by its on-demand pilot programs through which it connects Cirrus Aircraft plane owners with a pilot.¹⁷⁰ But the contracts through which Cirrus Aircraft plane owners enter into those programs explicitly state that the pilots may not fly as charter pilots under Part 135.¹⁷¹ Cirrus Aircraft also relies on the fact that certain Part 135 charter operations include its planes in their fleets to argue that it participates in the charter market.¹⁷² But selling planes to charter companies is not the same as competing in the charter market. If it was, Cirrus Aircraft would not sell its planes to a competitor.

Finally, Cirrus Aircraft has not offered concrete plans of expanding into charter. As Cirrus Aviation points out, although no legal obstacle prevents Cirrus Aircraft from becoming a charter broker, it has never brokered charter flights. And although it asserts that it is interested in expanding into charter, absent more concrete evidence, Cirrus Aircraft's intent is speculative. This factor weighs in favor of Cirrus Aviation.

I. Weighing the factors together

Weighing these factors together, the analysis weighs in favor of judgment for Cirrus Aviation. While the Court finds the strength of the mark to be a neutral factor and the similarity of the marks to favor

¹⁷⁰ ECF No. 174 at 86:6-9, 135:14-136:15, 162:3-15; Exs. 20, 61-63, 66-67, 78.

¹⁷¹ Exs. 62 at § 1.1; 63 at § 1.1; 78 at § 1.

¹⁷² Ex. 152 at 1-5.

Cirrus Aircraft, the remaining six factors weigh in favor of Cirrus Aviation, even if slightly so. Cirrus Aircraft did not meet its burden of proving its claims by a preponderance of the evidence. As a result, the Court finds that Cirrus Aviation has not infringed on Cirrus Aircraft's trademark or engaged in unfair competition. The Court thus cannot award Cirrus Aircraft its damages or injunctive relief.

CONCLUSION

Based on these findings of fact and conclusions of law, and with good cause appearing and no reason for delay, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that **final judgment is entered in favor of Plaintiff Great Western Air, LLC dba Cirrus Aviation Services, LLC and against Defendant Cirrus Design Corporation.** The Clerk of Court is kindly directed to ENTER FINAL JUDGMENT and CLOSE THIS CASE.

Dated: January 6, 2023

[handwritten: signature]

Daniel J. Albregts

United States Magistrate
Judge

App-60

Appendix E

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

No. 16-cv-02656

GREAT WESTERN AIR, LLC, dba CIRRUS AVIATION
SERVICES, LLC,

Plaintiff,

v.

CIRRUS DESIGN CORPORATION,

Defendant.

Filed: Aug. 23, 2023

ORDER

This is a trademark infringement case arising out of a dispute between a high-end airplane charter company—Great Western Air, LLC dba Cirrus Aviation Services, LLC (“Cirrus Aviation”)—and a personal airplane manufacturer—Cirrus Design Corporation (“Cirrus Aircraft”)—that share the same name. After a bench trial, the Court found that Cirrus Aircraft did not meet its burden of proving its claims that Cirrus Aviation had infringed on its trademark and engaged in unfair competition under federal, state, and common law. The Court thus entered judgment in favor of Cirrus Aviation and against Cirrus Aircraft.

Cirrus Aircraft now moves under Federal Rule of Civil Procedure 52(b), 59(a)(2), and 59(e) to alter, amend, or supplement the findings of fact and conclusion of law; or, in the alternative, for a new trial under Federal Rule of Civil Procedure 59(a)(1)(B). (ECF No. 184). Cirrus Aircraft also moves to seal exhibits to that motion. (ECF No. 186). Because the Court does not find that altering or amending the judgment or granting a new trial is merited, it denies Cirrus Aircraft's motion to alter, amend, or for new trial. Because the Court finds that neither Cirrus Aircraft nor Cirrus Aviation have provided compelling reasons sufficient for the Court to seal the attachments to Cirrus Aircraft's motion, it denies the motion to seal. The Court will give the parties fourteen days to file a joint declaration regarding sealing the documents.

DISCUSSION

I. The Court denies Cirrus Aircraft's motion for a new trial or to alter or amend judgment.

Rule 59(a) allows a district court to "grant a [party's motion for a] new trial on all or some of the issues . . . after a nonjury trial, for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court." Fed. R. Civ. P. 59(a)(1)(B). Rule 59(a)(2) allows that after a bench trial, "the court may, on motion for a new trial, open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new ones, and direct the entry of a new judgment." Fed. R. Civ. P. 59(a)(2). "There are three grounds for granting new trials in court-tried actions

under Rule 59(a)(2): (1) manifest error of law; (2) manifest error of fact; and (3) newly discovered evidence.” *Brown v. Wright*, 588 F.2d 708, 710 (9th Cir. 1978); *see also Molski v. M.J. Cable, Inc.*, 481 F.3d 724, 729 n.4 (9th Cir. 2007) (noting that *Brown v. Wright*, 588 F.2d 708 (9th Cir. 1978) established the standard for bench trial cases under Federal Rule of Civil Procedure 59(a)(2)).

Federal Rule of Civil Procedure 59(e) permits a party to file a motion to alter or amend a judgment no later than twenty-eight days after the entry of the judgment. “Since specific grounds for a motion to amend or alter are not listed in the rule, the district court enjoys considerable discretion in granting or denying the motion.” *McDowell v. Calderon*, 197 F.3d 1253, 1255 n.1 (9th Cir. 1999). But the relief provided for is extraordinary and “should be used sparingly.” *Allstate Ins. Co. v. Herron*, 634 F.3d 1101, 1111 (9th Cir. 2011) (citing *McDowell*, 197 F.3d at 1255). The “four basic grounds upon which a Rule 59(e) motion may be granted [are]: (1) if such motion is necessary to correct manifest errors of law or fact upon which the judgment rests; (2) if such motion is necessary to present newly discovered or previously unavailable evidence; (3) if such motion is necessary to prevent manifest injustice; or (4) if the amendment is justified by an intervening change in controlling law.” *Id.* Federal Rule of Civil Procedure 52(b) states that “On a party’s motion filed no later than 28 days after the entry of judgment, the court may amend its findings—or make additional findings—and may amend the judgment accordingly. The motion may accompany a motion for a new trial under Rule 59.”

Cirrus Aircraft requests that the Court amend the judgment on every factor of the eight-factor *Sleekcraft* analysis that courts in the Ninth Circuit employ to determine likelihood of confusion under the Lanham Act. *See* 25 U.S.C. § 1125(a)(1); *see AMF, Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348-49 (9th Cir. 1979); *see Ironhawk Technologies, Inc. v. Dropbox, Inc.*, 2 F.4th 1150, 1159 (9th Cir. 2021). Cirrus Aircraft also requests that the Court amend its judgment to give more weight to certain evidence and less to other evidence, to consider the full range of Cirrus Aircraft’s trademark usages,¹ and to consider and give weight to Cirrus Aviation’s notice of opposition before the Trademark Trial and Appeal Board.² Alternatively, Cirrus Aircraft asks the Court to grant a new, jury³ trial.

Having reviewed the motion, as well as Cirrus Aviation’s response and Cirrus Aircraft’s reply, the Court cannot find that altering or amending the judgment, or granting a new trial is merited. Cirrus Aircraft’s motion primarily relies on the argument that the Court must correct manifest errors of law and fact upon which the judgment rests and to prevent manifest injustice. Having considered Cirrus Aircraft’s arguments, the Court finds no basis to reverse its previous rulings at trial or its previous

¹ Cirrus Aircraft raises this argument in its introduction but does not otherwise develop it. *See Kor Media Group, LLC v. Green*, 294 F.R.D. 579, 582 at n.3 (D. Nev. 2013) (explaining that the Court considers only well-developed arguments).

² Trial Exhibit 10.

³ Cirrus Aircraft argues that the Court erred in striking its jury demand.

holdings, and finds no newly discovered or previously unavailable evidence or any intervening change in controlling law that would justify altering or amending the judgment, or granting a new trial.

II. The Court denies Cirrus Aircraft’s motion to seal.

A party seeking to file a confidential document under seal must file a motion to seal and must comply with the Ninth Circuit’s directives in *Kamakana v. City and County of Honolulu*, 447 F.3d 1172 (9th Cir. 2006) and *Ctr. for Auto Safety v. Chrysler Group, LLC*, 809 F.3d 1092 (9th Cir. 2016). A party seeking to seal judicial records attached to motions more than tangentially related to the merits of the case must meet the “compelling reasons” standard. *See Kamakana*, 447 F.3d at 1183; *Ctr. for Auto Safety*, 809 F.3d at 1101. For records attached to motions not more than tangentially related to the merits of the case, the “good cause” standard applies. *See Ctr. for Auto Safety*, 809 F.3d 1095, 1101.

Under the compelling reasons standard, a court may seal a record only if it finds “compelling reasons” to support such treatment and articulates “the factual basis for its ruling, without relying on hypothesis or conjecture.” *Ctr. for Auto Safety*, 809 F.3d at 1096-97. Compelling reasons exist when such court files might have become a vehicle for improper purposes, such as the use of records to gratify private spite, promote public scandal, circulate libelous statements, or release trade secrets. *Id.* at 1097 (internal quotations and citations omitted). The compelling reasons must be “supported by specific factual findings,” that outweigh “the general history of access and the public

policies favoring disclosure, such as the public interest in understanding the judicial process.” *Kamakana*, 447 F.3d at 1178-79 (internal quotations and citations omitted). The Ninth Circuit has rejected efforts to seal documents under the “compelling reasons” standard based on “conclusory statements about the contents of the documents—that they are confidential” and that, in general, their disclosure would be harmful to the movant. *Id.* at 1182. Furthermore, any “requests to seal documents must be ‘narrowly tailored’ to remove from the public sphere only the material that warrants secrecy.” *Florence v. Cenlar Fed. Sav. & Loan*, No. 2:16-cv-00587, 2017 WL 1078637, at *2 (D. Nev. March 20, 2017). “As a corollary, to the extent any confidential information can be easily redacted while leaving meaningful information available to the public, the court must order that redacted versions be filed rather than sealing entire documents.” *Id.*; see *In re Roman Catholic Archbishop of Portland in Oregon*, 661 F.3d 417, 425 (9th Cir. 2011); see *Welch v. Minev*, No. 2:19-cv-01064-GMN-BNW, 2022 WL 4809269, at *2 (D. Nev. Oct. 1, 2022).

The Court denies Cirrus Aircraft’s motion without prejudice but will retain the documents at issue under seal. Cirrus Aircraft seeks to seal its proposed findings of fact and conclusions of law that the Court asked it to submit along with its closing brief. Per the Court’s instructions, Cirrus Aircraft submitted both of these items to the Court directly and did not file them on the docket, so they are otherwise not filed.

As a preliminary matter, the Court finds that the compelling reasons standard applies to these documents. Under that standard, however, the Court

cannot justify sealing the entirety of the documents Cirrus Aircraft attached based on its explanation. Cirrus Aircraft asserts that the documents should remain sealed because they contain Cirrus Aviation's financial information, which Cirrus Aviation marked confidential. But Cirrus Aviation has not responded to Cirrus Aircraft's motion to provide further reasoning to support retaining these documents under seal. And without this reasoning, the Court would have to rely on hypothesis and conjecture to maintain these documents under seal. Additionally, it appears that these documents could be redacted to remove the financial information, rather than being sealed in their entirety. The Court will therefore deny Cirrus Aircraft's motion to seal. But it will not order the parties to file public versions of these documents at this time. Instead, it will require the parties to meet and confer and file a joint declaration regarding their positions on and justifications for: (1) retaining these documents under seal in their entirety; (2) redacting the documents; or (3) removing the confidentiality designations altogether. The parties shall have until September 6, 2023 to file this declaration. If the Court does not receive a timely declaration, it will order the documents unsealed.

IT IS THEREFORE ORDERED that Cirrus Aircraft's motion to alter or amend the judgment or for new trial (ECF No. 184) is **denied**.

IT IS FURTHER ORDERED that Cirrus Aircraft's motion to seal (ECF No. 186) is **denied**.

IT IS FURTHER ORDERED that on or before **September 6, 2023**, the parties must meet and confer and file a declaration regarding their positions on and

App-67

justifications for: (1) retaining the documents attached to Cirrus Aircraft's motion alter or amend the judgment or for new trial under seal in their entirety; (2) redacting these documents; or (3) removing the confidentiality designations altogether. If the Court does not receive a timely declaration, it will order the documents unsealed.

DATED: August 23, 2023

[handwritten: signature]

Daniel J. Albregts

United States Magistrate
Judge

Appendix F

**RELEVANT CONSTITUTIONAL AND
STUATORY PROVISIONS**

U.S. Const. amend. VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

**15 U.S.C. §1114. Remedies; infringement;
innocent infringement by printers and
publishers**

(1) Any person who shall, without the consent of the registrant—

(a) use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive; or

(b) reproduce, counterfeit, copy, or colorably imitate a registered mark and apply such reproduction, counterfeit, copy, or colorable imitation to labels, signs, prints, packages, wrappers, receptacles or advertisements intended to be used in commerce upon or in connection with the sale, offering for sale, distribution, or advertising of goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive,

shall be liable in a civil action by the registrant for the remedies hereinafter provided. Under subsection (b) hereof, the registrant shall not be entitled to recover profits or damages unless the acts have been committed with knowledge that such imitation is intended to be used to cause confusion, or to cause mistake, or to deceive.

As used in this paragraph, the term “any person” includes the United States, all agencies and instrumentalities thereof, and all individuals, firms, corporations, or other persons acting for the United States and with the authorization and consent of the United States, and any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity. The United States, all agencies and instrumentalities thereof, and all individuals, firms, corporations, other persons acting for the United States and with the authorization and consent of the United States, and any State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this chapter in the same manner and to the same extent as any nongovernmental entity.

(2) Notwithstanding any other provision of this chapter, the remedies given to the owner of a right infringed under this chapter or to a person bringing an action under section 1125(a) or (d) of this title shall be limited as follows:

(A) Where an infringer or violator is engaged solely in the business of printing the mark or violating matter for others and establishes that he

or she was an innocent infringer or innocent violator, the owner of the right infringed or person bringing the action under section 1125(a) of this title shall be entitled as against such infringer or violator only to an injunction against future printing.

(B) Where the infringement or violation complained of is contained in or is part of paid advertising matter in a newspaper, magazine, or other similar periodical or in an electronic communication as defined in section 2510(12) of Title 18, the remedies of the owner of the right infringed or person bringing the action under section 1125(a) of this title as against the publisher or distributor of such newspaper, magazine, or other similar periodical or electronic communication shall be limited to an injunction against the presentation of such advertising matter in future issues of such newspapers, magazines, or other similar periodicals or in future transmissions of such electronic communications. The limitations of this subparagraph shall apply only to innocent infringers and innocent violators.

(C) Injunctive relief shall not be available to the owner of the right infringed or person bringing the action under section 1125(a) of this title with respect to an issue of a newspaper, magazine, or other similar periodical or an electronic communication containing infringing matter or violating matter where restraining the dissemination of such infringing matter or violating matter in any particular issue of such

periodical or in an electronic communication would delay the delivery of such issue or transmission of such electronic communication after the regular time for such delivery or transmission, and such delay would be due to the method by which publication and distribution of such periodical or transmission of such electronic communication is customarily conducted in accordance with sound business practice, and not due to any method or device adopted to evade this section or to prevent or delay the issuance of an injunction or restraining order with respect to such infringing matter or violating matter.

(D)(i)(I) A domain name registrar, a domain name registry, or other domain name registration authority that takes any action described under clause (ii) affecting a domain name shall not be liable for monetary relief or, except as provided in subclause (II), for injunctive relief, to any person for such action, regardless of whether the domain name is finally determined to infringe or dilute the mark.

(II) A domain name registrar, domain name registry, or other domain name registration authority described in subclause (I) may be subject to injunctive relief only if such registrar, registry, or other registration authority has—

(aa) not expeditiously deposited with a court, in which an action has been filed regarding the disposition

of the domain name, documents sufficient for the court to establish the court's control and authority regarding the disposition of the registration and use of the domain name;

(bb) transferred, suspended, or otherwise modified the domain name during the pendency of the action, except upon order of the court; or

(cc) willfully failed to comply with any such court order.

(ii) An action referred to under clause (i)(I) is any action of refusing to register, removing from registration, transferring, temporarily disabling, or permanently canceling a domain name—

(I) in compliance with a court order under section 1125(d) of this title; or

(II) in the implementation of a reasonable policy by such registrar, registry, or authority prohibiting the registration of a domain name that is identical to, confusingly similar to, or dilutive of another's mark.

(iii) A domain name registrar, a domain name registry, or other domain name registration authority shall not be liable for damages under this section for the registration or maintenance of a domain name for another absent a showing of bad faith intent to profit

from such registration or maintenance of the domain name.

(iv) If a registrar, registry, or other registration authority takes an action described under clause (ii) based on a knowing and material misrepresentation by any other person that a domain name is identical to, confusingly similar to, or dilutive of a mark, the person making the knowing and material misrepresentation shall be liable for any damages, including costs and attorney's fees, incurred by the domain name registrant as a result of such action. The court may also grant injunctive relief to the domain name registrant, including the reactivation of the domain name or the transfer of the domain name to the domain name registrant.

(v) A domain name registrant whose domain name has been suspended, disabled, or transferred under a policy described under clause (ii)(II) may, upon notice to the mark owner, file a civil action to establish that the registration or use of the domain name by such registrant is not unlawful under this chapter. The court may grant injunctive relief to the domain name registrant, including the reactivation of the domain name or transfer of the domain name to the domain name registrant.

(E) As used in this paragraph—

(i) the term “violator” means a person who violates section 1125(a) of this title; and

(ii) the term “violating matter” means matter that is the subject of a violation under section 1125(a) of this title.

(3)(A) Any person who engages in the conduct described in paragraph (11) of section 110 of Title 17 and who complies with the requirements set forth in that paragraph is not liable on account of such conduct for a violation of any right under this chapter. This subparagraph does not preclude liability, nor shall it be construed to restrict the defenses or limitations on rights granted under this chapter, of a person for conduct not described in paragraph (11) of section 110 of Title 17, even if that person also engages in conduct described in paragraph (11) of section 110 of such title.

(B) A manufacturer, licensee, or licensor of technology that enables the making of limited portions of audio or video content of a motion picture imperceptible as described in subparagraph (A) is not liable on account of such manufacture or license for a violation of any right under this chapter, if such manufacturer, licensee, or licensor ensures that the technology provides a clear and conspicuous notice at the beginning of each performance that the performance of the motion picture is altered from the performance intended by the director or copyright holder of the motion picture. The limitations on liability in subparagraph (A) and this subparagraph shall not apply to a manufacturer, licensee, or licensor of technology that fails to comply with this paragraph.

(C) The requirement under subparagraph (B) to provide notice shall apply only with respect to technology manufactured after the end of the 180-day period beginning on April 27, 2005.

(D) Any failure by a manufacturer, licensee, or licensor of technology to qualify for the exemption under subparagraphs (A) and (B) shall not be construed to create an inference that any such party that engages in conduct described in paragraph (11) of section 110 of Title 17 is liable for trademark infringement by reason of such conduct.

**15 U.S.C. §1117. Recovery for violation
of rights**

(a) Profits; damages and costs; attorney fees

When a violation of any right of the registrant of a mark registered in the Patent and Trademark Office, a violation under section 1125(a) or (d) of this title, or a willful violation under section 1125(c) of this title, shall have been established in any civil action arising under this chapter, the plaintiff shall be entitled, subject to the provisions of sections 1111 and 1114 of this title, and subject to the principles of equity, to recover (1) defendant's profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action. The court shall assess such profits and damages or cause the same to be assessed under its direction. In assessing profits the plaintiff shall be required to prove defendant's sales only; defendant must prove all elements of cost or deduction claimed. In assessing damages the court may enter judgment, according to the circumstances of the case, for any sum above the amount found as actual damages, not

exceeding three times such amount. If the court shall find that the amount of the recovery based on profits is either inadequate or excessive the court may in its discretion enter judgment for such sum as the court shall find to be just, according to the circumstances of the case. Such sum in either of the above circumstances shall constitute compensation and not a penalty. The court in exceptional cases may award reasonable attorney fees to the prevailing party.

(b) Treble damages for use of counterfeit mark

In assessing damages under subsection (a) for any violation of section 1114(1)(a) of this title or section 220506 of Title 36, in a case involving use of a counterfeit mark or designation (as defined in section 1116(d) of this title), the court shall, unless the court finds extenuating circumstances, enter judgment for three times such profits or damages, whichever amount is greater, together with a reasonable attorney's fee, if the violation consists of—

- (1) intentionally using a mark or designation, knowing such mark or designation is a counterfeit mark (as defined in section 1116(d) of this title), in connection with the sale, offering for sale, or distribution of goods or services; or
- (2) providing goods or services necessary to the commission of a violation specified in paragraph (1), with the intent that the recipient of the goods or services would put the goods or services to use in committing the violation.

In such a case, the court may award prejudgment interest on such amount at an annual interest rate established under section 6621(a)(2) of Title 26,

beginning on the date of the service of the claimant's pleadings setting forth the claim for such entry of judgment and ending on the date such entry is made, or for such shorter time as the court considers appropriate.

(c) Statutory damages for use of counterfeit marks

In a case involving the use of a counterfeit mark (as defined in section 1116(d) of this title) in connection with the sale, offering for sale, or distribution of goods or services, the plaintiff may elect, at any time before final judgment is rendered by the trial court, to recover, instead of actual damages and profits under subsection (a), an award of statutory damages for any such use in connection with the sale, offering for sale, or distribution of goods or services in the amount of—

- (1)** not less than \$1,000 or more than \$200,000 per counterfeit mark per type of goods or services sold, offered for sale, or distributed, as the court considers just; or
- (2)** if the court finds that the use of the counterfeit mark was willful, not more than \$2,000,000 per counterfeit mark per type of goods or services sold, offered for sale, or distributed, as the court considers just.

(d) Statutory damages for violation of section 1125(d)(1)

In a case involving a violation of section 1125(d)(1) of this title, the plaintiff may elect, at any time before final judgment is rendered by the trial court, to recover, instead of actual damages and profits, an award of statutory damages in the amount of not less

than \$1,000 and not more than \$100,000 per domain name, as the court considers just.

(e) Rebuttable presumption of willful violation

In the case of a violation referred to in this section, it shall be a rebuttable presumption that the violation is willful for purposes of determining relief if the violator, or a person acting in concert with the violator, knowingly provided or knowingly caused to be provided materially false contact information to a domain name registrar, domain name registry, or other domain name registration authority in registering, maintaining, or renewing a domain name used in connection with the violation. Nothing in this subsection limits what may be considered a willful violation under this section.