

No. _____

IN THE
Supreme Court of the United States

TWD, LLC,

Petitioner,

v.

GRUNT STYLE LLC,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Section 35(a) of the Lanham Act, 15 U.S.C. § 1117(a), which governs the scope of relief available in most trademark-infringement suits, authorizes an award of prejudgment interest.

PARTIES TO THE PROCEEDING

Petitioner TWD, LLC, is a California-based limited liability company. Petitioner was defendant-appellant in the court of appeals; petitioner was initially plaintiff-counterclaim-defendant in the district court but was later realigned as defendant. *See* D. Ct. Doc. 223 (Mar. 23, 2023).

Respondent Grunt Style LLC is an Illinois-based limited liability company. Respondent was plaintiff-appellee in the court of appeals; respondent was initially defendant-counterclaim-plaintiff in the district court but was later realigned as plaintiff. *See* D. Ct. Doc. 223.

CORPORATE DISCLOSURE STATEMENT

Petitioner TWD, LLC, has no parent company and no publicly held company owns 10% or more of petitioner's stock.

RELATED PROCEEDINGS

United States District Court for the Northern District
of Illinois:

Grunt Style LLC v. TWD, LLC, No. 1:18-cv-07695
(Jan. 28, 2025)

United States District Court for the Southern District
of California:

TWD, LLC v. Grunt Style LLC, No. 3:18-cv-00532-
GPC-BLM (May 22, 2018)

United States Court of Appeals for the Seventh Circuit:

Grunt Style LLC v. TWD, LLC, No. 25-1305 (June 10,
2026)

Grunt Style LLC v. TWD, LLC, No. 25-1341 (June 12,
2025)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner TWD, LLC, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

INTRODUCTION

Section 35 of the Lanham Act, 15 U.S.C. § 1117, governs the scope of relief in all trademark-infringement cases, and it tells courts exactly what a successful trademark plaintiff may recover—and when prejudgment interest is part of that recovery. Section 1117(a) entitles a prevailing plaintiff to damages, the defendant’s profits, and costs; in exceptional cases, it authorizes awards of attorney’s fees, too. *Id.* § 1117(a). Nowhere does it mention prejudgment interest. Section 1117(b), by contrast, mainly applies to a narrow category of cases involving the knowing and intentional counterfeiting of a registered mark; in this provision Congress expressly authorized courts to “award prejudgment interest” at a specified rate running from a specified date, in addition to other specifically enumerated relief. *Id.* § 1117(b).

The courts of appeals cannot agree on what to make of this asymmetry. In this case, the Seventh Circuit applied its longstanding precedent holding that federal common law creates a freestanding, cross-statutory “presumpti[on]” in favor of awarding prejudgment interest to all “victims of federal law violations.” *Gorenstein Enters. v. Quality Care-USA, Inc.*, 874 F.2d 431, 436 (7th Cir. 1989); *see* Pet. App. 7a. The Eighth, Tenth, and D.C. Circuits take the same view. *See EFCO Corp. v. Symons Corp.*, 219 F.3d 734, 742-43 (8th Cir. 2000); *United Phosphorus, Ltd. v. Midland Fumigant, Inc.*,

205 F.3d 1219, 1236-37 (10th Cir. 2000); *ALPO Petfoods, Inc. v. Ralston Purina Co.*, 997 F.2d 949, 954 (D.C. Cir. 1993).

The Third Circuit, however, has held the opposite. In the Third Circuit’s view, Congress’s decision to authorize prejudgment interest in § 1117(b) and withhold it in § 1117(a) forecloses such awards altogether outside the intentional-counterfeiting context. *See Kars 4 Kids Inc. v. Am. Can!*, 8 F.4th 209, 225 (3d Cir. 2021).

The Second and Fourth Circuits, for their part, have staked out middle-ground positions. The Second Circuit holds that prejudgment interest is unavailable under § 1117(a) as a general matter but may still be awarded in “exceptional” cases, *Merck Eprova AG v. Gnosis S.p.A.*, 760 F.3d 247, 263-64 (2d Cir. 2014), and the Fourth Circuit holds that prejudgment interest may be available as an element of certain *damages* awards but not as part of a *disgorgement* award, *see Ga.-Pac. Consumer Prods. LP v. von Drehle Corp.*, 781 F.3d 710, 721-22 (4th Cir. 2015).

And two other circuits have issued unpublished opinions joining the fray. *See Moscow Distillery Cristall v. Pepsico, Inc.*, 141 F.3d 1177 (Table), 1998 WL 101696, at *3 (9th Cir. 1998) (per curiam) (adopting what would later become the Third Circuit’s position that “[p]rejudgment interest is available under the Lanham Act only for counterfeiting”); *Wynn Oil Co. v. Am. Way Serv. Corp.*, 61 F.3d 904 (Table), 1995 WL 431019, at *3 (6th Cir. 1995) (per curiam) (adopting the Second Circuit’s position that prejudgment interest is permissible in “exceptional” cases (internal quotation marks omitted)).

The Seventh Circuit’s position is wrong. Section 1117’s text and structure both point to one inevitable conclusion: prejudgment interest is permitted in cases involving intentional counterfeiting under § 1117(b), and not in cases of ordinary infringement under § 1117(a). Section 1117(a) specifies precisely what forms of relief are available in that latter case, and it does not mention prejudgment interest. Section 1117(b), by contrast, *does* expressly authorize awards of prejudgment interest—at a specified rate and from a specified date—in the most culpable cases: those involving intentional counterfeiting. The decision below renders that textual distinction a nullity, while at the same time bizarrely permitting courts to award prejudgment interest against *less culpable* defendants under § 1117(a) at a higher rate and for a longer period than would be permitted under § 1117(b). The Lanham Act’s text compels the opposite conclusion: that prejudgment interest is available for intentional counterfeiting under § 1117(b) but not for ordinary infringement under § 1117(a).

Even if § 1117(a) permitted prejudgment interest in *some* circumstances—and it does not—the Seventh Circuit’s presumption in favor of awarding prejudgment interest in *all* cases would still be wrong. The Seventh Circuit derived that presumption from thin air: it has no footing in the text of § 1117, this Court’s cases on prejudgment interest, or any legal or equitable principles. At minimum, the Court should reject the Seventh Circuit’s unbounded presumption in favor of a narrower standard, grounded in the text of § 1117 and equitable principles, that constrains the circumstances in which prejudgment interest may be awarded.

The question presented is important and this case is an ideal vehicle for resolving it. The circuits are deeply divided. The issue arises frequently, with published opinions from seven courts of appeals and hundreds of district-court decisions over decades addressing the availability of prejudgment interest under § 1117(a). Prejudgment interest, moreover, can represent a significant share of a plaintiff's overall recovery, particularly if courts in § 1117(a) cases elect to run interest from the date of the plaintiff's injury, as the district court did here, even though under § 1117(b) any prejudgment interest would run only from "the date of the service of the claimant's pleadings setting forth the claim for such entry of judgment." 15 U.S.C. § 1117(b). To wit: in this case, the prejudgment interest award increased respondent Grunt Style LLC's recovery by over 30%. And this case presents a clean vehicle to resolve the question presented. TWD raised and preserved the textual argument at every stage below, the courts below decided it on the merits, and there is no argument that Grunt Style could be entitled to prejudgment interest if the Seventh Circuit's presumption were not applied; indeed, prejudgment interest would plainly be unavailable under the middle-ground standards applied by the Second and Fourth Circuits, respectively.

The petition should be granted.

OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-7a) is unpublished but is available at 2026 WL 1678866. A separate, prior opinion of the court of appeals ordering a limited remand for a clerical correction of the judgment (Pet. App. 8a-21a) is reported at 140 F.4th 839. The order

of the district court amending the final judgment to include prejudgment interest (Pet. App. 22a-33a) is unreported. A separate order of the district court granting summary judgment in part (Pet. App. 34a-51a) is reported at 598 F. Supp. 3d 676.

JURISDICTIONAL STATEMENT

The judgment of the court of appeals was entered on June 10, 2026. A petition for rehearing was denied on July 31, 2026. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The pertinent sections of the U.S. Code, 15 U.S.C. §§ 1117 and 1125, are reproduced in the appendix to this petition. Pet. App. 54a-69a.

STATEMENT

A. Statutory background

“Congress enacted the Lanham Act in 1946 in order to provide national protection for trademarks used in interstate and foreign commerce.” *Park ’N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 193 (1985). To accomplish this goal, the Act “make[s] ‘actionable the deceptive and misleading use of marks.’” *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 767 (1992) (quoting 15 U.S.C. § 1127); *see* 15 U.S.C. § 1114 (claim for infringement of registered marks); *id.* § 1125(a) (claim based on unregistered marks).

This case concerns Section 35 of the Lanham Act, 15 U.S.C. § 1117, which “particularizes in considerable detail the types of monetary relief available for trademark infringement and defines the criteria for awarding each

type.” *Ga.-Pac.*, 781 F.3d at 721. Relevant here are the provision’s first two subsections: 15 U.S.C. § 1117(a) and (b).

Section 1117(a), to begin, applies generally to trademark-infringement and false-designation claims. It provides that when a violation is “established in any civil action” brought under the Lanham Act, “the plaintiff shall be entitled, subject to [other remedial provisions], and subject to the principles of equity, to recover (1) the defendant’s profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action.” 15 U.S.C. § 1117(a).

Section 1117(a) then goes on to provide courts with authority to modify the award of profits or damages “according to the circumstances of the case.” 15 U.S.C. § 1117(a). It states that “[i]n assessing damages the court may enter judgment . . . for any sum above the amount found as actual damages, not exceeding three times such amount.” *Id.* Likewise, “[i]f the court shall find that the amount of the recovery based on profits is either inadequate or excessive,” then “the court may in its discretion enter judgment for such sum as the court shall find to be just.” *Id.* Finally, “in exceptional cases,” § 1117(a) provides that “[t]he court . . . may award reasonable attorney fees to the prevailing party.” *Id.* The provision does not mention prejudgment interest.

Section 1117(b), in turn, sets out special rules governing recovery in a narrow set of cases where the defendant’s conduct is more culpable. At the outset, it applies (as relevant here) only to cases involving infringement

of a *registered* trademark. *See* 15 U.S.C. § 1117(b).¹ In such cases, it directs:

In assessing damages under subsection (a) for any violation of [15 U.S.C. §] 1114(1)(a) . . . , *in a case involving use of a counterfeit mark or designation* . . . , 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 [either] intentionally using [the] mark or designation, knowing such mark or designation is a counterfeit mark . . . ; [or] providing goods or services necessary to the commission of [such] a violation . . . with the intent that the recipient of the goods or services would put the goods or services to use in committing the violation.

Id. (emphasis added); *see id.* § 1116(d) (defining counterfeit-mark procedures). Congress added this provision in 1984 to provide “heightened monetary awards” in counterfeiting cases, “reflect[ing] the fact that use of a counterfeit mark is ‘the most blatant and egregious form of “passing off.”’” *Ga.-Pac.*, 781 F.3d at 717 (quoting 3 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 25:10 (4th ed. 2012)); *see* Trademark Counterfeiting Act of 1984, Pub. L. No. 98-473, tit. II, ch. XV, § 1503(2), 98 Stat. 2178, 2182.

¹ Section 1117(b) also governs the unusual case of infringing the U.S. Olympic and Paralympic Committee’s exclusive rights in the “5 interlocking rings” symbol and other Olympics-related symbol-ogy. 36 U.S.C. § 220506(a)(2); *see* 15 U.S.C. § 1117(b).

Whereas § 1117(a) gives courts discretion to award up to treble damages, to modify profits awards, and to award attorney’s fees in “exceptional cases,” 15 U.S.C. § 1117(a), under § 1117(b) those remedies are mandatory. Moreover, unlike § 1117(a), § 1117(b) expressly permits courts in intentional-counterfeiting cases to award prejudgment interest:

In such a case, the court may award prejudgment interest on such amount at [the federal short-term rate plus 3 percentage points, *see* 26 U.S.C. § 6621(a)(2)], 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.

Id. § 1117(b).

B. Procedural history

1. After researching the symbology of snakes in American history, TWD discovered the phrase “This We’ll Defend” in imagery used by the U.S. War Office in 1778 and began selling t-shirts bearing that phrase. Pet. App. 36a; *see* D. Ct. Doc. 176-2, ¶ 8 (May 19, 2021). In May 2015, TWD applied to register that mark for use on t-shirts, and the U.S. Patent and Trademark Office granted that application in January 2016. Pet. App. 37a. In July 2019, TWD entered into an agreement with the Department of the Army—which owns a trademark for use of the mark in other contexts—“allowing for TWD’s use of the [m]ark for the sale of clothes.” *Id.* Grunt Style, meanwhile, claimed it possessed common-law trademark rights in the same phrase, based on earlier, sporadic uses

of the phrase in connection with its apparel and website. *See id.* at 35a-37a.

2. In 2018, TWD and Grunt Style filed competing trademark-infringement suits in the U.S. District Courts for the Southern District of California and the Northern District of Illinois, respectively. *See* Pet. App. 2a n.2. TWD's claim was for infringement of its registered mark pursuant to 15 U.S.C. §§ 1114 and 1125(a). *See* D. Ct. Doc. 1, at 17-21 (Mar. 13, 2018). Grunt Style counterclaimed for common-law infringement of its unregistered mark under 15 U.S.C. § 1125(a), the remedies for which are governed by § 1117(a). *See* D. Ct. Doc. 29, at 55-57 (Jan. 7, 2019). Grunt Style did not allege intentional use of a counterfeit mark that would trigger § 1117(b)'s separate remedial scheme. *See id.*

In April 2022, the district court granted partial summary judgment for Grunt Style. Pet. App. 34a-51a. The court held that Grunt Style had established common-law priority in the mark and that, as a result, TWD's federal registration must be canceled. *Id.* at 46a-49a. The court thus concluded that TWD's infringement claims failed as a matter of law. *Id.* at 49a.

In March 2024, the case proceeded to trial on Grunt Style's claim for common-law infringement of its unregistered mark. *See* D. Ct. Doc. 254, at 3 (Feb. 22, 2024). The jury found TWD liable and awarded Grunt Style \$739,500—the amount it found TWD had profited from its use of the mark. D. Ct. Doc. 264 (Mar. 14, 2024). Because the jury concluded that TWD's actions did not constitute willful infringement, it declined Grunt Style's request for punitive damages. *Id.* The district court's

initial judgment did not include an award of prejudgment interest. *See* D. Ct. Doc. 294 (Nov. 22, 2024).

3. On December 6, 2024, Grunt Style moved (as relevant here) to amend the judgment to add prejudgment interest, arguing that “pre-judgment interest is presumptively available for all federal law violations.” D. Ct. Doc. 314, at 2 (Dec. 6, 2024) (citing *Gorenstein*, 874 F.2d at 435-36); *see id.* at 2-3. In Grunt Style’s view, TWD “should pay interest at the prime rate” from “the date that TWD’s online retail store went live, July 7, 2015,” through the date of the judgment, November 22, 2024: a total of approximately \$229,000. *Id.* at 3-5 (bold-face omitted).

TWD opposed the motion, arguing that, because this case involved a claim of ordinary infringement of an unregistered mark and not the intentional counterfeiting of a registered mark, Grunt Style’s remedies were limited to those specified in § 1117(a), and that provision—unlike § 1117(b)—does not permit awards of prejudgment interest. *See* D. Ct. Doc. 317, at 1-7 (Dec. 23, 2024). In support, TWD cited several out-of-circuit cases holding that “the language differences between” the two subsections of § 1117 “preclude[] an award of prejudgment interest” under § 1117(a). *Id.* at 3-5 (citing, *inter alia*, *Ga.-Pac.*, 781 F.3d 710; *Moscow Distillery Cristall*, 141 F.3d 1177, 1998 WL 101696; and *Kars 4 Kids*, 8 F.4th 209). TWD also argued that, in any event, awarding prejudgment interest here would “def[y] equity” because Grunt Style sought only disgorgement of TWD’s profits (rather than actual damages) and because TWD had no incentive for delay. *Id.* at 6-7. At minimum, TWD argued, any award of prejudgment interest should be at the rate and

for the time period specified in § 1117(b), not the higher prime rate and longer time period that Grunt Style proposed. *See id.* at 7-8.

On January 28, 2025, the district court granted Grunt Style’s motion and awarded it approximately \$229,000 of prejudgment interest. Pet. App. 22a-33a. The court recognized that § 1117(a) defined the remedies “for traditional trademark infringement claims, including those asserted by Grunt Style,” and that § 1117(a), unlike § 1117(b), “does not explicitly provide for pre-judgment interest.” *Id.* at 23a-24a. But the court believed that Seventh Circuit precedent nonetheless required it to award prejudgment interest. *See id.* at 23a-25a (citing *Gorenstein*, 874 F.2d at 436). It further rejected TWD’s argument that prejudgment interest was inappropriate in a case involving an award of the defendant’s profits. *See id.* at 25a. And it likewise read circuit precedent to support the calculation of that interest at the prime rate and from “the date on which the claim accrued,” rather than at the lower rate and for the shorter period specified in § 1117(b). *Id.* at 26a-28a. The court therefore entered an amended judgment awarding prejudgment interest to Grunt Style. D. Ct. Doc. 322 (Jan. 28, 2025).

4. TWD appealed from the amended judgment.² As relevant here, TWD reprised its argument that the textual differences between § 1117(a) and § 1117(b)

² At the start of the appeal, the Seventh Circuit ordered a limited remand for the district court to correct a clerical error in the judgment, while retaining jurisdiction. Pet. App. 14a, 18a; *see id.* at 8a-21a. On remand, the district court entered a corrected amended judgment, *see* D. Ct. Doc. 380 (June 20, 2025), after which the Seventh Circuit resolved the appeal on the merits.

precluded an award of prejudgment interest. C.A. Appellant’s Br. 64-66. And it argued that the district court’s reliance on the Seventh Circuit’s earlier decision in *Gorenstein* was improper because “*Gorenstein* . . . ‘overlooked [the] clear evidence of Congress’s intent’ shown in the text of 15 U.S.C. § 1117(a) and (b).” *Id.* at 66 (quoting *Kars 4 Kids*, 8 F.4th at 225 n.24).

The Seventh Circuit affirmed the district court’s award of prejudgment interest. Pet. App. 1a-7a. The court of appeals applied *Gorenstein*’s holding that “prejudgment interest [is] ‘presumptively available’ for trademark-infringement claims” governed by § 1117(a). *Id.* at 7a (quoting *Gorenstein*, 874 F.2d at 436).

The panel expressly acknowledged that the circuits had split on the question. It recognized, first, that “several circuits[]” have “diverge[d] from *Gorenstein*’s rule[] on the grounds that the statute only mentions prejudgment interest for claims under section 1117(b) involving the intentional use of a counterfeit mark.” Pet. App. 7a (citing *Kars 4 Kids*, 8 F.4th at 225 n.24; and *Ga.-Pac.*, 781 F.3d at 721-22). The panel noted that the Second and Tenth Circuits, by contrast, had followed *Gorenstein* and awarded prejudgment interest under § 1117(a). *Id.* (citing *Merck Eprova*, 760 F.3d at 264; and *United Phosphorus*, 205 F.3d at 1236-37). The panel declined to consider the textual and other arguments that TWD offered against prejudgment interest, concluding that *Gorenstein* “remains the binding law of this circuit” and that it would be inappropriate to reconsider it “‘just to move from one side of a conflict to another.’” *Id.* (quoting *United States v. Orona*, 118 F.4th 858, 868 (7th Cir. 2024)).

5. TWD sought panel and en banc rehearing, again pressing the conflict between the decision below and the decisions of other circuits. *See* C.A. Doc. 50, at 6-9 (July 1, 2026). The Seventh Circuit denied TWD’s petition. Pet. App. 52a-53a.

REASONS FOR GRANTING THE PETITION

Four courts of appeals have nonchalantly brushed aside the textual distinctions between 15 U.S.C. § 1117(a) and (b) to allow prejudgment interest as part of a § 1117(a) award as a matter of course. By contrast, three courts of appeals have recognized that because § 1117(b) expressly permits prejudgment interest in narrow circumstances—mostly confined to cases involving intentional counterfeiting of registered trademarks—while § 1117(a) does not, prejudgment interest is not generally available for awards governed by § 1117(a). Yet even within that group there is disagreement. Two courts of appeals have held that prejudgment interest may still *sometimes* be awarded under § 1117(a), while another has held that § 1117(a) precludes prejudgment interest altogether given its textual departure from § 1117(b).

The latter view is the correct one. Section 1117 sets forth the available relief in Lanham Act suits with remarkable detail and clarity. Section 1117(a)—the provision governing this case and most trademark-infringement cases—authorizes many forms of relief, including some only in exceptional cases, but is silent on prejudgment interest. On the other hand, Section 1117(b)—which applies only in a sliver of exceptional cases involving intentional counterfeiting—expressly authorizes prejudgment interest. The unavoidable

inference is that when relief is governed by § 1117(a) and not § 1117(b), prejudgment interest is unavailable. At minimum, even if § 1117(a) does permit awards of prejudgment interest in some circumstances, the Seventh Circuit's presumption in favor of such awards—which no text, precedent, or purpose supports—should be rejected in favor of a narrower rule permitting awards of prejudgment interest under limited circumstances that align with the purposes of prejudgment interest.

The question presented is important, recurring, and cleanly presented in this case. This Court should grant review.

I. The Courts Of Appeals Have Split On Whether Prejudgment Interest Is Available Under 15 U.S.C. § 1117(a).

The question presented is straightforward: is prejudgment interest available when a court awards relief under 15 U.S.C. § 1117(a)? The courts of appeals have answered that question in drastically different, irreconcilable ways.

A. Four circuits precedentially hold that an award under § 1117(a) presumptively includes prejudgment interest.

Like the panel below, the Eighth, Tenth, and D.C. Circuits hold that notwithstanding its silence on prejudgment interest, an award under 15 U.S.C. § 1117(a) presumptively includes that relief.

1. The panel's position in this case—that there is a presumption that prejudgment interest is available to a Lanham Act plaintiff who succeeds in proving ordinary

infringement—originates in *Gorenstein*, 874 F.2d 431. The Seventh Circuit in *Gorenstein* noted that § 1117(a) “makes no reference to prejudgment interest.” *Id.* at 436. In the court’s view, that silence triggered the “rule that prejudgment interest should be presumptively available to victims of federal law violations,” a presumption that purportedly has its roots in “federal common law.” *Id.* The court did not examine the Lanham Act’s text for any indication of whether prejudgment interest was appropriate.³ Nonetheless, in cases since *Gorenstein*, the Seventh Circuit has adhered to this rule. *See, e.g., Sands, Taylor & Wood Co. v. Quaker Oats Co.*, 978 F.2d 947, 963 (7th Cir. 1992) (rejecting argument that § 1117(a)’s silence on prejudgment interest means it is unavailable and reiterating “this Circuit’s rule that ‘prejudgment interest should be presumptively available to victims of federal law violations’” (quoting *Gorenstein*, 874 F.2d at 436)).

2. The Tenth Circuit has followed the Seventh Circuit in eschewing any statutory analysis, instead following purported general federal-common-law principles to

³ After “announc[ing]” this general rule, Judge Posner’s opinion for the court then criticized the district court for using too low of an interest rate, urging “that district judges use the prime rate for fixing prejudgment interest where there is no statutory interest rate” because it is more “readily ascertainable” and “provides a reasonable although rough estimate” of the amount needed to compensate for both “the loss of the use of their money” and “the risk of default.” *Gorenstein*, 874 F.2d at 436. The opinion further explained that, although *post*judgment interest rates are set by statute and bind courts, prejudgment interest is instead “governed by federal common law,” leaving courts free to “adopt a more discriminating approach.” *Id.* at 436-37; *see* 28 U.S.C. § 1961.

conclude that an award under § 1117(a) should include prejudgment interest. *See United Phosphorus*, 205 F.3d at 1236-37. There, the court reversed a district court’s denial of prejudgment interest in a Lanham Act case involving an award under § 1117(a). *Id.*; *see id.* at 1232, 1236 (citing 15 U.S.C. § 1117(a)). In the Tenth Circuit’s view, claims arising in “the federal context” warrant a “preference, if not a presumption, for prejudgment interest.” *Id.* at 1236. Under that court’s doctrine, an award of prejudgment interest is proper if it “would serve to compensate” the plaintiff, unless “equity precludes” it. *Id.* at 1237.

In the decades since *United Phosphorus*, district courts within the Tenth Circuit routinely award prejudgment interest under § 1117(a), in addition to disgorgement or damages. *See, e.g., Vitamins Online, Inc. v. Heartwise, Inc.*, 71 F.4th 1222, 1233 (10th Cir. 2023) (discussing district court’s judgment).

3. The D.C. Circuit has reached the same conclusion. *See ALPO Petfoods*, 997 F.2d at 954. *ALPO Petfoods* involved the proper measure of damages under § 1117(a) for a successful Lanham Act claim. 997 F.2d at 950-51. The district court awarded the plaintiff, *inter alia*, damages for the delay of its “income stream from a national product rollout.” *Id.* at 951. The court of appeals held that the district court should have “reduce[d] the award to reflect [the plaintiff’s] alternative use of the funds it did not have to expend on a national rollout.” *Id.* at 954. The court deemed it irrelevant that the plaintiff “may in fact have spent some or all of the money on a responsive advertising campaign” as a result of the Lanham Act violation, because such expenditures “constituted, in

effect, an alternative investment, *the return on which is the prejudgment interest to which [the plaintiff] is entitled.*” *Id.* (emphasis added). As support for the conclusion that prejudgment interest is an “entitle[ment]” under § 1117(a), the D.C. Circuit cited the Seventh Circuit’s position on the topic. *ALPO Petfoods*, 997 F.2d at 954 (citing *Sands, Taylor & Wood*, 978 F.2d at 963).

4. Likewise with the Eighth Circuit. That court, too, has treated Lanham Act claims governed by § 1117(a) as subject to the same rules as other federal claims. *See EFCO Corp.*, 219 F.3d at 742-43. Because “the issue of prejudgment interest in a Lanham Act recovery is . . . governed by federal law,” the district court thus “has discretion to deny” prejudgment interest if “equity and fairness counsel[] against” it. *Id.* (citing *Pioneer Hi-Bred Int’l v. Holden Found. Seeds, Inc.*, 35 F.3d 1226, 1246 (8th Cir. 1994)); *see Pioneer Hi-Bred*, 35 F.3d at 1246 (applying presumption that prejudgment interest is warranted unless “exceptional circumstances . . . justify the refusal” (internal quotation marks omitted)).⁴

B. The Third Circuit, as well as the Ninth Circuit in an unpublished opinion, have held that § 1117(a) categorically does not permit an award of prejudgment interest.

1. The Third Circuit has rejected the approach of the Seventh, Eighth, Tenth, and D.C. Circuits and held that

⁴ In addition to the three courts of appeals to have agreed with the Seventh Circuit in published decisions, the Federal Circuit has affirmed a district court’s award of prejudgment interest for Lanham Act violations under § 1117(a) in an unpublished decision. *See Nutting v. RAM Sw., Inc.*, 69 F. App’x 454, 457 (Fed. Cir. 2003).

prejudgment interest is categorically “unavailable” under § 1117(a). *Kars 4 Kids*, 8 F.4th at 225.

Unlike the courts of appeals discussed above, the Third Circuit in *Kars 4 Kids* relied on the Lanham Act’s text, not freestanding principles of federal law, to explain that § 1117(a) “particularizes in considerable detail the types of monetary relief available for trademark infringement and defines the criteria for awarding each type.” 8 F.4th at 225 (quoting *Ga.-Pac.*, 781 F.3d at 721). That provision, the court explained, “authorizes awards of ‘(1) defendant’s profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action.’” *Id.* (quoting 15 U.S.C. § 1117(a)). By contrast, § 1117(b), “which applies to knowing and intentional use of a counterfeit mark,” authorizes prejudgment interest. *Id.* Invoking the canon that “[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion,” the Third Circuit concluded that prejudgment interest is “unavailable” under § 1117(a) “because § 1117(b) allows courts to award prejudgment interest and § 1117(a) does not.” *Id.* (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

The Third Circuit acknowledged that it was splitting from (at least) the Seventh and Tenth Circuits, which had “determined that prejudgment interest is presumptively available to successful plaintiffs under § 1117(a).” *Kars 4 Kids*, 8 F.4th at 225 n.24 (citing *United Phosphorus*, 205 F.3d at 1236-37, and *Gorenstein*, 874 F.2d at 436, but not the Eighth and D.C. Circuits). In the Third Circuit’s view, “[n]either court” had “considered the text of

§ 1117 in its entirety” and so “overlooked th[e] clear evidence of Congress’s intent.” *Id.* The court thus “decline[d] to adopt” their view “that prejudgment interest is presumptively available under § 1117(a).” *Id.*

2. The Ninth Circuit has agreed in a nonprecedential opinion. In *Moscow Distillery Cristall*, 141 F.3d 1177, 1998 WL 101696, the successful Lanham Act plaintiff argued that the district court erred by declining to award prejudgment interest. *Id.* at *3. The Ninth Circuit found this argument to be “frivolous,” presaging the Third Circuit’s analysis that “[p]rejudgment interest is available under the Lanham Act only for counterfeiting, and this is not a counterfeiting case.” *Id.* (citation omitted); see also *Gaboratory, Inc. v. Gaboratory Int’l, Inc.*, No. 07-cv-4725, 2008 WL 11406056, at *15 (C.D. Cal. June 10, 2008) (“Recovery of pre-judgment interest ‘is available under the Lanham Act only for counterfeiting.’” (quoting *Moscow Distillery Cristall*, 1998 WL 101696, at *3)).

Later, in *Y.Y.G.M. SA v. Redbubble, Inc.*, 75 F.4th 995 (9th Cir. 2023), the Ninth Circuit precedentially held that prejudgment interest is unavailable when a plaintiff obtains relief under 15 U.S.C. § 1117(c), which provides statutory damages for the use of counterfeit marks. *Y.Y.G.M.*, 75 F.4th at 1007-08. Mirroring the Third Circuit’s analysis in *Kars 4 Kids*, the Ninth Circuit explained in *Y.Y.G.M.* that the “express allowance of prejudgment interest in § 1117(b)” implied that prejudgment interest is unavailable under § 1117(c). 75 F.4th at 1008. So while the Ninth Circuit has yet to hold precedentially that § 1117(a) precludes prejudgment interest, that holding is foreordained.

C. The Second and Fourth Circuits have taken intermediate positions.

The Second and Fourth Circuits (as well as the Sixth Circuit in a nonprecedential opinion) have staked out intermediate positions. These circuits hold, in contrast with the plurality of circuits, that § 1117(a) does not authorize prejudgment interest as a general matter, but that such an award is still available under certain circumstances.

1. The Second Circuit has held that § 1117(a) “does not provide for prejudgment interest,” but that in ““exceptional” cases,” it is “within the discretion of the trial court” to award it. *Merck Eprova*, 760 F.3d at 263-64 (quoting *Am. Honda Motor Co. v. Two Wheel Corp.*, 918 F.2d 1060, 1064 (2d Cir. 1990)). To be “exceptional” enough to “warrant an award of pre-judgment interest,” the case must involve “willfulness and bad faith.” *Id.* at 264. The Second Circuit thus has held that, while § 1117’s text warrants a departure from otherwise-applicable rules that generally govern federal claims, § 1117(b)’s explicit authorization of prejudgment interest does not bar that form of relief under § 1117(a).

In an unpublished ruling, the Sixth Circuit has adopted the same view. *See Wynn Oil*, 1995 WL 431019, at *3. Quoting the Second Circuit’s recitation of the rule, the court held that “[a]lthough Section 1117(a) does not provide for prejudgment interest, such an award is within the discretion of the trial court and is normally reserved for “exceptional” cases.” *Id.* (quoting *Am. Honda*, 918 F.2d at 1064); *see also, e.g., LidoChem, Inc. v. Stoller Enters.*, No. 09-cv-204, 2016 WL 9281944, at *3 (W.D. Mich. Jan. 5, 2016) (“[T]his [is] an exceptional case

entitling Plaintiff to pre-judgment interest under the Lanham Act.”); *Powerhouse Marks LLC v. Chi Hsin Impex, Inc.*, 463 F. Supp. 2d 733, 740 (E.D. Mich. 2006) (“Although Section 1117(a) does not provide for prejudgment interest, the Sixth Circuit has held that such an award is within the discretion of the trial court, but ‘is normally reserved for “exceptional” cases.’” (quoting *Wynn Oil*, 1995 WL 431019, at *3)).⁵

2. The Fourth Circuit has taken yet another middle-ground position. *See Ga.-Pac.*, 781 F.3d at 721-22. Like the Third Circuit in *Kars 4 Kids*, the Fourth Circuit in *Georgia-Pacific* analyzed the issue by comparing the explicit reference to prejudgment interest in § 1117(b) with the lack of any such reference in § 1117(a). 781 F.3d at 721-22. The court explained that § 1117(b) “authorizes an award of prejudgment interest in cases involving the knowing and intentional use of a counterfeit mark, but § 1117 makes no express provision for prejudgment interest in other circumstances.” *Ga.-Pac.*, 781 F.3d at 721-22 (emphasis omitted). And in the court’s view, “when, as here, a statute provides particularized forms of monetary relief and explicitly authorizes prejudgment interest in some circumstances but not others, . . . prejudgment interest is not intended to be awarded except as provided in the statute.” *Id.* at 722.

The Fourth Circuit “recognize[d]” that the Second Circuit had “authorized prejudgment interest under

⁵ The question whether § 1117(a) authorizes prejudgment interest is also presented in a pending Sixth Circuit appeal. *See* Defendants-Appellees Cross-Appellants’ Principal Brief on Appeal at 35-37, *Ford Glob. Techs., LLC v. Intermotive, Inc.*, Nos. 25-1971 & 25-1985 (6th Cir. Apr. 14, 2026), ECF No. 46.

§ 1117(a) in an ‘exceptional’ case.” *Ga.-Pac.*, 781 F.3d at 722 (quoting *Am. Honda*, 918 F.2d at 1064). But the court could “find no support for [that] conclusion in the text of the statute.” *Id.*

At the same time, the Fourth Circuit refused to “categorically foreclose an award of prejudgment interest under § 1117(a) as an element of a *damages* award.” *Ga.-Pac.*, 781 F.3d at 722. Specifically, the court observed that “one’s loss of the use of a particular sum of money over a period of time causes damage, for which the law generally allows an award of prejudgment interest.” *Id.* The Fourth Circuit thus concluded that § 1117(a) may permit courts to award prejudgment interest in cases involving damages awards, but precludes them from doing so where the plaintiff seeks only to recover the defendant’s profits. *See id.*⁶

* * *

In short, the courts of appeals are in disarray on the question presented. Four circuits have declined a textual or structural analysis of § 1117, instead applying a background presumption that prejudgment interest is available to successful federal claimants. The other

⁶ District courts in the Fourth Circuit have interpreted *Georgia-Pacific* to permit prejudgment interest under § 1117(a) in certain (but not all) circumstances. *See, e.g., Beyond, Inc. v. Asset Store, LLC*, No. 24-cv-1555, 2025 WL 1865770, at *8 (D. Md. July 7, 2025); *Concordia Pharms., Inc. v. Method Pharms., LLC*, 240 F. Supp. 3d 449, 458 (W.D. Va. 2017); *see also CPI Sec. Sys., Inc. v. Vivint Smart Home, Inc.*, No. 20-cv-504, 2024 WL 5186692, at *2 (W.D.N.C. Feb. 13, 2024) (“Defendant is surely wrong that pre-judgment interest is only available under the Lanham Act for counterfeiting claims . . .” (citing *Ga.-Pac.*, 781 F.3d at 722)).

circuits to have addressed the issue recognize that a departure from any ordinary rule is warranted, but have disagreed on where to land. At this point, only this Court can provide much-needed clarity.

II. The Seventh Circuit’s Position Is Wrong.

The best reading of 15 U.S.C. § 1117(a) forecloses prejudgment interest, and the Seventh Circuit’s contrary view—that prejudgment interest is presumptively available to all successful Lanham Act plaintiffs—is erroneous. At minimum, if prejudgment interest is available under § 1117 at all, it should be available in a narrow subset of cases, as in the Second and Fourth Circuits, not presumed appropriate in all cases, as in the Seventh Circuit.

1. As this Court’s cases make clear, the availability of prejudgment interest for violations of federal law is a matter of statute. Sometimes, textual analysis will reveal Congress’s intent to permit awards of prejudgment interest. *See, e.g., Rodgers v. United States*, 332 U.S. 371, 373-74 (1947). Sometimes not. *See, e.g., Monessen Sw. Ry. Co. v. Morgan*, 486 U.S. 330, 336-39 (1988) (finding a “sufficiently clear indication of legislative intent” to deny prejudgment interest under the Federal Employers’ Liability Act). Either way, it is Congress’s intent—as manifested in Congress’s statutes—that controls.

In assessing Congress’s intent, “courts must give effect to the clear meaning of [its] statutes as written.” *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 580 U.S. 405, 408 (2017) (internal quotation marks omitted); *see, e.g., Bartenwerfer v. Buckley*, 598 U.S. 69, 74 (2023) (“[W]e start where we always do: with the text of the

statute.” (quoting *Van Buren v. United States*, 593 U.S. 374, 381 (2021))). Section 1117(a) is no different: this Court has routinely interpreted it in line with its plain text. See *Dewberry Grp. v. Dewberry Eng’rs Inc.*, 604 U.S. 321, 326-28 (2025); *Romag Fasteners, Inc. v. Fossil, Inc.*, 590 U.S. 212, 214-16 (2020).

Several principles flow from this focus on plain text. First, courts “review[] text in context,” *Pulsifer v. United States*, 601 U.S. 124, 133 (2024), and do not “limit th[eir] inquiry to the text of [the relevant provision] in isolation,” *Star Athletica*, 580 U.S. at 414; see *Romag Fasteners*, 590 U.S. at 215 (interpreting § 1117(a) in light of “the statute’s structure” as a whole). Second, when “Congress [has] include[d] particular language in one section of a statute but omit[ted] it in another section of the same Act, it is generally presumed that Congress [has] act[ed] intentionally and purposely in the disparate inclusion or exclusion.” *Russello*, 464 U.S. at 23. Third, and relatedly, where “Congress has shown that it knows how to adopt the omitted language” in another provision, “[i]t is a fundamental principle . . . that [the] ‘absent provision[s] cannot be supplied by the courts.’” *Rotkiske v. Klemm*, 589 U.S. 8, 14 (2019) (second alteration in original) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 94 (2012)).

2. Applying these principles here requires the conclusion that awards of prejudgment interest are not available under § 1117(a).

Begin with § 1117(a)’s text, which “particularizes in considerable detail the types of monetary relief available for trademark infringement and defines the criteria for awarding each type.” *Ga.-Pac.*, 781 F.3d at 721.

Specifically, § 1117(a) identifies three classes of relief to which a successful trademark-infringement plaintiff “shall be entitled”: the defendant’s profits, the plaintiff’s damages, and costs. 15 U.S.C. § 1117(a). It further provides that, “according to the circumstances of the case,” the court may adjust an award of damages (up to treble) or profits (up or down, to avoid an inadequate or excessive recovery). *Id.* And it states that, “in exceptional cases,” the court “may award reasonable attorney fees to the prevailing party.” *Id.* Section 1117(a)’s text nowhere mentions prejudgment interest—not as a form of relief to which a plaintiff “shall be entitled”; not as a form of relief that the court may award “according to the circumstances of the case”; and not even as a form of relief that may be appropriate “in exceptional cases.” *Id.*

The proper interpretation of § 1117(a)’s silence on the question of prejudgment interest becomes clear once that provision is read in light of “the text of the whole statute.” *Star Athletica*, 580 U.S. at 414 (internal quotation marks omitted). The very next subsection, § 1117(b), expressly provides that, in specified circumstances involving the knowing and intentional use of a counterfeit mark, “the court may award prejudgment interest” at a specified rate and for a specified period. 15 U.S.C. § 1117(b). There is no reason to depart from the “presum[ption] that Congress act[ed] intentionally and purposely” when it “include[d]” this language in § 1117(b) but “omit[ted]” it from § 1117(a). *Russello*, 464 U.S. at 23.

Section 1117’s structure further confirms the point. *See Romag Fasteners*, 590 U.S. at 215. Section 1117(a) is a general provision that identifies the remedies for

infringement of registered and unregistered marks alike. Section 1117(b), in turn, specifies additional rules for “assessing damages under subsection (a)” in a narrow class of cases mostly involving the intentional infringement of a registered mark through counterfeiting. 15 U.S.C. § 1117(b). In those circumstances, Congress modified § 1117(a)’s discretionary authority to adjust an award “according to the circumstances of the case” and award attorney’s fees in “exceptional cases,” *id.* § 1117(a), into a command that the court “shall,” absent “extenuating circumstances,” award treble profits or damages *and* a reasonable attorney’s fee, *id.* § 1117(b). By mandating these heightened penalties, § 1117(b) reflects Congress’s judgment that a violation involving the intentional counterfeiting of a registered mark is particularly blameworthy—that it is, one might say, an “exceptional case[.]” as a matter of law. *Id.* § 1117(a).

Only “[i]n such a case” did Congress provide that district courts “*may* award prejudgment interest” at the rate established in 26 U.S.C. § 6621(a)(2) from “the date of the service of the claimant’s pleadings.” 15 U.S.C. § 1117(b) (emphasis added). That express grant is a powerful indication that courts *may not* award prejudgment interest in *other* cases. If district courts already possessed discretion to award prejudgment interest “[i]n assessing damages under subsection (a),” *id.*, the grant would be largely “inoperative or superfluous”—a disfavored result. *Corley v. United States*, 556 U.S. 303, 314 (2009) (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)).

Not only does the contrary reading expand the authorization of prejudgment interest from § 1117(b) to § 1117(a), it does so on *harsher* terms. Section 1117(b)

constrains the scope of a prejudgment-interest award, capping the interest rate and fixing the accrual date for the most culpable infringers. *See* 15 U.S.C. § 1117(b) (directing that interest be calculated at the rate established under 26 U.S.C. § 6621(a)(2), “beginning on the date of the service of the claimant’s pleadings setting forth the claim”). But because § 1117(a) has no textual constraints on prejudgment interest—because it says nothing about such an award at all—courts have felt at liberty to invent their own terms. *See Gorenstein*, 874 F.2d at 436-37 (“[C]ourts are bound by th[e statutory] rate so far as postjudgment interest is concerned. But prejudgment interest is governed by federal common law, and the courts are free to adopt a more discriminating approach.”). That is exactly what happened here: Grunt Style recovered interest on TWD’s profits at the prime rate rather than the lower rate applicable under § 1117(b), and for a period beginning several years before Grunt Style filed its lawsuit, *see* Pet. App. 26a-28a—and all this on a claim for infringement of an *unregistered* mark that the jury expressly concluded was not willful. *See id.* at 35a-36a; D. Ct. Doc. 264. Congress could not have envisioned that topsy-turvy result.

The more sensible result is the one dictated by § 1117’s text and structure: prejudgment interest is available for intentional counterfeiting under § 1117(b), and unavailable otherwise. Because Congress “show[ed] that it knows how to adopt the omitted [prejudgment-interest] language” in § 1117(b), the Seventh Circuit’s “[a]textual judicial supplementation” of § 1117(a) was “particularly inappropriate.” *Rotkiske*, 589 U.S. at 14.

3. Even if prejudgment interest were available in *some* § 1117(a) cases—and it is not—the Seventh Circuit’s holding that, in *all* cases, “prejudgment interest [is] ‘presumptively available’ for trademark-infringement claims under 15 U.S.C. § 1117(a),” Pet. App. 7a (quoting *Gorenstein*, 874 F.2d at 436), cannot stand. That presumption rests on nothing. *Gorenstein* did not derive it from § 1117’s text; to the contrary, it acknowledged that § 1117(a) “makes no reference to prejudgment interest,” and it ignored the fact that § 1117(b) *does* contain such a reference. 874 F.2d at 436. Nor did *Gorenstein* derive its presumption from any decision of this Court. Rather, it observed that “federal common law authorizes the award of [prejudgment] interest in appropriate cases”; collected various decisions from a “diverse” set of cases awarding such interest; and concluded that “[t]he time has come . . . to generalize.” *Id.* In so doing, *Gorenstein* concluded that “prejudgment interest should be presumptively available to victims of federal law violations” because it believed that “[w]ithout it, compensation of the plaintiff is incomplete and the defendant has an incentive to delay.” *Id.* But crucially, none of the collected cases that *Gorenstein* cited announced a freestanding presumption *in favor* of prejudgment interest on these or any other grounds; each case simply assessed the relevant statutes to determine whether prejudgment interest was, in fact, “appropriate” under the applicable statute or doctrine. *Id.*

The Seventh Circuit’s presumption, moreover, cannot be squared with its own rationales, as this case illustrates. Because Grunt Style did not ask the jury to award it actual damages and instead sought only

disgorgement of TWD’s profits, *see* D. Ct. Doc. 269, at 16-17 (Mar. 14, 2024) (jury instructions); *id.* at 24-25 (verdict form), this case did not involve “compensation” at all, *Gorenstein*, 874 F.2d at 436. *Cf. Ga.-Pac.*, 781 F.3d at 722 (holding that, while prejudgment interest may be available as part of a damages award under § 1117(a), it is not available where the plaintiff seeks only to recover the defendant’s profits). And because *TWD*, not Grunt Style, filed suit first, *see* D. Ct. Doc. 1, TWD plainly had no “incentive to”—and did not—“delay,” *Gorenstein*, 874 F.2d at 436. *Cf. Merck Eprova*, 760 F.3d at 263-64 (holding that prejudgment interest is available under § 1117(a) only in “‘exceptional’ cases” involving the defendant’s “willfulness and bad faith”).

At minimum, therefore, if this Court were to hold that prejudgment interest is appropriate in some cases under § 1117(a), it should reject the Seventh Circuit’s artificial thumb on the scale and adopt instead an approach—like the ones adopted by the Second and Fourth Circuits—under which prejudgment interest is available only when warranted for some case-specific reason.

III. The Question Presented Is Important And This Case Is An Ideal Vehicle For Resolving It.

1. The question presented is important and frequently recurring. Private parties file over 3,000 federal trademark cases each year on average.⁷ Because

⁷ *See* U.S. Cts., Table 4.7: U.S. District Courts—Intellectual Property Rights Cases Filed During the 12-Month Periods Ending June 30, 1990, and September 30, 1995 Through 2024 (Sep. 2024), https://www.uscourts.gov/sites/default/files/document/jff_4.7_0930.2024.pdf.

§ 1117(a) governs recovery for trademark actions generally, whenever one of those cases results in an award of damages or profits—unless the relatively unusual requirements of § 1117(b) are met—the availability of prejudgment interest under § 1117(a) will be at issue. And because different circuits answer that question differently, plaintiffs have an incentive to file in circuits that permit such awards, particularly because prejudgment interest, if available, can represent a substantial fraction of a plaintiff’s ultimate recovery—especially when, as here, the court claims discretion to award prejudgment interest at whatever rate it pleases and from whatever date it pleases. This case illustrates the point: the jury awarded Grunt Style profits of \$739,500, Pet. App. 23a, and the district court awarded prejudgment interest—at the prime rate and running from a date years before Grunt Style served notice of its claims—of approximately \$229,000, *id.* at 27a-28a, increasing Grunt Style’s recovery by roughly 31%.

Indeed, the issue has been litigated at the court of appeals level in nearly every circuit. *See* pp. 14-22, *supra*. There are hundreds of reported district court decisions addressing requests for prejudgment interest under § 1117(a). The split of authority on the question presented is well recognized. *See* 4 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 30:93 (Westlaw 5th ed. updated Sep. 2026). And even now, the question presented is pending before the Sixth Circuit in a case set for argument this month. *See* p. 21 n.5, *supra*.

Not only would resolving the question presented settle a fracture among the lower courts, it could also

resolve a parallel split under the Copyright Act. As with § 1117(a), the courts of appeals are split over whether successful *copyright*-infringement plaintiffs can recover prejudgment interest. Compare, e.g., *Polar Bear Prods., Inc. v. Timex Corp.*, 384 F.3d 700, 717-18 (9th Cir. 2004) (Copyright Act permits prejudgment interest); *McRoberts Software, Inc. v. Media 100, Inc.*, 329 F.3d 557, 572-73 (7th Cir. 2003) (same); *Kleier Advert., Inc. v. Premier Pontiac, Inc.*, 921 F.2d 1036, 1040-41 (10th Cir. 1990) (same), with, e.g., *Robert R. Jones Assocs. v. Nino Homes*, 858 F.2d 274, 282 & n.8 (6th Cir. 1988) (vacating a grant of prejudgment interest and noting that the Patent Act's explicit authorization of prejudgment interest supports the inference that such an award is unavailable in copyright suits). The principles this Court announces in resolving the Lanham Act split would likely bring clarity to copyright law as well.

2. This case is an ideal vehicle for resolving the question presented. TWD raised and preserved the argument that § 1117's text and structure preclude an award of prejudgment interest here at every stage below—in its opposition to Grunt Style's motion to amend the judgment, in its briefing on appeal, and in its petition for rehearing. And both the district court and the court of appeals considered the parties' arguments and decided the issue on the merits. Indeed, the Seventh Circuit panel expressly *acknowledged* the circuit split on the question presented before declining to revisit *Gorenstein*. Pet. App. 7a. The issue was raised, briefed with citation to controlling authority on both sides of the conflict, and resolved on the merits by both the district court and the court of appeals.

3. The question is outcome determinative and, as discussed, involves a substantial sum: the district court’s prejudgment-interest award of approximately \$229,000 increased the jury’s award by over 30%. Pet. App. 23a, 27a-28a. A ruling in TWD’s favor would eliminate that portion of the award in its entirety and irrevocably, as there is no dispute that this case did not involve the knowing counterfeiting of a registered mark that would trigger § 1117(b)’s authorization for prejudgment interest. Moreover, prejudgment interest would be unavailable to Grunt Style under either of the intermediate rules adopted by the Second and Fourth Circuits. The jury expressly found that TWD did not willfully infringe Grunt Style’s unregistered mark, *see* D. Ct. Doc. 264, so the case does not qualify as an “exceptional” case under the Second Circuit’s approach, which requires a showing of the defendant’s “willfulness and bad faith,” *Merck Eprova*, 760 F.3d at 264. And because Grunt Style sought recovery measured by TWD’s profits rather than any damages that Grunt Style actually suffered, prejudgment interest would be unavailable under the Fourth Circuit’s approach, too. *See Ga.-Pac.*, 781 F.3d at 722. Thus, Grunt Style has never argued—and could not have argued—that the award of prejudgment interest in this case would be appropriate in the absence of the presumption applied by the courts below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

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APPENDIX A

NONPRECEDENTIAL DISPOSITION

To be cited only in accordance with FED. R. APP. P. 32.1

**United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604**

Argued January 29, 2026
Decided June 10, 2026

Before

KENNETH F. RIPPLE, *Circuit Judge*

JOHN Z. LEE, *Circuit Judge*

JOSHUA P. KOLAR, *Circuit Judge*

No. 25-1305

GRUNT STYLE LLC,
Plaintiff-Appellee,

v.

Appeal from the United
States District Court for
the Northern District of
Illinois, Eastern
Division.

TWD, LLC,
Defendant-Appellant,

No. 1:18-cv-07695

LaShonda A. Hunt,
Judge.

O R D E R

The parties have spent over eight years litigating trademark rights in the phrase “This We’ll Defend,” a historical slogan associated with the United States Army.¹ Grunt Style LLC sells patriotic apparel with the “This We’ll Defend” mark; so does TWD, LLC. After the parties sued each other,² Grunt Style moved for partial summary judgment on TWD’s claims. The district court found that Grunt Style had established common-law priority in the mark, and dismissed TWD’s claims and cancelled its federal registration. The case went to trial on Grunt Style’s counterclaims, and a jury found TWD liable for infringement. The district court then entered final judgment, awarding Grunt Style damages and pre- and post-judgment interest and enjoining TWD’s further use of the mark.

TWD now appeals an assortment of rulings from across the case’s lifespan. It asks us to (among other

¹ The Army continues to use “This We’ll Defend” as a motto. *See* Henry Howe, *This We’ll Defend: The Army’s Defining Motto*, U.S. Army (Mar. 20, 2025), <https://perma.cc/6ZLR-R53H>. The parties’ use of the phrase is limited, by agreement (at least between TWD and the Army), to clothing and online sales of clothing. We do not address whether such a commonly recognized historical phrase is trademarkable to begin with, because that issue is not before us.

² The parties filed parallel lawsuits in 2018: Grunt Style in the Northern District of Illinois, and TWD in the Southern District of California. This appeal arises from TWD’s action, which became the vehicle for the parties’ dispute after the California suit was transferred to the Northern District of Illinois on Grunt Style’s motion. TWD was the original plaintiff in this suit, but the district court granted Grunt Style’s motion to realign the parties after dismissing TWD’s claims at summary judgment.

things) vacate the district court’s damages award and permanent injunction, reverse its summary-judgment ruling, and order a new trial.

We affirm. Despite the many issues TWD raises on appeal, this dispute is fundamentally about who began using the “This We’ll Defend” mark first. That is because “trademark ownership is not acquired by federal or state registration, but rather from prior appropriation and actual use in the market.” *S.C. Johnson & Son, Inc. v. Nutraceutical Corp.*, 835 F.3d 660, 665 (7th Cir. 2016) (cleaned up); *Hana Financial, Inc. v. Hana Bank*, 574 U.S. 418, 419 (2015) (“Rights in a trademark are determined by the date of the mark’s first use in commerce. The party who first uses a mark in commerce is said to have priority over other users.”). TWD makes much of its successful May 2015 application to register “This We’ll Defend” with the U.S. Patent and Trademark Office, but “[a] trademark application is always subject to previously established common law trademark rights of another party.” *S.C. Johnson*, 835 F.3d at 665-66 (quoting *Johnny Blastoff, Inc. v. Los Angeles Rams Football Co.*, 188 F.3d 427, 435 (7th Cir. 1999)). And any presumption of validity that federal registration confers “evaporates as soon as evidence of invalidity”—such as another party’s prior use—“is presented.” *Georgia-Pacific Consumer Prods. LP v. Kimberly-Clark Corp.*, 647 F.3d 723, 727 (7th Cir. 2011) (citation omitted).

The district court did not err when it found at summary judgment that Grunt Style’s use came first. Whether a party has demonstrated prior and superior rights is determined “on a case by case basis, considering the totality of the circumstances.” *Johnny Blastoff*, 188

F.3d at 433. The undisputed material facts—construed in TWD’s favor as the nonmovant—show that Grunt Style’s founder began using “This We’ll Defend” on Grunt Style’s clothing, company letterhead, and website (which was accessible nationwide) as early as 2011. Grunt Style continued to use the mark thereafter, including on invoices and at trade shows throughout the United States. These uses show “first, adoption, and second, use in a way sufficiently public to identify or distinguish [Grunt Style’s] goods.” *Id.* (cleaned up). TWD, meanwhile, concedes that its founder did not begin using the mark on clothing until September 2014—several years after Grunt Style’s first established use.

TWD’s efforts to contest Grunt Style’s prior rights in the mark are unpersuasive. It argues that Grunt Style’s evidence fails to show a sufficient volume of sales before September 2014. But Grunt Style “did not have to show either a high volume of sales or widespread recognition”; its sales via “a publicly available website” that “was available nationwide,” plus its other uses of the mark in company materials and at trade events, were enough. *S.C. Johnson*, 835 F.3d at 669–70; see *Johnny Blastoff*, 188 F.3d at 434 (“Evidence of actual sales is not necessary to establish ownership.”).

In addition, TWD argues that Grunt Style’s prior uses of the mark were solely “ornamental”—that is, use as decoration rather than as a means of identifying the product’s source. This ornamentality argument turns on the visual analysis of TWD’s expert, trademark attorney Eric Wachspress, which the district court excluded at summary judgment. TWD contends this exclusion was itself an abuse of discretion, but we disagree: not only

did TWD fail to introduce evidence of Wachspress’s qualifications, as required by Federal Rule of Evidence 702, but Wachspress’s report repeatedly veered into impermissible conclusions of law on Grunt Style’s underlying rights. In any event, we are satisfied that the “size, location, and dominance” of Grunt Style’s pre-2014 uses of the mark—including in small print on shirt tags—made these uses indisputably source-identifying rather than merely ornamental. U.S. Patent & Trademark Off., *Trademark Manual of Examining Procedure* § 1202.03(a) (May 2026); see 1 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 7:24 (5th ed. Mar. 2026 update) (collecting cases).

TWD also questions whether Grunt Style proved “continuous” use over the relevant period, again without success. *S.C. Johnson*, 835 F.3d at 668. It suggests that Grunt Style’s 2014 dissolution in Georgia and immediate reincorporation in Illinois under the same business name somehow breaks the chain of Grunt Style’s ongoing use. And it picks out certain changes in Grunt Style’s sale numbers, product lines, and the positioning of the “This We’ll Defend” slogan on its website to argue the company failed to actively stake out its rights in the mark.³

³ TWD’s argument on this front tracks the affirmative defense of “abandonment.” But the district court struck that defense, along with others, after TWD repeatedly failed to plead facts sufficient to support them as a matter of law; we find no error in that decision. Separately, TWD disputes the district court’s dismissal of its affirmative defenses of federal preemption and unclean hands at summary judgment. We conclude that TWD either waived or forfeited both defenses before the district court by failing to muster coherent “factual and legal arguments in support” of its position, and so we

The district court rejected these underdeveloped arguments, and so do we. The record shows a consistent pattern of public-facing use by the successive Grunt Style entities from 2011 onward; the law does not require rightsholders to use the mark in precisely the same way, or on the same products, over time. As we held in *S.C. Johnson*, “focusing exclusively” on one type of evidence in assessing continuous use “misse[s] the forest while looking for one specific type of tree.” *Id.* We thus affirm the district court’s dismissal of TWD’s claims, and cancellation of TWD’s trademark registration, based on its priority finding in Grunt Style’s favor at summary judgment.

Aside from priority, TWD also raises a host of other alleged missteps made by the district court throughout the litigation. Most—such as rulings on various discovery disputes, motions *in limine* based on the earlier summary-judgment order, and instructions to the jury on the scope of Grunt Style’s infringement claims—were both legally sound and well within the discretion of the two district judges who ably managed this case over many years.⁴ “[M]atters of trial management are for the district judge and we intervene only when it is apparent

do not address them. *Soo Line R.R. Co. v. Consol. Rail Corp.*, 965 F.3d 596, 602 (7th Cir. 2020).

⁴ TWD also criticizes the Southern District of California’s decision to transfer its case to Illinois at the outset of the litigation. But we could not review that decision even if we were so inclined. TWD does not appear to have ever moved the Illinois district court to transfer the case back to California, and “we cannot review the decision of a court in another circuit to transfer a case to a district court in this circuit.” *Alexander v. Erie Ins. Exch.*, 982 F.2d 1153, 1156 (7th Cir. 1993).

the judge has acted unreasonably.” *Blue v. Hartford Life & Accident Ins. Co.*, 698 F.3d 587, 593 (7th Cir. 2012) (citation omitted).

We pause to address the district court’s decision to award prejudgment interest on Grunt Style’s damages. In *Gorenstein Enterprises, Inc. v. Quality Care-USA, Inc.*, we found prejudgment interest “presumptively available” for trademark-infringement claims under 15 U.S.C. § 1117(a). 874 F.2d 431, 436 (7th Cir. 1989). TWD gestures at several circuits’ more recent divergence from *Gorenstein*’s rule, on the grounds that the statute only mentions prejudgment interest for claims under section 1117(b) involving the intentional use of a counterfeit mark. See *Kars 4 Kids Inc. v. America Can! Cars for Kids*, 8 F.4th 209, 225 n.24 (3d Cir. 2021) (no prejudgment interest for claims under section 1117(a)); *Georgia-Pacific Consumer Prods. LP v. von Drehle Corp.*, 781 F.3d 710, 721-22 (4th Cir. 2015) (same). But see *Merck Eprova AG v. Gnosis S.p.A.*, 760 F.3d 247, 264 (2d Cir. 2014) (affirming the district court’s award of prejudgment interest under section 1117(a)); *United Phosphorus, Ltd. v. Midland Fumigant, Inc.*, 205 F.3d 1219, 1236-37 (10th Cir. 2000) (reversing the district court’s denial of prejudgment interest under section 1117(a)). But *Gorenstein*—which TWD neither asked us to overrule in its briefing nor meaningfully addressed at oral argument—remains the binding law of this circuit, and we will not disturb it so easily. See *United States v. Orona*, 118 F.4th 858, 868 (7th Cir. 2024) (“[I]t is rarely appropriate to overrule circuit precedent just to move from one side of a conflict to another.” (citation omitted)).

AFFIRMED

APPENDIX B

In the
United States Court of Appeals
For the Seventh Circuit

Nos. 25-1305 & 25-1341

GRUNT STYLE LLC, an Illinois limited liability company,
Plaintiff-Appellee,

v.

TWD, LLC, a California limited liability company,
Defendant-Appellant.

Appeals from the United States District Court for the
for the Northern District of Illinois, Eastern Division.
No. 1:18-cv-07695 — **LaShonda A. Hunt**, *Judge.*

SUBMITTED APRIL 9, 2025 — DECIDED JUNE 12, 2025

Before HAMILTON, KIRSCH, and LEE, *Circuit
Judges.*

PER CURIAM. We address in this opinion recurring issues that arise in civil appeals when a district court's final judgment is silent on the disposition of some claims in the case. The district court's final judgment here was silent about the disposition of the defendant's counter-claims. After that omission was identified, the parties

and the district court proposed four separate solutions. That number suggests some clarification might be helpful to parties and district courts.

We agree with the district court's solution: we will remand the case for correction of what amounts to a clerical mistake in the judgment, and we will retain jurisdiction. No new notice of appeal will be needed as long as the district court only corrects the clerical mistake.

I. *Procedural Background*

In 2018, TWD, LLC, filed a complaint against Grunt Style LLC alleging trademark infringement. Both parties sell goods with trademarks related to the military and appealing to patriotic feelings, including a mark, "This We'll Defend." Grunt Style answered with counterclaims asserting that TWD was infringing Grunt Style's prior trademark. The district court (Judge Kocoras) granted Grunt Style's motion for partial summary judgment in April 2022, concluding that all of TWD's claims failed as a matter of law. With only Grunt Style's counterclaims remaining, in March 2023, Judge Kocoras sensibly redesignated Grunt Style as the plaintiff, and that is how the case has been framed ever since.

In June 2023, the case was then assigned to Judge Hunt, who held a trial in 2024. The district court entered judgment ordering TWD to pay Grunt Style \$739,500 without interest. Grunt Style promptly moved to amend the judgment to include interest and permanent injunctive relief. On January 28, 2025, the district court granted that motion and set out the injunction in a separate document consistent with our case law. See *MillerCoors LLC v. Anheuser-Busch Companies, LLC*, 940

F.3d 922, 922 (7th Cir. 2019). The same day the district court entered a separate amended judgment including the added interest. See Fed. R. Civ. P. 58. Within thirty days, TWD filed a notice of appeal from the amended judgment “and all orders now appealable, including but not limited to” five specified orders. We docketed it as appeal No. 25-1305.

Shortly after an appeal is docketed, this court conducts a preliminary review of the record for potential jurisdictional problems. See *Barrow v. Falck*, 977 F.2d 1100, 1102-03 (7th Cir. 1992) (describing procedure). This review begins with the judgment, which Rule 58 requires to be set out in a separate document precisely because it “keeps jurisdictional lines clear.” *Wisconsin Cent. Ltd. v. TiEnergy, LLC*, 894 F.3d 851, 854 (7th Cir. 2018). The entry of judgment in a separate document starts clocks on several critical appellate deadlines. See 28 U.S.C. § 2107(a); Fed. R. App. P. 4; Fed. R. Civ. P. 59.

Beyond just timing of an appeal, our appellate jurisdiction is ordinarily limited to final decisions, 28 U.S.C. § 1291, which typically means a district court has resolved all claims against all parties—including any counterclaims. See, e.g., *Chessie Logistics Co. v. Krinos Holdings, Inc.*, 867 F.3d 852, 856 (7th Cir. 2017). The judgment should be a self-contained document stating who won what relief and allowing anyone to see that all claims have been resolved and how. See *Reytblatt v. Denton*, 812 F.2d 1042, 1043-44 (7th Cir. 1987). If a judgment falls short of this standard, lawyers should alert the district court so it may make corrections. See *Philadelphia Indemnity Ins. Co. v. Chicago Trust Co.*, 930 F.3d 910, 912 (7th Cir. 2019).

Potential pitfalls of jurisdiction can be identified from the judgment. For example, a judgment “in favor of” a plaintiff without specifying a remedy suggests the case is not over. E.g., *Cooke v. Jackson Nat’l Life Ins. Co.*, 882 F.3d 630, 631-32 (7th Cir. 2018). For another example, a judgment dismissing Counts I, II, and IV leaves us to wonder whether Count III is still out there. E.g., *Thornton v. M7 Aerospace LP*, 796 F.3d 757, 763-64 (7th Cir. 2015). More to the point here, a judgment entered on one side’s claims looks incomplete if there was a counterclaim. E.g., *Sterling Nat’l Bank v. Block*, 984 F.3d 1210, 1216-17 (7th Cir. 2021).

The amended judgment here provides that judgment was entered “in favor of plaintiff Grunt Style LLC and against defendant TWD, LLC in the amount of \$739,500.00, plus \$229,235.38 in pre-judgment interest; post-judgment interest, which shall accrue at a rate of \$115.45 per day; and permanent injunctive relief, as set forth in the separate Order of Permanent Injunction.” The judgment does not reflect that TWD, as the original plaintiff, would take nothing from its original complaint. It was therefore not clear from the judgment alone that TWD’s claims had been resolved. We directed the parties to file memoranda addressing whether the judgment was deficient and whether we should either dismiss for lack of jurisdiction or remand for correction of the judgment.

Critically, a deficiency in a Rule 58 judgment is only *evidence* of a possible jurisdictional problem. It does not necessarily show conclusively that there *is* a jurisdictional problem. See *American Int’l Specialty Lines Ins. Co. v. Electronic Data Sys. Corp.*, 347 F.3d 665, 669 (7th

Cir. 2003). For purposes of ensuring that we have a final decision under § 1291, “[t]he test is not the adequacy of the judgment but whether the district court has finished with the case.” *Chase Manhattan Mortg. Corp. v. Moore*, 446 F.3d 725, 726 (7th Cir. 2006). Even the absence of a Rule 58 judgment does not preclude appeal if the district court has in fact reached a final decision, but that situation is far from ideal and creates avoidable uncertainty and expense. See Fed. R. App. P. 4(a)(7)(B); *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 384 (1978); *Calumet River Fleeting, Inc. v. Int’l Union of Operating Eng’rs, Loc. 150, AFL-CIO*, 824 F.3d 645, 650 (7th Cir. 2016). The parties are entitled to waive a deficiency in the judgment, though not the absence of a final decision within our appellate jurisdiction. But to avoid confusion, this court directs parties to address a deficiency early, before they brief an appeal that could end up being dismissed because of a jurisdictional defect.

TWD’s attempt to waive the defect in this judgment has created its own set of problems. Rather than filing a memorandum, TWD filed an amended notice of appeal saying that it intended to appeal regardless of any deficiency consistent with Rule 4(a)(7)(B). The amended notice also added more orders to the list of those being appealed. The amended notice was docketed as a new appeal, No. 25-1341, and a fee was assessed, though TWD suggests that it did not intend to open a new docket and that it should owe no additional fee. See Fed. R. App. P. 4(a)(4)(B)(iii).

In addition to identifying jurisdictional problems, we try to keep our docket free of duplicative appeals. Each party needs only one appeal to seek relief from any given

judgment or order. See *Harris v. Bellin Mem'l Hosp.*, 13 F.3d 1082, 1083 (7th Cir. 1994). Redundant appeals can breed confusion. Documents can wind up filed in the wrong case, or one can get the mistaken impression that there are separate appellants or appealable decisions. Unless there is some risk a party would be prejudiced, we invite litigants to dismiss extra appeals, and we will dismiss them ourselves at the outset if they are unnecessary.

We thus asked the parties in an order dated March 3, 2025, whether this second appeal was necessary. TWD had been invited to make its position known in a memorandum, not a new notice of appeal, and the 2021 amendments to the Federal Rules of Appellate Procedure abolished any need to enumerate orders preceding the judgment designated in a notice of appeal. Fed. R. App. P. 3(c).

After this order, TWD changed tack and asked the district court to correct its judgment. Grunt Style opposed; it thought the judgment accurately reflected that judgment had been entered in its favor—on both its own claims and on TWD's. The district court agreed with TWD and granted the motion to correct the judgment. Before correcting the judgment on the docket, however, it determined that it lacked the authority to do so while these two appeals were pending. The district court therefore entered an indicative ruling to signal its intent to correct the judgment if we remanded. Fed. R. Civ. P. 62.1.

TWD then filed a memorandum. It argued that the district court did not need this court's permission to cor-

rect the judgment. TWD also acknowledged that its second notice of appeal was unnecessary, but TWD explained that it had wanted to avoid any risk of waiving its rights. Grunt Style, for its part, stands on the amended judgment, though it agrees the second appeal is duplicative.

II. *Analysis*

At this stage we have been offered four proposed responses to the apparent omission of counterclaims in the judgment. Grunt Style insists there is no deficiency. TWD first said it wanted to waive the deficiency. Then it argued that the district court should correct the judgment without a remand. Finally, the district court said it cannot correct the judgment unless and until we remand for it to do so. We believe the district court's solution is the cleanest and most correct, so we remand for correction of what is best deemed a clerical mistake in the judgment. See Fed. R. Civ. P. 60(a); Fed. R. App. P. 12.1(b). We will also dismiss TWD's amended notice of appeal (docketed as No. 25-1341) as unnecessary without collecting a fee for that appeal.

A. *Remand for Correction of the Judgment*

The amended judgment is deficient, though we can understand Grunt Style's position that it is accurate enough. Judgment seems to have been entered in Grunt Style's favor on all claims, not just its own. But the purpose of the separate Rule 58 judgment is to make appellate jurisdiction clear, not just discernible. See *Reyblatt*, 812 F.2d at 1043. Standing alone, the judgment in Grunt Style's favor awarding damages is consistent with

several possibilities: (a) that TWD's claims remain pending, which would prevent finality; or (b) that TWD was awarded its own damages that were simply omitted by mistake; or (c) as in this case, that another district judge had dismissed those claims years earlier and they were omitted from this judgment as an oversight.

By reviewing the docket here, it is possible to confirm that option (c) is correct and that the district court was indeed finished with the case. But the need for that extra step is precisely the problem. The rules are designed to make the Rule 58 judgment crystal clear, without requiring anyone to study the district court's docket to figure out its intended meaning. That requires district courts to draft their judgments carefully, looking for earlier dismissals of parties and claims (especially where a case has been transferred among judges). See *Philadelphia Indemnity*, 930 F.3d at 912 (with limited exceptions, Rule 58(b) requires judge herself to inspect and approve judgments). Now that we know the underlying meaning, we could still proceed in this case if the parties agreed. But TWD has withdrawn its request that we do so. Given that shift and the district court's effort to clear up the record, we decline now to let the case proceed as is.

Is a remand needed to correct the judgment? TWD argues that the district court should be free to correct the judgment without a remand, relying on Rule 4(a)(2) of the Federal Rules of Appellate Procedure. Titled "Filing Before Entry of Judgment," that rule provides: "A notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or or-

der—is treated as filed on the date of and after the entry.” In addition to dealing with a simply delayed entry of judgment on a separate document, this rule also governs an appeal filed after a ruling that was reasonably but mistakenly believed to have been final. See *FirsTier Mortg. Co. v. Investors Mortg. Ins. Co.*, 498 U.S. 269, 277 (1991); *Brown v. Columbia Sussex Corp.*, 664 F.3d 182, 189-90 (7th Cir. 2011).

Here the notice of appeal was filed after the district court had entered a document it called a final judgment; the judgment it entered was just incomplete. We think that, for purposes of Rule 4, a deficient judgment is still a judgment—at least if there is little doubt about finality. A contrary rule would undermine the clarity the separate document is intended to provide. In a case like this one, it would mean the time to appeal did not start until 150 days after the court finished with the case—or here June 27, 2025. See Fed. R. App. P. 4(a)(7). TWD was right to appeal when it did. It could not wait another five months simply because the judgment did not tell it explicitly what it already knew—that its own claims had been resolved years ago. See *Thornton*, 796 F.3d at 763064; *Dale v. Lappin*, 376 F.3d 652, 654 (7th Cir. 2004). A party in doubt about whether a judgment is actually final can file an appropriate motion to suspend the time to appeal under Rule 4(a)(4) until the district court clarifies the matter. We are wary of instead inviting every party who makes a calendaring mistake to quibble with the judgment’s precision in an attempt to make a late appeal seem early. Cf. *Selective Ins. Co. of South Carolina v. City of Paris*, 769 F.3d 501, 509 (7th Cir. 2014) (holding

omission in judgment did not allow timely motion to reconsider three years later).

Contrary to TWD’s theory, then, the district court could not act unilaterally to correct the judgment while these timely appeals were pending. While it is true that premature appeals do not limit the court’s power to tie up loose ends and enter judgment, see *INTL FCStone Fin. Inc. v. Jacobson*, 950 F.3d 491, 502 (7th Cir. 2020), the general rule applies to these timely appeals: a proper appeal “divests the district court of its control over those aspects of the case involved in the appeal.” *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982). The district court recognized correctly that the pending appeal required it instead to offer only an indicative ruling. Fed. R. Civ. P. 62.1(a)(3).

The deficiency here—silence as to TWD’s counterclaims—is a clerical mistake that can be corrected under Federal Rule of Civil Procedure 60(a). Correction of a clerical mistake changes nothing of substance but is used to “restore the original meaning of the judgment.” *Shuffle Tech Int’l, LLC v. Wolff Gaming, Inc.*, 757 F.3d 708, 711 (7th Cir. 2014). Both parties understand that TWD received no relief on its claims; the judgment just needs to reflect that fact. A clerical mistake may be corrected “at any time,” but consistent with the *Griggs* principle, “after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court’s leave.” Fed. R. Civ. P. 60(a). One way we may provide that leave is with a remand—with or without the district court’s indication—for the limited purpose of having the district court correct the judgment to implement fully its decisions. E.g.,

Philadelphia Indemnity, 930 F.3d at 912 (remanding without indicative ruling). Because the flaw with the judgment is only clerical and does not affect finality, we have jurisdiction over the appeal and retain that jurisdiction during the remand. See Fed. R. App. P. 12.1(b); *Mosley v. Atchison*, 689 F.3d 838, 843 (7th Cir. 2012).

B. *Dismissal of Duplicative Appeal*

We will, however, retain jurisdiction over only one of TWD’s appeals. Appeal No. 25-1341 is unnecessary. All the issues we have discussed were subjects of the first appeal. An amendment to identify additional orders pre-dating the judgment is not necessary.

The Federal Rules of Appellate Procedure acknowledge the concept of amended notices of appeal but say little about how they operate. Commentators have noted a lack of case law providing further guidance. See 16A Wright & Miller, *Federal Practice & Procedure* § 3949.4 n.52 (5th ed.). Rule 4(a)(4) governs the effect of certain post-judgment motions on appellate deadlines. If a party appeals the judgment while one of these post-judgment motions is pending, Rule 4(a)(4)(B)(ii) provides that a party intending to challenge the later order disposing of that motion must file a notice of appeal or an amended notice of appeal. Otherwise, all the Rules say about an amended notice of appeal is that “No additional fee is required to file an amended notice.” Fed. R. App. P. 4(a)(4)(B)(iii).

TWD insists that it never intended to open a new appellate docket, but the Rules do not otherwise distinguish between amended notices of appeal and ordinary notices. See *Nocula v. UGS Corp.*, 520 F.3d 719, 724 (7th

Cir. 2008) (holding amended notice of appeal must be filed within time to appeal). The district court clerk transmits any notice of appeal—amended or otherwise—to our clerk, who docketed that appeal as a new case. Fed. R. App. P. 3(d)(1), 12(a).

In contrast to the post-judgment orders governed by Rule 4(a)(4), an amendment is only rarely needed to appeal additional pre-judgment orders. Since 2021, Rule 3(c)(4) has provided that a “notice of appeal encompasses all orders that, for purposes of appeal, merge into the designated judgment or appealable order. It is not necessary to designate those orders in the notice of appeal.” Rule 3(c)(6) further clarifies: “An appellant may designate only part of a judgment or appealable order by expressly stating that the notice of appeal is so limited. Without such an express statement, specific designations do not limit the scope of the notice of appeal.” In other words, designating the final judgment in the notice of appeal will bring up all then-appealable orders unless the appellant clearly intends to limit its rights. (Even designating the judgment is not always necessary. Fed. R. App. P. 3(c)(5).) This case is not the rare exception to the general rule. TWD said expressly in its notice that its appeal included but was *not* limited to specified orders. Any other reviewable orders were thus brought along by operation of Rule 3(c).

We also agree with TWD that it should not be required to pay a fee for the duplicative appeal. Rule 4(a)(4)(B)(iii) is written in categorical terms that no fee is owed for an amended notice—not just those relating to the post-judgment motions in Rule 4. See *Owen v.*

Harris County, 617 F.3d 361, 363 (5th Cir. 2010). Independent judgments require independent appeals and fees. See *Ammons v. Gerlinger*, 547 F.3d 724, 726 (7th Cir. 2008). But a litigant does not owe multiple fees if there is a single judgment that could have been appealed with a single notice. That is true whether because a post-judgment motion suspends the finality of the judgment until the motion is denied under Rule 4(a)(4) or because, as here, the two notices encompass the same orders from the beginning.

Having dismissed its second appeal, we stop to explain why TWD should not need to file a third. The mere correction of a clerical mistake (which is all we are remanding to be done) is made *nunc pro tunc*—Latin meaning “now for then”—because it “changes the records to reflect what actually happened.” *Mosley*, 689 F.3d at 842-43. (The *nunc pro tunc* maneuver should not be used, however, to rewrite history. See, e.g., *Monroe v. Bowman*, 122 F.4th 688, 690–91 (7th Cir. 2024) (district court could not convert earlier preliminary injunction into a permanent injunction “*nunc pro tunc*”).) Such a proper use of a *nunc pro tunc* change has retroactive legal effect back to the entry of the judgment that was deemed deficient and allows a prior appeal to proceed from the corrected judgment without a subsequent or amended notice of appeal. See *Mosley*, 689 F.3d at 843-44; *Local 1545, United Mine Workers of Am. v. Inland Steel Coal Co.*, 876 F.2d 1288, 1291 n.4 (7th Cir. 1989); accord, e.g., *Philadelphia Indemnity*, 930 F.3d at 912.

Grunt Style’s request to alter the judgment to include prejudgment interest, for example, did not address

a clerical mistake. The district court had originally declined to award interest—a portion of Grunt Style’s damages, see *Dual-Temp of Illinois, Inc. v. Hench Control, Inc.*, 777 F.3d 429, 430 (7th Cir. 2015)—but then reconsidered. The amended judgment was a new judgment, triggering a new time to appeal. Litigants in doubt whether the court merely corrected a clerical mistake or did something more can file a second notice of appeal out of caution, and in the face of ambiguity we will consolidate the appeals. But we do not foresee that being necessary here.

Conclusion

We DISMISS appeal No. 25-1341 as unnecessary. No fee shall be collected for that appeal. We REMAND appeal No. 25-1305 to the district court for the limited purpose of correcting its judgment to include the resolution of TWD’s claims. We will retain jurisdiction over No. 25-1305. TWD shall file a status report within one week of this opinion informing us whether the district court has entered a corrected judgment.

APPENDIX C

[Date Filed: 01/28/2025]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GRUNT STYLE LLC,

Plaintiff,

v.

TWD, LLC,

Defendant.

Case No. 18 C 7695

Hon. LaShonda A. Hunt

ORDER

This matter comes before the Court on Plaintiff Grunt Style LLC's ("Grunt Style") motion to amend the final judgment entered on November 22, 2024 to include pre- and post-judgment interest and for entry of permanent injunctive relief.¹ (Dkt. 313). Defendant TWD, LLC ("TWD") opposes the motion. (Dkt. 317). For the reasons discussed below, Grunt Style's motion is granted. Grunt Style is awarded \$229,235.38 in pre-judgment interest, post-judgment interest shall accrue at a rate of \$115.45 per day, and the Court grants permanent injunctive relief, as set forth in the accompanying Permanent Injunction Order.

¹ The Court assumes familiarity with the factual and procedural background set forth in prior opinions, including the post-trial ruling. (*See, e.g.,* Dkt. 293).

I. Pre-Judgment Interest

Grunt Style seeks to amend the judgment to include \$229,235.38 in pre-judgment interest on the \$739,500.00 jury award. In response, TWD argues that Grunt Style's request should be denied because (1) Section 1117(a) of the Lanham Act does not provide for pre-judgment interest and (2) the jury award is based on disgorgement of profits, rather than actual damages. Additionally, TWD argues that if Grunt Style is awarded pre-judgment interest, it should be limited to the rate and time period set forth in Section 1117(b) of the Lanham Act. Upon consideration of the applicable law, the Court finds that an award of pre-judgment interest is appropriate.

A. Pre-Judgment Interest

Whether to award pre-judgment interest is a matter committed to the district court's discretion. *Santa's Best Craft, LLC v. St. Paul Fire & Marine Ins. Co.*, 611 F.3d 339, 355 (7th Cir. 2010). That said, the Seventh Circuit has adopted a presumption in favor of awarding pre-judgment interest "to victims of federal law violations" because "[w]ithout it, compensation of the plaintiff is incomplete and the defendant has an incentive to delay." *Gorenstein Enterprises, Inc. v. Quality Care-USA, Inc.*, 874 F.2d 431, 436 (7th Cir. 1989). Despite this presumption, TWD argues that the textual differences between Sections 1117(a) and 1117(b) of the Lanham Act preclude such an award. The Court is not convinced.

Section 1117(a) provides remedies for traditional trademark infringement claims, including those asserted by Grunt Style in this case. *See Badger Meter, Inc. v. Grinnell Corp.*, 13 F.3d 1145, 1156 (7th Cir. 1994) ("[A]

plaintiff that prevails under 15 U.S.C. § 1125(a) is entitled to recover under 15 U.S.C. § 1117(a).”). Section 1117(a) does not explicitly provide for pre-judgment interest. On the other hand, Section 1117(b) provides remedies for the intentional use of a counterfeit mark and does expressly allow pre-judgment interest.

In support of its position, TWD relies on *Locklin v. Day-Glo Color Corp.*, which held that recovery of interest was precluded because it was not enumerated as a recoverable item in the statute. 429 F.2d 873, 877 (7th Cir. 1970). However, *Locklin* was not a trademark infringement case and it was decided well before the Seventh Circuit announced the presumptive rule about pre-judgment interest in *Gorenstein, supra*. Notably, at that time, the Seventh Circuit acknowledged that Section 1117(a) of the Lanham Act made no reference to pre-judgment interest but nonetheless found it appropriate to “generalize” and set forth a universal rule. *Id.* at 436.

TWD’s reliance on several out-of-circuit cases in support of its position is misplaced. See *Georgia-Pac. Consumer Prods. LP v. von Drehle Corp.*, 781 F.3d 710, 722 (4th Cir. 2015) (finding that when a statute explicitly authorizes pre-judgment interest in some circumstances but not others, pre-judgment interest is not intended to be awarded except as provided in the statute); *Moscow Distillery Cristall v. Pepsico, Inc.*, Nos. 96 C 36217, 96 C 36249, 96 C 36250, 1998 WL 101696, at *3 (9th Cir. Mar. 9, 2008); (holding that pre-judgment interest is available under the Lanham Act only for counterfeiting); *Kars 4 Kids Inc. v. Am. Can!*, 8 F.4th 209, 225 (3d Cir. 2021) (finding that pre-judgment interest is unavailable under Section 1117(a) because Section 1117(b) allows courts to

award prejudgment interest but Section 1117(a) does not). This Court is required to follow Seventh Circuit precedent.

Additionally, TWD also argues that even if *Gorenstein* is law in this circuit, the case is distinguishable because that award was based on plaintiff's damages, not defendant's profits. However, such a distinction is irrelevant. In fact, this argument was rejected in *R.J. Reynolds Tobacco Co. v. Premium Tobacco Stores, Inc.*, No. 99 C 1174, 2005 WL 293512 (N.D. Ill. Feb. 8, 2005). There, the defendant argued that because the award was a disgorgement of profits rather than actual damages, pre-judgment interest was not available. *Id.* at *1. The court noted that while pre-judgment interest is commonly awarded in cases where a party is compensated for actual damages, the case law does not support that pre-judgment interest is available only in that type of setting. *Id.* The court further explained that if pre-judgment interest were not available when profits are disgorged, a tortfeasor would be allowed to profit from the wrong inflicted on the victim. *Id.* "To allow such a result would undermine one of the primary goals of the Lanham Act: to prevent infringement from being a financially attractive way of conducting business." *Id.* Other courts in this circuit have reached similar conclusions. See *Dyson, Inc. v. SharkNinja Operating LLC*, 2019 U.S. Dist. LEXIS 56028, 69-70 (N.D. Ill. Mar. 31, 2019); *Forest River, Inc. v. inTech Trailers, Inc.*, No. 21 C 645, 2024 WL 4234739, at *10 (N.D. Ind. Sept. 19, 2024).

Thus, based on the applicable law in this Circuit, the Court finds that Grunt Style is entitled to pre-judgment interest.

B. Interest Rate for Pre-Judgment Interest

TWD argues that if the Court awards pre-judgment interest, it should apply the interest rate set forth in Section 1117(b) of the Lanham Act. On the other hand, Grunt Style contends that the applicable interest rate should be the average prime rate for the applicable period.

The Seventh Circuit has instructed district courts to use the prime rate as the benchmark for pre-judgment interest unless either there is a statutorily defined rate or the district court engages in “refined rate-setting” directed at determining a more accurate market rate for interest. *Frey v. Coleman*, 903 F.3d 671, 682 (7th Cir. 2018). Section 1117(b) Act provides a statutorily defined rate. Specifically, it provides that the applicable interest rate should be the annual interest rate established under Section 6621(a)(2) of the Internal Revenue Code of 1986. 15 U.S.C. § 1117(b)(2).

However, as discussed *supra* and as TWD vehemently points out throughout its opposition, Grunt Style has not asserted a claim under Section 1117(b). Nevertheless, TWD argues that even in the “most extreme cases of intentional and knowing trademark infringement,” this lower rate applies. (TWD’s Opp. at 11). But TWD has not pointed to any cases where a court embraced such a rate in a Section 1125(a) trademark infringement case. In light of the lack of support provided by TWD and the clear instruction from the Seventh Circuit, the Court finds that the applicable rate should be the prime rate. *See Curry v. Revolution Lab’s, LLC*, No. 17 C 2283, 2023 WL 5509337, at *22 (N.D. Ill. Aug. 25, 2023), *aff’d*, No. 23-2850, 2024 WL 5162836 (7th Cir.

Dec. 19, 2024) (The Seventh Circuit has repeatedly stated that the prime rate is the preferred rate for awarding pre-judgment interest.).

C. Timeframe for Pre-Judgment Interest

Grunt Style asserts that the interest period should begin on the date that TWD’s online retail store went live—July 7, 2015. Conversely, TWD argues that, pursuant to Section 1117(b) of the Lanham Act, the interest period should begin on the date that Grunt Style served its pleadings. Again, Section 1117(b) does not apply here; thus, Grunt Style has the better argument.

Pre-judgment interest typically accrues from the date of the loss or from the date on which the claim accrued. *Am. Nat. Fire Ins. Co. ex rel. Tabacalera Contreras Cigar Co. v. Yellow Freight Sys., Inc.*, 325 F.3d 924, 935 (7th Cir. 2003). “A claim ordinarily accrues when a plaintiff has a complete and present cause of action.” *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 670 (2014) (finding that copyright claim accrues “when an infringing act occurs”). Here, Grunt Style’s trademark rights were infringed as of, at least, July 7, 2015, when TWD’s website went live. Thus, the Court finds that the pre-judgment interest period is July 7, 2015 to November 22, 2024—the date that the final judgment was entered. *See Curry*, 2023 WL 5509337, at *22 (awarding prejudgment interest at the prime rate beginning with the date of the first known infringing sale).

Grunt Style provided a pre-judgment interest calculation and a declaration explaining its calculation. TWD does not object to that calculation. Accordingly, the

Court finds that Grunt Style is entitled to \$229,235.38 in pre-judgment interest.

II. Post-Judgment Interest

“Regardless of whether there is any reference to post-judgment interest in the pleadings, a court’s order, or the entry of a money judgment, a prevailing plaintiff in federal court is automatically entitled to post-judgment interest.” *Miller v. Artistic Cleaners*, 153 F.3d 781, 785 (7th Cir. 1998). Referencing its arguments about Grunt Style’s entitlement to pre-judgment interest, TWD argues only that it should not be required to pay post-judgment interest on any prejudgment interest award. As discussed *supra*, Grunt Style is awarded pre-judgment interest. Thus, TWD is also required to pay post-judgment interest on that amount. *See R.J. Reynolds Tobacco Co.*, 2005 WL 293512, at *3 (finding that post-judgment interest shall accrue on “the amount of the jury’s award plus prejudgment interest”).

Grunt Style provided a chart listing the applicable post-judgment interest rate and a declaration explaining its calculation. TWD does not object to that calculation. Accordingly, post-judgment interest shall accrue at a rate of \$115.45 per day.

III. Permanent Injunctive Relief

Grunt Style seeks a permanent injunction restraining TWD from interfering with and infringing its trademark rights. TWD makes several arguments in opposition to Grunt Style’s request. First, TWD contends that Grunt Style is not entitled to injunctive relief as a remedy for its Illinois Uniform Deceptive Trade Practices Act (“IUDTPA”) or California Unfair Competition Law

(“UCL”) claims. Additionally, TWD argues that Grunt Style has not shown irreparable harm, as evidenced by its long delay in seeking injunctive relief. Finally, TWD contends that the relief Grunt Style seeks is far beyond the scope of the issues that were litigated in this case. The Court considers each of TWD’s arguments below.

A. IUDTPA

TWD argues that Grunt Style cannot obtain injunctive relief under the IUDTPA because it has not proved that it is likely to be damaged in the future. True, “[t]he IUDTPA only allows consumers to sue for injunctive relief, and to state a claim under that Act, plaintiffs must allege a likelihood of future harm.” *In re Fluidmaster, Inc.*, 149 F. Supp. 3d 940, 961 (N.D. Ill. 2016). Given that the jury found that TWD infringed Grunt Style’s trademark rights, the Court is persuaded that Grunt Style has demonstrated a sufficient likelihood of future damage. *See CME Grp. Inc. v. Nagovski*, No. 19 C 1621, 2019 WL 13252880, at *2 (N.D. Ill. Sept. 27, 2019) (“Absent a permanent injunction, there is nothing to prevent [defendants] from engaging in infringing conduct in the future.”); *United Air Lines, Inc. v. Air Line Pilots Ass’n, Int’l*, 563 F.3d 257, 275 (7th Cir. 2009) (“The court may consider how easily former practices might be resumed at any time in determining the appropriateness of injunctive relief.”).

B. UCL

TWD also argues that Grunt Style is not entitled to injunctive relief under the UCL because it waived its claim for actual damages. The Court disagrees. As an in-

itial matter, “it is not necessary for plaintiff to prove actual damage or injury to obtain injunctive relief.” *Am. Taxi Dispatch, Inc. v. Am. Metro Taxi & Limo Co.*, 582 F. Supp. 2d 999, 1005 (N.D. Ill. 2008) (quoting 5 McCarthy on Trademarks and Unfair Competition § 30:10 (4th ed. 2008)). Even so, Grunt Style proved that TWD infringed its trademark rights, “which is itself a cognizable injury” under the UCL. *Monster Energy Co. v. Integrated Supply Network, LLC*, 821 F. App’x 730, 733 (9th Cir. 2020)). Having established a claim, Grunt Style is entitled to injunctive relief, which is the one of the few forms of relief available under the UCL. See *Kryzhanovskiy v. Amazon.com Servs., Inc.*, No. 22 CV 1292, 2022 WL 2345677, at *3 (E.D. Cal. June 29, 2022) (“A UCL action is equitable in nature, damages cannot be recovered, and prevailing plaintiffs are generally limited to injunctive relief and restitution.”).

C. Application of Permanent Injunction Factors

“Permanent injunctive relief is appropriate if the party seeking the injunction demonstrates ‘(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.’” *Vaughn v. Walthall*, 968 F.3d 814, 824-25 (7th Cir. 2020) (quoting *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006)). “[I]t is well-established in the Seventh Circuit that irreparable harm and inadequate remedy at law are presumed in trademark and trade dress

infringement cases.” *MetroPCS v. Devor*, 215 F. Supp. 3d 626, 639 (N.D. Ill. 2016) (collecting cases). Here, TWD argues that the presumption of irreparable harm has been rebutted because Grunt Style waited multiple years before seeking injunctive relief.

In support of its position, TWD points to the prior court order from March 2023 denying Grunt Style’s motion for a preliminary injunction. (Dkt. 223). There, the Court held that Grunt Style failed to establish irreparable harm as it did not explain why it waited over four years after learning of TWD’s infringement to move for a preliminary injunction. Grunt Style says that denial of a preliminary injunction has no effect at this stage of the case, as it has shown that it is entitled to the remedies afforded under the Lanham Act, Illinois law, and California law. The Court agrees. *See Gjertsen v. Bd. of Election*, 751 F.2d 199, 202 (7th Cir. 1984) (“A preliminary injunction has no preclusive effect—no formal effect at all—on the judge’s decision whether to issue a permanent injunction.”); *Mitchell v. Wall*, 808 F.3d 1174, 1176 (7th Cir. 2015) (“[T]he district judge’s denial of preliminary relief does not preclude the later issuance of a permanent injunction.”).

At this point, Grunt Style has established each of the four factors. As to the first and second factors, “injuries incurred by trademark infringement, which [Grunt Style] has established here, ‘are by their very nature irreparable and not susceptible of adequate measurement for remedy at law.’” *Coach, Inc. v. 3D Designers Inspirations*, 70 F. Supp. 3d 942, 950 (C.D. Ill. 2014) (quoting *Processed Plastic Co. v. Warner Commc’ns, Inc.*, 675 F.2d 852, 858 (7th Cir. 1982)). As to the third and fourth

factors, “[t]here is no harm to Defendant[] to being enjoined from violating the law, and eliminating potential consumer confusion serves the public interest.” *Ent. One UK Ltd. v. 2012Shiliang*, 384 F. Supp. 3d 941, 955 (N.D. Ill. 2019). Accordingly, these factors weigh in favor of granting a permanent injunction.

D. Content and Scope of Permanent Injunction

The parties dispute the content and scope of the permanent injunction. Specifically, Grunt Style proposes that the permanent injunction should encompass “Federally Registered trademarks owned by Plaintiff Grunt Style and any common law trademark of Grunt Style identified in the above identified suit, particularly THIS WE’LL DEFEND.” (Proposed Permanent Inj. Or. at 2, Dkt. 5). TWD, on the other hand, proposes a more limited injunction, which enjoins TWD “from using THIS WE’LL DEFEND as a trademark source identified on t-shirts and as a trademark source identifier for an online retail store selling t-shirts in violation of 15 U.S.C. § 1125(a).” (TWD’s Opp. at 18).

The scope of injunctive relief is dictated by the extent of the violation established. *City of Evanston v. Barr*, 412 F. Supp. 3d 873, 887 (N.D. Ill. 2019) (citing *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)); *see also Philips Med. Sys. (Cleveland), Inc. v. Buan*, No. 19 C 2648, 2023 WL 143200, at *4 (N.D. Ill. Jan. 10, 2023) (“If a permanent injunction is warranted, we then must tailor the injunction to the scope of the violation.”) (internal quotations omitted). The only trademark rights at issue in this case were the rights to the THIS WE’LL DEFEND mark. Specifically, the issues that were decided in this case were: (1) whether TWD infringed Grunt

Style's trademark rights by using THIS WE'LL DEFEND on t-shirts, and (2) whether TWD infringed Grunt Style's trademark rights by using THIS WE'LL DEFEND in connection with its online retail store. The Court declines to enter an injunction that extends to other trademark rights that were not at issue in this case.

IV. CONCLUSION

For the reasons stated above, Grunt Style's motion to amend the final judgment and for entry of permanent injunctive relief [313] is granted. The final judgment [294] is amended to include an award in favor of Grunt Style and against TWD for pre-judgment interest in the amount of \$229,235.38, post-judgment interest of \$115.45 per day, and permanent injunctive relief, as set forth in a separate order.

DATED: January 28, 2025 **ENTERED:**

[/s/ LaShonda A. Hunt]

LASHONDA A. HUNT

United States District Judge

APPENDIX D

[Date Filed: 04/12/2022]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

TWD, LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	18 C 7695
	)	
GRUNT STYLE LLC,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

CHARLES P. KOCORAS, District Judge:

Before the Court is Defendant Grunt Style LLC's ("Grunt Style") Motion for Partial Summary Judgment. For the following reasons, the Court grants the Motion.

BACKGROUND

In resolving a motion for summary judgment, the Court views the evidence in the light most favorable to the nonmovant. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The following facts are taken from the record and are undisputed unless otherwise noted.

This action raises an issue over the ownership of the "THIS WE'LL DEFEND" trademark (the "Mark").

Plaintiff TWD, LLC (“TWD”) owns U.S. Trademark Number 4880766, while Defendant Grunt Style asserts it has common law rights to the Mark.

I. Grunt Style’s History and Use of the Mark

Grunt Style traces its beginnings to 2009 when Daniel Alarik, a U.S. Army veteran, began selling apparel out of his car. Alarik marketed his apparel under the marks “Grunt Style,” which is a reference to his time as an Army “grunt,” and “This We’ll Defend,” which is an homage to his time in the U.S. Army as a drill sergeant. Alarik lived in Georgia at the time he started the company, so he initially formed the company as a Georgia limited liability company (“Grunt Style Georgia”).

However, Alarik moved to Illinois and wanted his company to be an Illinois company. So, in May 2014, Alarik filed a certificate of termination with the Georgia Secretary of State and Grunt Style Georgia was dissolved on June 11, 2014. Grunt Style’s Illinois articles of organization were filed with the Illinois Secretary of State on June 17, 2014. That company is the Defendant in this action. Alarik ensured that the Illinois company worked to wrap up the Grunt Style Georgia’s affairs, including fulfilling all pending orders on the Grunt Style Georgia’s—www.gruntstyle.com—which is now Defendant Grunt Style’s website.

Grunt Style began prominently using the Mark in 2011, featuring it on hangtags, iron-on collar tags, company letterheads, and directly on its shirts. When using the Mark in this manner, it was included directly next to or directly below the company name. *See* Dkt. # 167-1,

¶¶ 14, 16-17, 20. Around the same time, Grunt Style began using the Mark on its online retail store, www.gruntstyle.com, including in the browser tab and header.

As the company grew, Grunt Style developed an insignia featuring two crossed rifles—a reference to the United States and its independence—and the initials of the company. Grunt Style also uses a design featuring the insignia with the name of the company above the insignia and the Mark below the insignia. Grunt Style owns Federal Trademark Registration Number 4991746 for this design. The trademarked design is featured on its clothes, both as a tag and on the sleeve, and in the online retail store header. Grunt style also uses the Mark on its own, directly emblazoned on the front, back, and sleeve of shirts, and on the leg of a pair of shorts. *See id.* at ¶ 20.

II. TWD's History and Use of the Mark

TWD is a California limited liability company founded by Tim Bauer in 2013. Bauer first became familiar with the phrase “this we’ll defend” in 2004 while doing research on historical American flags. The phrase was featured on a flag used by the U.S. War Office in 1778. Bauer wanted to start a brand that “would echo [his] strong sense of gun advocacy and patriotism to others who felt the same way.” Dkt. # 176-16, ¶ 3. He conducted research on the use of the phrase with the U.S. Patent and Trademark Office (“USPTO”) and on Google. Finding no apparent prior use, he purchased the domain name “www.thiswelldefend.com” in April 2013. Bauer then began designing t-shirts and sold his first shirt in September 2014.

TWD applied for a trademark in May 2015. TWD received its federal trademark for use of the Mark on t-shirts in Class 25 in January 2016. In July 2019, TWD and the U.S. Department of the Army, which owns a federal trademark for use of the Mark in connection with career services, entered into a written agreement allowing for TWD's use of the Mark for the sale of clothes in Class 25, or online or retail sales in Class 35. TWD continues to use the Mark on its website and on shirts, both on the tag and on the front of the shirt.

TWD alleges Grunt Style's use of the Mark infringes on its federally registered trademark in violation of the Lanham Act, 15 U.S.C. §§ 1114, 1125(a). Grunt Style also brings several counterclaims, including a declaratory judgment for invalidity of TWD's registered trademark; a declaratory judgment of non-infringement of TWD's registered trademark; violations of the Lanham Act, 15 U.S.C. § 1125; common law trademark infringement; common law unfair competition; violations of the Illinois Deceptive Business Practices Act, 815 ILCS 510/1 *et seq.*; and a violation of California's unfair competition law, Cal. Bus. & Prof. Code § 17200, *et seq.* Grunt Style now moves for partial summary judgment.

LEGAL STANDARD

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (citation omitted). "A genuine dispute as to any material fact exists if the evidence is such that a reasonable jury

could return a verdict for the nonmoving party.” *Kvapil v. Chippewa Cnty.*, 752 F.3d 708, 712 (7th Cir. 2014) (cleaned up).

In deciding whether a dispute exists, the Court must “construe all facts and reasonable inferences in the light most favorable to the non-moving party.” *Citizens for Appropriate Rural Roads v. Foxx*, 815 F.3d 1068, 1074 (7th Cir. 2016). The nonmovant “must go beyond the pleadings” to demonstrate that there is evidence “upon which a jury could properly proceed to find a verdict in [their] favor.” *Modrowski v. Pigatto*, 712 F.3d 1166, 1168-69 (7th Cir. 2013). “The existence of a mere scintilla of evidence, however, is insufficient to fulfill this requirement.” *Wheeler v. Lawson*, 539 F.3d 629, 634 (7th Cir. 2008). And “[c]onclusory statements, not grounded in specific facts” cannot defeat a motion for summary judgment. *Bordelon v. Bd. of Educ. of the City of Chi.*, 811 F.3d 984, 989 (7th Cir. 2016) (cleaned up).

Not all factual disputes will preclude the entry of summary judgment, only those that “could affect the outcome of the suit under governing law.” *Outlaw v. Newkirk*, 259 F.3d 833, 837 (7th Cir. 2001) (citation omitted). In deciding a motion for summary judgment, the Court’s sole function is “to determine whether there is a genuine issue for trial.” *Tolan v. Cotton*, 572 U.S. 650, 657 (2014). The Court cannot weigh conflicting evidence, assess the credibility of witnesses, or determine the ultimate truth of the matter, as these are functions of the jury. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Omnicare, Inc. v. UnitedHealth Grp., Inc.*, 629 F.3d 697, 704-05 (7th Cir. 2011).

Local Rule 56.1 requires a party moving for summary judgment to submit a statement of material facts as to which the movant contends there is no genuine issue and entitles the movant to judgment as a matter of law. The party opposing the motion for summary judgment is then required to file “any opposing affidavits and other materials referred to in [Federal Rule of Civil Procedure 56(e)]” and a “concise response” to the movant’s statement of facts containing “any disagreement, specific references to the affidavits, parts of the record, and other supporting materials.” L.R. 56.1(b)(1), (3).

“A general denial is insufficient to rebut a movant’s factual allegations; the nonmovant must cite specific evidentiary materials justifying the denial.” *Malec v. Sanford*, 191 F.R.D. 581, 584 (N.D. Ill. 2000). Local Rule 56.1(b)(3)(C) is not satisfied by “purely argumentative denials,” *id.*, or “evasive denials that do not fairly meet the substance of the material facts asserted,” *Bordelon v. Chi. Sch. Reform Bd. of Trs.*, 233 F.3d 524, 528 (7th Cir. 2000). If a response to a statement of material fact provides only extraneous or argumentative information, this response will not constitute a proper denial of the fact, and the fact is admitted. *See Graziano v. Vill. of Oak Park*, 401 F. Supp. 2d 918, 936 (N.D. Ill. 2005). Similarly, if a statement of fact contains a legal conclusion or otherwise unsupported statement, including a fact that relies upon inadmissible hearsay, such a fact is disregarded. *Eisenstadt v. Centel Corp.*, 113 F.3d 738, 742 (7th Cir. 1997). “The purpose of the 56.1 statement is to identify for the Court the evidence supporting a party’s

factual assertions in an organized manner[;] it is not intended as a forum for factual or legal argument.” *Malec*, 191 F.R.D. at 585.

DISCUSSION

Before addressing the merits of the Motion, we must first address evidentiary disputes raised by the parties.

I. TWD’s Objections

In its Local Rule 56.1 Response, TWD raises evidentiary objections to 28 of Grunt Style’s statements of fact. On a motion for summary judgment, the Court considers “only those facts whose substance would be admissible at trial under a form permitted by the Federal Rules of Evidence, although the form produced at summary judgment need not be admissible.” *Wragg v. Vill. of Thornton*, 604 F.3d 464, 466 (7th Cir. 2010) (citing *Celotex*, 477 U.S. at 324).

TWD first raises a bevy of foundational objections to evidence supporting Grunt Style’s corporate background and use of the Mark. TWD mostly objects to interrogatory responses verified by Timothy Jensen, Grunt Style’s Chief Operating Officer, saying, for example, “Ex. A (Interrogatory Responses) [Dkt. 167-3] is verified by Timothy Jensen, not Mr. Alarik. Mr. Jensen started working in February 2013 in Illinois for non-party Grunt Style, LLC (Georgia). [Jensen Depo., at 10:18 (“I started work in February of 2013”)].” So, TWD’s argument appears to be that Jensen does not have the personal knowledge to testify to those facts. *See* Fed. R. Evid. 602. But presumably, the Chief Operating Officer of a company would have personal knowledge of the company’s general history and use of a

trademark. Nevertheless, the facts are independently supported by the declarations of Alarik, the founder of the company. Accordingly, TWD’s foundational objections are overruled.

TWD next asserts several vagueness objections regarding Grunt Style Georgia and Grunt Style Illinois. Those objections are overruled as the statements of fact are not vague when read in light of the supporting evidence and surrounding statements of fact.

TWD also attempts to raise several hypertechnical disputes where there is no dispute. For example, Grunt Style asserts “TWD, LLC was formed on or after February 10, 2015.” Dkt. # 166-1, ¶ 56. TWD responds “**Disputed in Part.** Plaintiff TWD, LLC was formed on February 10, 2015, not ‘after.’” Dkt. # 176-1, ¶ 56 (emphasis in original). Since there is no real dispute, we take these as admissions.

II. Grunt Style’s Objections

In its Reply, Grunt Style asks the Court ignore TWD’s proposed expert, which TWD relies heavily on in its Response. In determining the admissibility of an expert opinion under Federal Rule of Evidence 702, the Court acts as a “gatekeeper” to determine whether the proffered expert testimony is reliable and relevant. *See Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 149 (1999) (discussing *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993)). In doing so, the Court asks whether: (1) the expert is “qualified by knowledge, skill, experience, training, or education”; (2) the proposed expert testimony will “assist the trier of fact in determining a relevant fact at issue in the case”; (3) the expert’s

testimony is “based on sufficient facts or data and reliable principles and methods”; and (4) the expert “reliably applies the principles and methods to the facts of the case.” *Lees v. Carthage Coll.*, 714 F.3d 516, 521-22 (7th Cir. 2013). The party seeking to introduce the expert testimony bears the burden of demonstrating the expert testimony satisfies Rule 702 by a preponderance of the evidence. *Gopalratnam v. Hewlett-Packard Co.*, 877 F.3d 771, 782 (7th Cir. 2017). TWD’s proffered expert testimony fails on at least two of these inquiries.

First, TWD has not established by a preponderance of evidence that the proposed expert is qualified as an expert. “Proof of qualifications typically includes years of experience, training, publications, degrees, work history, professional affiliations, and other indicia of expertise.” *A.S. b/n/f Snider v. Remington Arms Co., LLC*, 2020 WL 1244404, at *3 (S.D. Ind. 2020) (citing *Hall v. Flannery*, 840 F.3d 922, 928 (7th Cir. 2016)). Notably, TWD does not include the proposed expert’s resume or curriculum vitae. Instead, TWD relies on the proposed expert’s report itself. But the report does little more than state the proposed expert has experience working in the USPTO for seven years from 1980 to 1987, and in private legal practice after 1987. But these general statements, which do not even make clear whether the proposed expert is an attorney or another type of trademark practitioner, are not enough for the Court to determine whether the proposed expert is indeed qualified to offer his opinion. Inclusion of a resume would have allowed for the Court to make a more thorough determination as to his credentials.

Second, the proposed expert's report offers only legal conclusions about Grunt Style's use of the Mark. It is axiomatic that "expert testimony as to legal conclusions that will determine the outcome of the case is inadmissible." *Good Shepherd Manor Found., Inc. v. City of Mokence*, 323 F.3d 557, 564 (7th Cir. 2003). The expert here opines that Grunt Style had no prior trademark use of the Mark because its use was minimal and ornamental, but, if there was trademark use of the Mark, it was by Grunt Style Georgia, not Defendant Grunt Style Illinois. Such legal conclusions determine the outcome of Grunt Style's claims and are therefore not admissible.

III. Motion for Summary Judgment

Turning to the merits of the Motion, Grunt Style argues: it has common law rights in the Mark; the Court must cancel TWD's federally registered trademark because it has superior rights; the Court should dismiss TWD's claims as a matter of law; and the Court should dismiss TWD's affirmative defenses as a matter of law. We address each in turn.

a. Grunt Style's Common Law Rights in the Mark

Grunt Style asserts it has common law trademark rights in the Mark because it started using the Mark in 2011. TWD challenges this on several grounds. First, TWD says Defendant Grunt Style is separate from non-party Grunt Style Georgia, which first began the alleged use of the Mark. TWD Asserts Grunt Style Georgia did not assign its rights to Defendant Grunt Style in writing, so Grunt Style Illinois has no rights in the Mark. TWD also argues Grunt Style Illinois discontinued its use of

the Mark and it has not shown the geographic areas, for example the city or zip codes, in which Grunt Style sold its products. To resolve these arguments, we ask two related questions: (1) whether Grunt Style Illinois is the successor of Grunt Style Georgia; and (2) whether Defendant Grunt Style has common law rights in the Mark. We resolve each question in turn.

1. Succession of Grunt Style Companies

“According to the Seventh Circuit, a successor corporation is one that has chosen to stand in the shoes of its predecessor and has chosen to accept the business expectations of those who have dealt previously with that predecessor.” *Playboy Enters. Int’l, Inc. v. Smartitan (Singapore) PTE Ltd.*, 804 F. Supp. 2d 730, 735 (N.D. Ill. 2011). Courts find one company is the successor of another: “(1) where there is an express or implied agreement of assumption; (2) where the transaction amounts to a consolidation or merger of the seller corporation; (3) where the purchaser is merely a continuation of the seller; or (4) where the transaction is for the fraudulent purpose of escaping liability for the seller’s obligation.” *Id.*¹ Further, “[a]ssignments of trademark rights do not have to be in writing, but an implied agreement to transfer requires conduct manifesting agreement, not just

¹ Though the parties do not argue choice of law, the Court notes Georgia law imposes a similar test. See *Dan J. Sheehan Co. v. Fairlawn on Jones Condo. Ass’n., Inc.*, 780 S.E.2d 35, 38 (Ga. Ct. App. 2015) (“Ordinarily, a successor entity does not assume the liabilities of its predecessor unless (1) there is an agreement to assume liabilities; (2) the transaction is, in fact, a merger; (3) the transaction is a fraudulent attempt to avoid liabilities; or (4) the [successor] is a mere continuation of the predecessor corporation.”).

conduct that might be characterized as being shady or otherwise inequitable.” *TMT N. Am., Inc. v. Magic Touch GmbH*, 124 F.3d 876, 884 (7th Cir.1997) (cleaned up).

Here, Grunt Style Illinois is unquestionably the successor of Grunt Style Georgia. Grunt Style Illinois was founded within a week after the dissolution of Grunt Style Georgia, both companies were founded and managed by Alarik, sell the same product, and Grunt Style Illinois fulfilled the pending orders when Grunt Style Georgia was dissolved. The uncontroverted evidence shows Grunt Style’s products were sold in all 50 states and have been continuously sold during the relevant timeframe. Thus, Grunt Style Illinois is the successor to Grunt Style Georgia, and any common law trademark rights owned by Grunt Style Georgia were impliedly assigned to Grunt Style Illinois.

TWD’s perfunctory and legally unsupported abandonment and geographic area arguments, waiver issues aside, are meritless and do not change this conclusion. The record shows Grunt Style’s clear and continuous use of the Mark. For example, it is undisputed that Grunt Style has used the Mark on shirt collars and sleeves since before TWD was founded. And while TWD seemingly focuses on Grunt Style’s sales, this Court has long recognized “[a]n attempt to market a product bearing a trademark, even if unsuccessful, indicates a lack of intent to abandon the mark.” *Roulo v. Russ Berrie & Co.*, 1987 WL 9018, at *2 (N.D. Ill. 1987) (Kocoras, J.).

Indeed, our conclusion is in line with other courts in this District. For example, in *Gaffrig Performance In-*

dus., Inc. v. Livorsi Marine, Inc., the court found the implied assignment of a trademark from one company to a second company founded by the owner of the first company. 2003 WL 23144859, at *12 (N.D. Ill. 2003). The court reasoned the owner “did all he could, short of a written document, to assign” the trademark rights from the first company to the second company because the second company was created “almost immediately” after the first company’s “doors were closed” and had “an almost identical workforce” to the first company. *Id.*

Similarly here, Alarik founded Grunt Style Illinois almost immediately after Grunt Style Georgia was dissolved. Further, Alarik himself continued the same operations of Grunt Style Georgia through Grunt Style Illinois with many of the same employees, selling the same products, and fulfilling orders made to Grunt Style Georgia. Thus, the undisputed facts show Grunt Style Illinois is the successor of Grunt Style Georgia and acquired any common law trademark rights Grunt Style Georgia owned.

2. Common Law Trademark Rights

“The determination of whether a party has established protectable rights in a trademark is made on a case by case basis, considering the totality of the circumstances.” *Johnny Blastoff, Inc. v. L.A. Rams Football Co.*, 188 F.3d 427, 433 (7th Cir. 1999). A party may only acquire a protectable right in a mark through the use of the mark in connection with its product, but evidence of actual sales is not necessary to establish ownership. *Id.* at 433-34. “The party seeking to establish appropriation of a trademark must show first, adoption, and second, use in a way sufficiently public to identify or distinguish

the marked goods in an appropriate segment of the public mind as those of the adopter of the mark.” *Id.* (cleaned up).

A trademark user “must show that it has actually used the designation at issue *as a trademark*; i.e., to perform the trademark function of identifying the source of the merchandise to the customers.” *Edsal Mfg. Co. v. Vault Brands, Inc.*, 2012 WL 5558849, at *4 (N.D. Ill. 2012) (cleaned up and emphasis in original). “A trademark need not be particularly large in size or appear in any particular position on the goods, but it must be used in such a manner that its nature and function are readily apparent and recognizable without extended analysis or research and certainly without legal opinion.” *MicroStrategy Inc. v. Motorola, Inc.*, 245 F.3d 335, 342 (4th Cir. 2001) (cleaned up). “[W]here a slogan or feature is not likely to be perceived as anything other than part of the thematic whole of the ornamentation of an article of clothing, that slogan or feature is not used as a trademark.” *Tovey v. Nike, Inc.*, 2014 WL 3510975, at *8 (N.D. Ohio 2014) (cleaned up). A mark, though, may be both decorative and function as a trademark. *Id.*

Here, the undisputed evidence shows Grunt Style adopted the Mark first, beginning use in April 2011. It used the Mark in a variety of ways, including at trade shows, on collar tags, business cards, invoices, its website, and on the front, back, and sleeves of shirts. Further, the undisputed evidence shows Grunt Style products bearing the Mark were sold in all 50 states. While the Mark was occasionally used in a decorative manner, Grunt Style’s continuous use of the Mark in a traditional trademark fashion shows that any decorative use would

indicate the source of the goods. Put simply, Grunt Style’s continuous use of the Mark shows the Mark would be associated with Grunt Style’s goods. Thus, Grunt Style has indisputably shows it adopted the Mark and used it in a way to identify itself as the adopter of the Mark.

b. Cancellation of TWD’s Federal Trademark

The Lanham Act allows a court to cancel a trademark or order the USPTO to do so. *TE-TA-MA Truth Found.-Family of URI, Inc. v. World Church of Creator*, 297 F.3d 662, 665-66 (7th Cir. 2002) (citing 15 U.S.C. § 1119); *Purepecha Enters., Inc. v. El Matador Spices & Dry Chiles*, 2012 WL 3686776, at *11 (N.D. Ill. 2012) (St. Eve., J.) (“Pursuant to 15 U.S.C. § 1119, federal courts may cancel registration of a trademark when warranted.”). The Seventh Circuit made clear where “a registrant’s asserted rights to a mark are shown to be invalid, cancellation is not merely appropriate, it is the best course.” *Central Mfg., Inc. v. Brett*, 492 F.3d 876, 883 (7th Cir. 2007).

“[E]ven ‘a holder of a federally registered trademark is subject to any superior common law rights acquired by another party.’” *RGB Plastic, LLC v. First Pack, LLC*, 184 F. Supp. 3d 649, 670 (N.D. Ill. 2016) (quoting *Allard Enters., Inc. v. Advanced Programming Res., Inc.*, 249 F.3d 564, 572 (6th Cir. 2001)) (cleaned up). Thus, we must determine if the undisputed evidence shows Grunt Style has superior rights in the Mark.

“The party who first appropriates the mark through use, and for whom the mark serves as a designation of source, acquires superior rights to it.” *Johnny Blastoff*,

188 F.3d at 434. “It is a bedrock principle of trademark law that trademark ownership is not acquired by federal or state registration, but rather from prior appropriation and actual use in the market.” *S.C. Johnson & Son, Inc. v. Nutraceutical Corp.*, 835 F.3d 660, 665 (7th Cir. 2016). A federal trademark registration “establishes only a rebuttable presumption of use as of the filing date.” *Zazu Designs v. L’Oreal, S.A.*, 979 F.2d 499, 504 (7th Cir. 1992). “Under 15 U.S.C. § 1115(b)(5), a party rebuts that presumption by proving that the mark was adopted without knowledge of the registrant’s prior use and has been continuously used by such party or those in privity with him from a date prior to the registration of the mark.” *S.C. Johnson*, 835 F.3d at 665 (cleaned up).

Here, the undisputed evidence shows Grunt Style has rebutted that presumption. As previously discussed, it is undisputed Grunt Style began use of the Mark in April 2011. Grunt Style has continuously used the Mark publicly on its clothes, website, and documents ever since. TWD, on the other hand, began its use of the Mark in September 2014. Thus, the undisputed evidence shows Grunt Style has superior rights in the Mark. It cannot be disputed that there is a likelihood of confusion between the two uses of the Mark. Therefore, TWD’s federally registered trademark must be cancelled.

c. TWD’s Claims

Having found Grunt Style has superior rights in the Mark and having cancelled TWD’s trademark, TWD’s claims of trademark infringement and unfair competition under the Lanham Act therefore fail as a matter of law.

d. TWD's Affirmative Defenses

Finally, Grunt Style seeks summary judgment on TWD's affirmative defenses of federal preemption and unclean hands.

It is undisputed the Lanham Act would preempt any common law claim of infringement by Grunt Style during the time TWD owned the federally registered trademark. But TWD's general preemption arguments fail to respond to the specifics of Grunt Style's claims and contains no analysis applying the case law it detailed to the facts of this case. In any event, Grunt Style only asserts common law infringement claims for t-shirt sales before May 27, 2015, the date TWD filed for trademark registration. So, in the Court's view, TWD's preemption defense fails because the alleged infringement occurred before TWD owned a federally registered trademark.

Next, in response to Grunt Style's argument that its unclean hands defense fails, TWD asserts only that "[t]his court's prior ruling upholding plaintiff TWD's unclean hands defense should not be disturbed." Dkt. # 176, p. 15. But the Court's previous order was on a motion to strike based on pleading defects. At this stage, TWD "must offer evidence that would allow a reasonable jury to find for them on [their affirmative] defense." *Oasis Legal Fin. Operating Co., LLC v. Chodes*, 454 F. Supp. 3d 724, 737 (N.D. Ill. 2020). TWD therefore waived any argument against granting Grunt Style's Motion. Moreover, TWD failed to identify a single fact that could support a jury verdict on their unclean hands defense. *See Richards v. Combined Ins. Co. of Am.*, 55 F.3d 247, 251 (7th Cir. 1995) ("It is not our task, or that of the district court, to scour the record in search of a genuine issue of

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triable fact. We rely on the nonmoving party to identify with reasonable particularity the evidence that precludes summary judgment.”). Accordingly, Grunt Styles’ Motion is granted on TWD’s affirmative defenses.

CONCLUSION

For the reasons mentioned above, the Court grants Grunt Style’s Motion for Partial Summary Judgment (Dkt # 166). Telephonic status is set for 5/10/2022 at 10:40 a.m. It is so ordered.

Dated: 04/12/2022

[/s/ Charles P. Kocoras]

Charles P. Kocoras

United States District Judge

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APPENDIX E

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

July 31, 2026

Before

KENNETH F. RIPPLE, *Circuit Judge*

JOHN Z. LEE, *Circuit Judge*

JOSHUA P. KOLAR, *Circuit Judge*

No. 25-1305

GRUNT STYLE LLC,
Plaintiff-Appellee,

v.

Appeal from the United
States District Court for
the Northern District of
Illinois, Eastern
Division.

TWD, LLC,
Defendant-Appellant,

No. 1:18-cv-07695

LaShonda A. Hunt,
Judge.

O R D E R

Defendant-appellant filed a petition for rehearing
and for rehearing en banc on July 1, 2026. No judge in

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regular active service has requested a vote on the petition for rehearing en banc, and all members of the original panel have voted to deny panel rehearing. It is therefore ordered that the petition for rehearing and for rehearing en banc is DENIED.

APPENDIX F

1. Section 35 of the Lanham Act, ch. 540, 60 Stat. 427 (1946), as amended, 15 U.S.C. § 1117, provides:

§ 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.

2. Section 43 of the Lanham Act, ch. 540, 60 Stat. 427 (1946), as amended, 15 U.S.C. § 1125, provides:

§ 1125. False designations of origin, false descriptions, and dilution forbidden

(a) Civil action

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

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,

shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

(2) As used in this subsection, the term “any person” includes any State, instrumentality of a State or employee of a State or instrumentality of a State acting in his or her official capacity. 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.

(3) In a civil action for trade dress infringement under this chapter for trade dress not registered on the principal register, the person who asserts trade dress protection has the burden of proving that the matter sought to be protected is not functional.

(b) Importation

Any goods marked or labeled in contravention of the provisions of this section shall not be imported into the United States or admitted to entry at any customhouse of the United States. The owner, importer, or consignee of goods refused entry at any customhouse under this section may have any recourse by protest or appeal that is given under the customs revenue laws or may have the remedy given by this chapter in cases involving goods refused entry or seized.

(c) Dilution by blurring; dilution by tarnishment

(1) Injunctive relief

Subject to the principles of equity, the owner of a famous mark that is distinctive, inherently or through

acquired distinctiveness, shall be entitled to an injunction against another person who, at any time after the owner's mark has become famous, commences use of a mark or trade name in commerce that is likely to cause dilution by blurring or dilution by tarnishment of the famous mark, regardless of the presence or absence of actual or likely confusion, of competition, or of actual economic injury.

(2) Definitions

(A) For purposes of paragraph (1), a mark is famous if it is widely recognized by the general consuming public of the United States as a designation of source of the goods or services of the mark's owner. In determining whether a mark possesses the requisite degree of recognition, the court may consider all relevant factors, including the following:

- (i) The duration, extent, and geographic reach of advertising and publicity of the mark, whether advertised or publicized by the owner or third parties.
- (ii) The amount, volume, and geographic extent of sales of goods or services offered under the mark.
- (iii) The extent of actual recognition of the mark.
- (iv) Whether the mark was registered under the Act of March 3, 1881, or the Act of February 20, 1905, or on the principal register.

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(B) For purposes of paragraph (1), “dilution by blurring” is association arising from the similarity between a mark or trade name and a famous mark that impairs the distinctiveness of the famous mark. In determining whether a mark or trade name is likely to cause dilution by blurring, the court may consider all relevant factors, including the following:

- (i) The degree of similarity between the mark or trade name and the famous mark.
- (ii) The degree of inherent or acquired distinctiveness of the famous mark.
- (iii) The extent to which the owner of the famous mark is engaging in substantially exclusive use of the mark.
- (iv) The degree of recognition of the famous mark.
- (v) Whether the user of the mark or trade name intended to create an association with the famous mark.
- (vi) Any actual association between the mark or trade name and the famous mark.

(C) For purposes of paragraph (1), “dilution by tarnishment” is association arising from the similarity between a mark or trade name and a famous mark that harms the reputation of the famous mark.

(3) Exclusions

The following shall not be actionable as dilution by blurring or dilution by tarnishment under this subsection:

(A) Any fair use, including a nominative or descriptive fair use, or facilitation of such fair use, of a famous mark by another person other than as a designation of source for the person's own goods or services, including use in connection with—

(i) advertising or promotion that permits consumers to compare goods or services; or

(ii) identifying and parodying, criticizing, or commenting upon the famous mark owner or the goods or services of the famous mark owner.

(B) All forms of news reporting and news commentary.

(C) Any noncommercial use of a mark.

(4) Burden of proof

In a civil action for trade dress dilution under this chapter for trade dress not registered on the principal register, the person who asserts trade dress protection has the burden of proving that—

(A) the claimed trade dress, taken as a whole, is not functional and is famous; and

(B) if the claimed trade dress includes any mark or marks registered on the principal register, the unregistered matter, taken as a whole, is famous

separate and apart from any fame of such registered marks.

(5) Additional remedies

In an action brought under this subsection, the owner of the famous mark shall be entitled to injunctive relief as set forth in section 1116 of this title. The owner of the famous mark shall also be entitled to the remedies set forth in sections 1117(a) and 1118 of this title, subject to the discretion of the court and the principles of equity if—

(A) the mark or trade name that is likely to cause dilution by blurring or dilution by tarnishment was first used in commerce by the person against whom the injunction is sought after October 6, 2006; and

(B) in a claim arising under this subsection—

(i) by reason of dilution by blurring, the person against whom the injunction is sought willfully intended to trade on the recognition of the famous mark; or

(ii) by reason of dilution by tarnishment, the person against whom the injunction is sought willfully intended to harm the reputation of the famous mark.

(6) Ownership of valid registration a complete bar to action

The ownership by a person of a valid registration under the Act of March 3, 1881, or the Act of February

20, 1905, or on the principal register under this chapter shall be a complete bar to an action against that person, with respect to that mark, that—

(A) is brought by another person under the common law or a statute of a State; and

(B)

(i) seeks to prevent dilution by blurring or dilution by tarnishment; or

(ii) asserts any claim of actual or likely damage or harm to the distinctiveness or reputation of a mark, label, or form of advertisement.

(7) Savings clause

Nothing in this subsection shall be construed to impair, modify, or supersede the applicability of the patent laws of the United States.

(d) Cyberpiracy prevention

(1)

(A) A person shall be liable in a civil action by the owner of a mark, including a personal name which is protected as a mark under this section, if, without regard to the goods or services of the parties, that person—

(i) has a bad faith intent to profit from that mark, including a personal name which is protected as a mark under this section; and

(ii) registers, traffics in, or uses a domain name that—

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(I) in the case of a mark that is distinctive at the time of registration of the domain name, is identical or confusingly similar to that mark;

(II) in the case of a famous mark that is famous at the time of registration of the domain name, is identical or confusingly similar to or dilutive of that mark; or

(III) is a trademark, word, or name protected by reason of section 706 of title 18 or section 220506 of title 36.

(B)

(i) In determining whether a person has a bad faith intent described under subparagraph (A), a court may consider factors such as, but not limited to—

(I) the trademark or other intellectual property rights of the person, if any, in the domain name;

(II) the extent to which the domain name consists of the legal name of the person or a name that is otherwise commonly used to identify that person;

(III) the person's prior use, if any, of the domain name in connection with the bona fide offering of any goods or services;

(IV) the person's bona fide noncommercial or fair use of the mark in a site accessible under the domain name;

(V) the person's intent to divert consumers from the mark owner's online location to a site accessible under the domain name that could harm the goodwill represented by the mark, either for commercial gain or with the intent to tarnish or disparage the mark, by creating a likelihood of confusion as to the source, sponsorship, affiliation, or endorsement of the site;

(VI) the person's offer to transfer, sell, or otherwise assign the domain name to the mark owner or any third party for financial gain without having used, or having an intent to use, the domain name in the bona fide offering of any goods or services, or the person's prior conduct indicating a pattern of such conduct;

(VII) the person's provision of material and misleading false contact information when applying for the registration of the domain name, the person's intentional failure to maintain accurate contact information, or the person's prior conduct indicating a pattern of such conduct;

(VIII) the person's registration or acquisition of multiple domain names which the person knows are identical or confusingly similar to marks of others

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that are distinctive at the time of registration of such domain names, or dilutive of famous marks of others that are famous at the time of registration of such domain names, without regard to the goods or services of the parties; and

(IX) the extent to which the mark incorporated in the person's domain name registration is or is not distinctive and famous within the meaning of subsection (c).

(ii) Bad faith intent described under subparagraph (A) shall not be found in any case in which the court determines that the person believed and had reasonable grounds to believe that the use of the domain name was a fair use or otherwise lawful.

(C) In any civil action involving the registration, trafficking, or use of a domain name under this paragraph, a court may order the forfeiture or cancellation of the domain name or the transfer of the domain name to the owner of the mark.

(D) A person shall be liable for using a domain name under subparagraph (A) only if that person is the domain name registrant or that registrant's authorized licensee.

(E) As used in this paragraph, the term "traffics in" refers to transactions that include, but are not limited to, sales, purchases, loans, pledges, licenses, exchanges of currency, and any other

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transfer for consideration or receipt in exchange for consideration.

(2)

(A) The owner of a mark may file an in rem civil action against a domain name in the judicial district in which the domain name registrar, domain name registry, or other domain name authority that registered or assigned the domain name is located if—

(i) the domain name violates any right of the owner of a mark registered in the Patent and Trademark Office, or protected under subsection (a) or (c); and

(ii) the court finds that the owner—

(I) is not able to obtain in personam jurisdiction over a person who would have been a defendant in a civil action under paragraph (1); or

(II) through due diligence was not able to find a person who would have been a defendant in a civil action under paragraph (1) by—

(aa) sending a notice of the alleged violation and intent to proceed under this paragraph to the registrant of the domain name at the postal and e-mail address provided by the registrant to the registrar; and

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(bb) publishing notice of the action as the court may direct promptly after filing the action.

(B) The actions under subparagraph (A)(ii) shall constitute service of process.

(C) In an in rem action under this paragraph, a domain name shall be deemed to have its situs in the judicial district in which—

(i) the domain name registrar, registry, or other domain name authority that registered or assigned the domain name is located; or

(ii) documents sufficient to establish control and authority regarding the disposition of the registration and use of the domain name are deposited with the court.

(D)

(i) The remedies in an in rem action under this paragraph shall be limited to a court order for the forfeiture or cancellation of the domain name or the transfer of the domain name to the owner of the mark. Upon receipt of written notification of a filed, stamped copy of a complaint filed by the owner of a mark in a United States district court under this paragraph, the domain name registrar, domain name registry, or other domain name authority shall—

(I) expeditiously deposit with the court documents sufficient to establish the court's control and authority regarding the

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disposition of the registration and use of the domain name to the court; and

(II) not transfer, suspend, or otherwise modify the domain name during the pendency of the action, except upon order of the court.

(ii) The domain name registrar or registry or other domain name authority shall not be liable for injunctive or monetary relief under this paragraph except in the case of bad faith or reckless disregard, which includes a willful failure to comply with any such court order.

(3) The civil action established under paragraph (1) and the in rem action established under paragraph (2), and any remedy available under either such action, shall be in addition to any other civil action or remedy otherwise applicable.

(4) The in rem jurisdiction established under paragraph (2) shall be in addition to any other jurisdiction that otherwise exists, whether in rem or in personam.