No. 26A263

In the Supreme Court of the United States

CESARI S.R.L.,

Applicant,

v.

PEJU PROVINCE WINERY L.P. AND
PEJU FAMILY OPERATING PARTNERSHIP L.P.,

Respondents.

TO THE HONORABLE SAMUEL J. ALITO, JR., ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

RESPONDENTS' OPPOSITION TO APPLICANT'S RENEWED MOTION TO RECALL AND STAY THE MANDATE

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Dated: September 2, 2026

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, Respondents Peju Province Winery L.P. and Peju Family Operating Partnership, L.P. state that they are privately held limited partnerships. They have no parent corporations and no publicly held company owns 10% or more of their stock or ownership interests.

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TO THE HONORABLE SAMUEL J. ALITO, JR., ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE UNITED STATES COURT OF APPEALS FOR THE THIRD AND FIFTH CIRCUITS:

Pursuant to Rule 21.4 of the Rules of this Court, Respondents Peju Province Winery, L.P. and Peju Family Operating Partnership, L.P. (collectively, "Peju"), respectfully oppose the emergency Application to Recall and Stay the Mandate Pending the Filing and Disposition of a Petition for a Certiorari and Request for Immediate Administrative Stay ("Application") filed by Cesari S.R.L. ("Cesari"), under Rules 22 and 23 and 28 U.S.C. §§ 1651 and 2101(f). Peju does so because this case does not present an issue meritorious of certiorari or irreparable harm and, thus, no stay is warranted.

INTRODUCTION

There are no grounds for the extraordinary intervention and emergency relief Cesari seeks in this case. Cesari does not come close to the clear showing of irreparable harm that is required for this Court to recall and stay a circuit court mandate pending a contemplated petition for certiorari. In addition to this material shortcoming, Cesari also has not demonstrated a reasonable probability certiorari will be granted, much less a fair prospect that this Court would reverse the Second Circuit's decision.

The Circuit Justice, Justice Sonia Sotomayor, already denied Cesari's application on August 28, 2026, without so much as a word from Peju and for good reason: The Application fails on all scores. For the same reasons, Your Honor should also deny Cesari's Application.

Cesari fails to present any grounds on which this Court would grant certiorari under Rule 10. Distilled to its essence, Cesari presents nothing more than its disagreement with how the Second Circuit interpreted and applied this Court's reasoning in *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138 (2015) to the particular facts of this case. But a claim that a court of appeals erroneously applied settled law is not a basis for certiorari. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law"). This Court already settled the law of issue preclusion in this area in 2015 and has no reason to revisit it now. Indeed, the Second Circuit's non-precedential Summary Order aligns precisely with the holding of the only other circuit to adjudicate this Court's opinion in *B&B Hardware* — the Eighth Circuit's decision on remand following *B&B Hardware*. 800 F.3d 427 (8th Cir. 2015). So, there are no decisions in conflict within the circuits. Moreover, the Summary Order correctly applied *B&B Hardware*.

Additionally, this Court would never even reach the issue Cesari presents in its Application. This is because the Court would need to address Peju's alternative ground under *B&B Hardware* for affirming the Second Circuit's Summary Order vacating the judgment. The Trademark Trial and Appeal Board's ("TTAB") 2004 decision was the result of a "fundamentally poor, cursory, or unfair" procedure in which it failed to give Peju notice that it was converting Cesari's motion for judgment on the pleadings into one for summary judgment, thereby depriving Peju of the opportunity to oppose the motion and submit evidence to support its opposition. The lack of notice is undisputed. Thus, issue preclusion could never apply on this alternative basis that the Court would need to address.

Just as important — perhaps more importantly — Cesari has come forth with no evidence of irreparable harm that will result if the Second Circuit's mandate is not recalled and stayed. Cesari's principal argument, indeed, the thrust of its Application, is that Peju's appeal bond will now be discharged because the judgment has been vacated. But this is not irreparable harm, and no court has ever identified it as such. Rather, it is a run-of-the-mill consequence of every vacated money judgment. In fact, the only party who stands to be harmed is Peju by virtue of having to pay yet another bond premium and having its collateral remain tied up despite prevailing on appeal. Nor will the remand proceedings, once they get underway, have any relevance to the issue preclusion matter that Cesari wants this Court to review. Because no irreparable harm exists, the Court should deny the Application just as the Second Circuit did with full knowledge of the case.

STATEMENT OF THE CASE

Cesari sued Peju for trademark infringement in early 2017, claiming Peju's use of its mark LIANA on some of its wines infringed on Cesari's mark LIANO. App'x 20a-21a.[1] Thirteen years prior in 2004, the TTAB entered a short, perfunctory decision that granted Cesari's opposition to Peju's application to register its mark LIANA for wine. *Id.* 33a-37a (the "2004 Decision"). It did so by expressly declining to consider the parties' actual usage of the marks in the marketplace under the long-

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[1] "Appl." shall refer to Cesari's Application. "App'x " shall refer to Cesari's Application Appendix.

settled rule from *Octocom Systems, Inc. v. Houston Computers Services, Inc.*, 918 F.2d 937 (Fed. Cir. 1990). *Id.* 36a. As the Second Circuit explained in its Summary Order, the TTAB limited its likelihood of confusion analysis to the four corners of the application and Cesari's registered mark, intentionally disregarding whatever else the record revealed about marketplace usages. *Id.* 8a-9a.

Separate and apart from this mode of analysis, the TTAB's procedure to reach its 2004 Decision was indisputably flawed. Cesari filed a one-page motion for judgment on the pleadings under Trademark Rule § 504.01 and Fed. R. Civ. P. 12(c). *Id.* 19a n.4, 34a. Peju opposed. However, the TTAB *sua sponte* and without notice to any party, including Peju, converted the motion into one for summary judgment and granted the converted motion. *Id.* 19a n.4, 26a-27a, 34a. This flagrant violation of both Trademark Rule § 504.03 and Fed. R. Civ. P. 12(d), which require that parties be given notice and an opportunity to submit evidence, deprived Peju of any opportunity to submit evidence in opposition to summary judgment. It is undisputed that Peju received no notice. *Id.* 19a n.4, 26a (district court recognizing lack of notice). Indeed, Judge Wesley during oral argument before the Second Circuit aptly described that the "problem" was the TTAB's summary proceeding failed to give Peju "a full and fair opportunity to litigate" because it "was a summary proceeding with no notice! — no notice to the one side which the summary proceeding is going to be invoked." 2d Cir. Oral Arg. Audio Tr. 18:15 – 18:45, Nos. 24-1903, 24-2014.[2]

[2] The May 18, 2026 Second Circuit oral argument audio is available by searching at Oral Argument Recordings.

The TTAB's violation that struck at the heart of the fundamental fairness and due process rights that animate Trademark Rule § 504.03 and Fed. R. Civ. P. 12(d), was precisely the kind of "fundamentally poor, cursory, or unfair" TTAB procedure that this Court said in *B&B Hardware, Inc. v. Hargis Indus., Inc*., 575 U.S. 138, 158-59 (2015) would counsel against the application of issue preclusion. *See, e.g.*, *Selva & Sons, Inc. v. Nina Footwear, Inc.*, 705 F.2d 1316, 1321-23 (Fed. Cir. 1983) (reversing a TTAB decision for the same no-notice conversion violation because it deprived the party of basic rights). Nonetheless, the Second Circuit's Summary Order here vacated the judgment on an alternative ground and did not substantively address this issue. *See* App'x 2a-13a. But Peju would certainly raise it before this Court as an alternative basis for affirming the Summary Order because Peju would be entitled to do so as a matter of law. *See infra*, Section II.

Returning to this lawsuit thirteen years later, in late 2017, based on the 2004 Decision, the district court granted partial summary judgment in favor of Cesari by precluding Peju from litigating the issue of whether there was a likelihood of confusion between the parties' marks. App'x 17a-31a ("*Peju I*"); *id.* 6a. After more than six years of litigation, the parties tried the issue of damages in 2023, with the district court ultimately awarding Cesari $666,214 in Peju's disgorged profits arising from its infringement. *Id.*; *Cesari S.r.l. v. Peju Province Winery L.P.*, 693 F. Supp. 3d 375, 381 (S.D.N.Y. 2023) ("*Peju II* "), *vacated and remanded*, 24-1903, 2026 WL 1643746 (2d Cir. June 8, 2026). In a now-vacated decision, the district court also awarded Cesari a fraction of the attorneys' fees and costs it sought under 15 U.S.C. §

1117(a). *Cesari S.r.l. v. Peju Province Winery L.P.*, No. 17-cv-873, 2024 WL 3374358, at *1 (S.D.N.Y. July 11, 2024) ("*Peju III*"), *vacated and remanded*, 24-1903, 2026 WL 1643746 (2d Cir. June 8, 2026). The district court then entered its judgment for profits, attorneys' fees, costs, and expert witness costs. ECF No. 496 (the "Judgment").

Peju appealed from the entire Judgment. ECF No. 498. Peju argued that *Peju I* should be reversed on two basic grounds under *B&B Hardware*. First, Peju argued that the TTAB's *sua sponte* no-notice conversion procedure meant that the 2004 Decision was not issue preclusive because it was the result of a fundamentally poor, cursory, or unfair TTAB procedure. 2d Cir. Dkt. 39.1 at 27-39; *see also* App'x 26a-27a. And second, Peju argued that issue preclusion did not apply because the 2004 Decision did not consider actual usage of the marks in the marketplace, which is a pre-condition that *B&B Hardware* requires for issue preclusion to apply. 2d Cir. Dkt. No. 39.1 at 40-52. Peju further argued, relatedly, that the use of the marks had changed dramatically in the decade-plus after the 2004 Decision issued. 2d Cir. Dkt. No. 39.1 at 40-52.[3]

The Second Circuit agreed with Peju on the second ground and resolved the appeal in an unpublished Summary Order that overruled *Peju I* and vacated the Judgment. App'x 7a-13a. The Second Circuit's analysis was unremarkable and faithfully applied *B&B Hardware* and the Second Circuit's precedents in accord. *Id.* 7a-12a.

[3] Peju also appealed other issues related to *Peju II* and *Peju III*. *See id.* at 52-69.

Peju timely moved for clarification and amendment, or alternatively, panel rehearing on a discrete issue that was unrelated to *Peju I* and the Second Circuit's vacatur of the Judgment. *Id.* 14a; 2d Cir. Dkt. No. 132.1. That motion was denied. App'x 14a.

Despite Cesari's strident, albeit misguided, criticisms of the Summary Order, Cesari never moved for panel rehearing under Fed. R. App. P. 40(a). So, when Cesari informs the Court that the Second Circuit denied panel rehearing, it purposely omits the identity of the party that filed the motion, leaving the Court with the misimpression that it had moved for rehearing and was denied, when it did not. *See* Appl. 4, 11.

On August 21, 2026, the Second Circuit then denied Cesari's motion to stay the mandate and issued its mandate the same day. App'x 15a-16a.[4] On August 24th, Cesari then filed an application directed to Justice Sotomayor, the Circuit Justice for the Second Circuit, to recall and stay the mandate. Justice Sotomayor denied the motion on August 28th without receiving opposition from Peju. The next day, Cesari renewed its Application directed to Your Honor under Rule 22.4. Your Honor should deny it too.

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4 Cesari misrepresents that Peju's made its comments about the appeal bond discharge "while that motion" — Cesari's motion to stay the mandate — "was pending." Appl. 11. That is untrue. Cesari quotes Peju's comment from a footnote in its July 15, 2026 reply brief supporting its motion to reconsider appeal costs. Appl. 11 (quoting 2d Cir. Dkt. 136.1 at 5 n.3). The Second Circuit denied that motion on July 28, 2026. App'x 14a. Cesari did not file its motion to stay the mandate until August 3, 2026. 2d Cir. Dkt. 138.1. So Peju's comments came almost three weeks prior to Cesari's motion to stay the mandate. Although this is substantively unimportant, it aptly demonstrates Cesari's tendency to make factual misrepresentations. *See infra*.

LEGAL ARGUMENT

Cesari's request to recall and stay the mandate of an appeals court seeks "extraordinary relief." *Teva Pharm. USA, Inc. v. Sandoz, Inc.*, 572 U.S. 1301, 1301-02 (2014) (Roberts, C.J., in chambers). "A single Justice will grant a stay only in extraordinary circumstances." *Bartlett v. Stephenson*, 535 U.S. 1301, 1304 (2002).

Cesari's burden is "particularly heavy" and requires an "extraordinary showing" because the court of appeals has already denied the applicant the same stay relief. *Beame v. Friends of the Earth*, 434 U.S. 1310, 1312-13 (1977) (Marshall, J., in chambers); *Graddick v. Newman*, 453 U.S. 928, 933 (1981); *Bd. of Ed. v. Taylor*, 82 S. Ct. 10, 10-11 (1961) (Brennan, J., in chambers); *Magnum Imp. Co. v. Coty*, 262 U.S. 159, 163-64 (1923) (denying application to stay the mandates in trademark cases where the appeals court with fuller knowledge of the case already denied the relief).

When a Justice then denies an application, "a renewed application is not favored." Sup. Ct. R. 22.4. Cesari's high burden is **even higher** now that the Circuit Justice of this Court has already denied Cesari's same application. *See New York Times Co. v. Jascalevich*, 439 U.S. 1331, 1332 (1978) (Marshall, J., in chambers) ("The applicants here bear an especially heavy burden, for a single Justice will seldom grant an order that has been denied by another Justice."); *Levy v. Parker*, 396 U.S. 1204, 1204-05 (1969) (Douglas, J., in chambers) ("The District Court, the Court of Appeals, and the Circuit Justice, Mr. Justice Brennan, have each denied bail. This application to me therefore carries a special burden, for we very seldom grant an order that has been denied by the Circuit Justice.").

With this extremely high burden in mind, to obtain a stay of the mandate, the applicant "must show (1) a reasonable probability that four justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam). The applicant must satisfy the same factors to recall the mandate in the first instance. *See Teva Pharm. USA*, 572 U.S. at 1301-02 (Robert, C.J., in chambers).

Because a Justice of this Court has already denied Cesari's motion to stay the mandate, as Justice Sotomayor has, App. 15a, Cesari must make an extraordinary showing to Your Honor. Cesari here has failed to do so with respect to any of the foregoing factors, although its failure to satisfy even one of them is enough to deny the Application. *See Teva Pharm. USA*, 572 U.S. at 1301-02 (Robert, C.J., in chambers). Accordingly, the Court should deny Cesari's Application, including the administrative stay.

Cesari's argument boils down to little more than a complaint that it disagrees with the Second Circuit's interpretation and application of recently settled law under *B&B Hardware* to the particular facts of this case. This is decidedly not a basis to grant certiorari. *See* Sup. Ct. R. 10. The Second Circuit's unremarkable decision was also correct, such that there is no fair prospect of reversal in any event. The Second Circuit's Summary Order further aligns with the only other circuit decision to apply *B&B Hardware*, the Eighth Circuit's decision on remand, *B & B Hardware, Inc. v.*

Hargis Indus., Inc., 800 F.3d 427 (8th Cir. 2015). Moreover, Cesari's application fails to account for Peju's alternative ground to affirm the Summary Order: the TTAB's undisputed failure in 2004 to notify Peju of its *sua sponte* conversion of Cesari's motion for judgment on the pleadings into one for summary judgment.

What comes through loud and clear is that the main driver of Cesari's Application is its puzzling fixation on the appeal bond that Peju procured to stay execution on the Judgment under Fed. R. Civ. P. 62(b). No matter how Cesari tries to dress it up, the appeal bond is a purely monetary matter. And it is well-settled that monetary concerns do not constitute irreparable harm — and certainly not the kind of irreparable harm that warrants this Court's extraordinary intervention. If it were otherwise, then every case in which an appeals court reversed or vacated a monetary judgment that had been stayed when the appellant posted an appeal bond, of which there are many, would qualify for the sort of intervention Cesari seeks here — thereby transforming the extraordinary into the ordinary. Your Honor should reject this attempt at abusing this Court's review and deny Cesari's Application.

I. No reasonable probability exists that the Court will grant certiorari.

No chance exists that this Court will vote to grant certiorari here. The Court grants certiorari to resolve important questions of law and splits of authority lingering among the lower courts. *See* Sup. Ct. R. 10; *City & Cnty. of San Francisco, Calif. v. Sheehan*, 575 U.S. 600, 610 (2015) (explaining that "certiorari jurisdiction exists to clarify the law"); *Layne & Bowler Corp. v. W. Well Works*, 261 U.S. 387, 393 (1923) (Taft, C.J.) (expressing that certiorari is intended to settle important issues of law important to the public and to resolve circuit splits). This case presents no important new question of law or split plaguing the lower courts. To the contrary, not long ago, in 2015, this Court settled the law of issue preclusion as between TTAB decisions involving issues of registration and federal court actions concerning matters of infringement in *B&B Hardware*. Cesari acknowledges that this Court previously resolved this same question. Appl. 14.

In this appeal about whether the TTAB's 2004 Decision was issue preclusive on the element of a likelihood of confusion in this infringement lawsuit, the Second Circuit here applied *B&B Hardware* as the controlling law and reversed the district court. App'x 8a-11a. The Second Circuit specifically explained *B&B Hardware*'s rule that for a TTAB decision to be preclusive, its decision must have considered the parties' actual usage of their marks in the marketplace: "where 'the TTAB d[id] not consider the marketplace usage of the parties' marks, the TTAB's decision should have no later preclusive effect in a suit where actual usage in the marketplace is the paramount issue.'" *Id.* 10a (alteration original) (quoting *B&B Hardware*, 575 U.S. at 156-57). Justice Ginsburg's short concurrence reinforces this same maxim. *See B&B Hardware*, 575 U.S. at 160-61 (Ginsburg, J., concurring). Here, the Second Circuit held that the 2004 Decision "on its face — did not consider the parties' 'actual usage in the marketplace." *Id.* 8a (quoting *B&B Hardware*, 575 U.S. at 157); *see also id.* 9a ("But the fact remains that the TTAB never 'considered the marketplace usage of the parties' marks'." (quoting *B&B Hardware*, 575 U.S. at 156)). In other words, the Second Circuit applied settled law to the particular facts of this case. The Summary Order faithfully applies *B&B Hardware* and does not conflict with it in any way, contrary to Cesari's contentions. Appl. 2. This unremarkable conclusion on these facts does not present a basis for certiorari.

Cesari spills a lot of ink criticizing the Summary Order's reasoning. But, at bottom, Cesari simply disagrees with how the Second Circuit applied *B&B Hardware* and claims that the decision was wrong. *See* Appl. 2-4, 13-20. The Court need look no farther than the question Cesari says its petition will present: "whether a court of appeals may withhold the preclusive effect *B&B Hardware* commands by modifying its holding, applying the circuit precedents its abrogated, and announcing a new federal rule of issue preclusion contrary to its test." Appl. 4. But this is just a longwinded way of asking this Court to grant certiorari to hold that the Summary Order wrongly interpreted and applied *B&B Hardware*. And while Cesari's view is simply wrong, more immediately, its proffered issue is not one of the "compelling reasons" for which this Court grants certiorari. *See* Sup. Ct. R. 10.

"A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10; *see also Taylor v. Riojas*, 592 U.S. 7, 11 (2020) (Alito, J., concurring). The Supreme Court is "not, and for well over a century ha[s] not been, a court of error correction." *Sheehan*, 575 U.S. at 620-21 (Scalia, J., concurring in part and dissenting in part); *see also Boag v. MacDougall*, 454 U.S. 364, 368-69 (1982) (Rehnquist, J., dissenting) ("The Supreme Court is not, and never has been, primarily concerned with the correction of errors in lower court decisions." (quoting Chief Justice Fred Vinson, Address Before the American Bar Association (Sept. 7, 1949)));

Taylor, 592 U.S. at 11 (Alito, J., concurring) (explaining the Court should not have granted certiorari where the appeals court erred by reading too much into Supreme Court decision). Rather, as noted above, it is to settle unsettled law of significance and to resolve splits of authority. *Sheehan*, 575 U.S. at 610; *Boag*, 454 U.S. at 368-69 (Rehnquist, J., dissenting); *see also Boag*, 454 U.S. at 366 (O'Connor, J. concurring). Cesari's attack on the Second Circuit's Summary Order's correctness here satisfies none of the exacting criteria that earns this Court's time and attention.

Relatedly, Cesari's argument that the Summary Order decided the case (i) only based on the Second Circuit's precedent pre-dating *B&B Hardware*; and (ii) on abrogated authorities (Cesari calls these "anterior precedents"), is wrong on both scores. Appl. 2-4, 8, 10, 13, 16-17. As to the first argument, the Second Circuit expressly decided the case under the rule of law this Court set down in *B&B Hardware*. App'x 8a-11a. That is clear from the Second Circuit's plain reasoning under *B&B Hardware* and its use of *B&B Hardware's* rule of law to vacate *Peju I* and the Judgment. *Id.* How Cesari claims the Summary Order was "not resolved under *B&B Hardware*'s holdings, but under the Second Circuit's own anterior precedents" is bewildering. Appl. 8.

As for its second argument, the Second Circuit explained that the rule of law set forth in its own pre-*B&B Hardware* precedents, *Levy v. Kosher Overseers Ass'n of Am., Inc.*, 104 F.3d 38 (2d Cir. 1997) and *Jim Beam Brands Co. v. Beamish & Crawford Ltd.*, 937 F.2d 729 (2d Cir. 1991), was "perfectly consistent" with the rule of law that *B&B Hardware* announced. App'x 8a-11a. And that too was correct. *Levy* and *Jim Beam*, like *B&B Hardware*, require that for a TTAB decision to have later preclusive effect, the TTAB determination must have considered "real world," marketplace usages. *Id.* 8a-9a; *B&B Hardware*, 575 U.S. at 156-57. For that reason, the Second Circuit rejected Cesari's attempt to mischaracterize its prior precedent. App'x 10a. Indeed, as the Summary Order observed, Professor Thomas McCarthy's leading trademark-law treatise — which was cited no less than ten times by the Supreme Court in *B&B Hardware* itself — views *Levy* and *Jim Beam* to stand for "essentially the same" rule as *B&B Hardware* set forth. App'x 11a (quoting 5 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 32:98 & n.3 (5th ed. Mar. 2026 update)).[5]

Indeed on the topic of leading treatises, another that *B&B Hardware* cited no less than four times specifically concluded that the district court here "misunderstood the Court's directive in *B&B Hardware* and found preclusion when it should not have." 3 Anne Gilson LaLonde, *Gilson on Trademarks* § 13:20[5][c][iii] (2024); *see B&B Hardware*, 575 U.S. at 142, 155-56 (citing treatise).

The only other case to apply *B&B Hardware* in the same context aligns with the Second Circuit too, which is why Cesari never mentions it. On remand from *B&B*

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[5] Cesari's attempt to denigrate the leading trademark-law treatise's assessment of *B&B Hardware* by misstating what it says merely underscores the weakness of Cesari's position. Professor McCarthy does not say he "wr[ote]" his treatise comment "to 'ameliorate' *B&B Hardware's* negative impacts." Appl. 17. What the treatise actually says is: "Some of the following factors may ameliorate any negative impacts of the *B&B Hardware* precedent: First, the scope of the decision was geographically limited. The high court's decision was essentially the same as that followed for some years in the Second [Circuit]. . . ." 5 *McCarthy* § 32:98.

Hardware, the Eighth Circuit's brief opinion held that the TTAB's prior decision "compared the marks in question in the marketplace context when it determined the likelihood of confusion issue," and thus that prior decision was issue preclusive. *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 800 F.3d 427 (8th Cir. 2015) (per curiam). Indeed, as proof the TTAB there considered marketplace usages, the Eighth Circuit cited both its prior majority and dissenting opinions that relied on *Levy* and *Jim Beam*. *Id.* at 427 (citing *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 716 F.3d 1020, 1025 (8th Cir. 2013); *id.* at 1029 (Colloton, J., dissenting)). If Cesari's criticism of *Levy* and *Jim Beam* was true, then the Eighth Circuit certainly would not have relied on its prior opinions citing *Levy* and *Jim Beam*.

The only two circuits to decide a TTAB issue preclusion case under *B&B Hardware* are in accord. No split of authority exists. Thus, there is no reason that this Court would revisit *B&B Hardware* when the only two circuit courts to have applied it, the Second and the Eighth, are aligned. *See* Sup. Ct. R. 10; *Maryland v. King*, 567 U.S. 1301, 1302 (2012) (Roberts, C.J., in chambers) (finding a reasonable probability that the Court would grant certiorari where a split of authority existed).

In sum, there is no reasonable probability that this Court will vote to grant certiorari in this case which has no relevance beyond the parties to it. This case meets none of the stringent criteria under Rule 10. And, certainly, Cesari has not carried its extra heavy burden here to show otherwise. Your Honor should deny the Application.

II. Cesari cannot demonstrate a fair prospect that this Court will reverse the Summary Order.

Cesari's arguments about the likelihood of reversal are similarly misdirected. Cesari devotes most of its argument to complaining about how the Second Circuit got it wrong and advocating that this Court reach a different result. Appl. 16-20. But there is no prospect this Court would reverse, much less a "fair prospect" that it would do so. Section I sets forth many of the reasons why the Court will not do so. Yet, there is at least one more critical reason why this Court will not reverse: the Court would never even reach the issue that Cesari raises in its Application and proposes as a basis for certiorari. This is because the Court would affirm the Summary Order based on the alternative meritorious ground under *B&B Hardware* that Peju raised before the district court and the Second Circuit. That is, the 2004 Decision is not issue preclusive because it was the result of the TTAB's "fundamentally poor, cursory, or unfair" procedure that deprived Peju of a full and fair opportunity to contest the likelihood of confusion before the TTAB in 2004. *B&B Hardware*, 575 U.S. at 158-59.

When Cesari moved for judgment on the pleadings under Trademark Rule § 504.01 and Fed. R. Civ. P. 12(c), the TTAB, *sua sponte*, with **no notice** to Peju (or to Cesari), converted the motion into one for summary judgment in flagrant violation of Trademark Rule § 504.03[6] and Fed. R. Civ. P. 12(d). App'x 19a n.4, 26a-27a, 34a. Both rules require parties be given notice of any such conversion and an opportunity

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[6] "Ordinarily, the parties to the proceeding will be notified that the motion for judgment on the pleadings is being treated as a motion for summary judgment, and they will be given a reasonable opportunity to present all material made pertinent to such a motion by Fed. R. Civ. P. 56." Trademark Rule § 504.03; *accord* Trademark Rule § 504.03, TBMP (2d ed. Mar. 2004, Rev. 1).

to submit evidence. They do so because basic fairness and due process demand a party receive notice and an opportunity to submit evidence in opposition. *See Selva & Sons, Inc.*, 705 F.2d at 1321-23 (vacating and remanding where the TTAB failed to notify the party of the motion's conversion which deprived the party of basic rights); *see also Thoen v. United States*, 765 F.2d 1110, 1114-15 (Fed. Cir. 1985); *Jones v. L.A. Cent. Plaza LLC*, 74 F.4th 1053, 1060 (9th Cir. 2023); *Krijn v. Pogue Simone Real Estate Co.*, 896 F.2d 687, 688-90 (2d Cir. 1990); *Blassingame v. Sec'y of Navy*, 811 F.2d 65, 74 (2d Cir. 1987); *James River Petroleum Inc. v. Petro Stopping Centers L.P.*, 50 U.S.P.Q.2d 1702, at *2 (TTAB 1999) (declining to convert motion because party did not have an opportunity to respond). It is undisputed that the TTAB failed to give Peju notice and an opportunity to submit evidence before it *sua sponte* converted the motion and entered summary judgment in favor of Cesari. App'x 19a n.4, 26a-27a; *see also* 2d Cir. Oral Arg. Audio Tr. 18:15 – 18:45, Nos. 24-1903, 24-2014.

If there was ever a TTAB proceeding that qualifies as one that is "fundamentally poor, cursory, or unfair" such that a resulting decision is not issue preclusive in a subsequent infringment litigation, it is this one. *B&B Hardware*, in fact, identified one such "ill-suited" TTAB procedure that would prevent issue preclusion where "a party may have tried to introduce material evidence but was prevented by the TTAB from doing so." *B&B Hardware*, 575 U.S. at 159. The problem here was similar but far worse and even more unfair. Peju was prevented from even attempting to introduce evidence to oppose the motion because it was never notified of the TTAB's intent to convert it. As Judge Wesley pointedly put it during oral argument on appeal before the Second Circuit, the TTAB's procedure deprived Peju of "a full and fair opportunity to litigate" because it "was a summary proceeding with no notice! — no notice to the one side which the summary proceeding is going to be invoked." 2d Cir. Oral Arg. Audio Tr. 18:15 – 18:45, Nos. 24-1903, 24-2014. Accordingly, this Court would be compelled to affirm the Summary Order vacating the Judgment on this alternative ground and would never even reach Cesari's question presented. Nor is there any dispute that Peju raised this issue before the district court, App'x 19a n.4, 26a-27a, and at length again on appeal. 2d Cir. Dkt. 39.1 at 27-39 (opening brief); 2d Cir. Dkt. 87.1 at 16-25 (reply brief).

Cesari incorrectly disregards this issue, apparently under the mistaken belief that this Court would not or could not consider it in a merits decision because it is not a basis of the Summary Order's vacatur. *See* Appl. 10 ("Only the first [ground] matters here — it is the sole ground on which the court of appeals later vacated."). Here too Cesari is incorrect. Not only could Peju conditionally cross-petition for certiorari under Rule 12.5 if it chose to, but Peju need not even do so to properly raise the issue. "Without cross-petitioning for certiorari, a prevailing party may, of course, defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals." *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 273 (2009); *see also Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 38-39 (1989) (same); *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 478 n.20 (1979) (same). This rule is "well accepted." *Union Pac. R. Co. v. Bhd. of Locomotive Engineers*

& Trainmen, 558 U.S. 67, 80 (2009). Thus, the fact that the Second Circuit disposed of the appeal entirely on the issue that Cesari raises now does not preclude Peju from raising an alternative ground under *B&B Hardware* to defend the Judgment, which would result in an affirmance.[7] In short, "whether Peju had a full and fair opportunity to litigate" a likelihood of confusion before the TTAB **does** "matter[ ] here," Appl. 10, and it is further reason why there is no fair prospect that this Court would reverse the Summary Order.

Finally, one other matter bears mentioning. Despite Cesari's vehement protest to this Court that the Second Circuit's Summary Order was wrong and violated *B&B Hardware*'s holding (it did not), Cesari never petitioned the Second Circuit for panel rehearing or rehearing en banc under Fed. R. App. P. 40(a). Cesari's choice weighs against a stay of the mandate too. *See Sussman v. Jenkins*, 642 F.3d 532, 536 (7th Cir. 2011) (Ripple, J., in chambers) (denying a stay of the mandate and noting that "despite the State's view of the alleged serious overreaching by the panel, the State did not choose to bring this issue to the panel by way of a petition for rehearing" or en banc). As Peju notes above, Cesari's purposely opaque wording in its Application leaves the Court with the misimpression that Cesari moved for rehearing and was denied. *See* Appl. 4, 11. It did not.

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[7] No cross-petition is needed because affirming the Summary Order's vacatur of *Peju I* and the Judgment based on this alternative ground rather than on the ground the Second Circuit elected "would neither expand nor contract the rights of either party established by the judgment below." *Granfinanciera*, 492 U.S. at 38-39.

For these reasons too, Cesari fails to satisfy its very heavy burden that there is a fair prospect this Court would reverse the Summary Order. Therefore, the Court should decline to recall and stay the mandate.

III. Cesari cannot demonstrate irreparable harm.

Cesari has not met its burden to demonstrate a likelihood of irreparable harm if the Court refuses a stay. This should end the Court's inquiry into the merits of extraordinary relief Cesari requests. The Court, rather, should entertain Cesari's arguments through the ordinary course of seeking a writ of certiorari.

The most critical element in assessing Cesari's Application is whether it will suffer irreparable harm absent a stay of the mandate. *See Teva Pharm. USA*, 572 U.S. at 1301-02 (Robert, C.J., in chambers); *Trump v. CASA, Inc.*, 606 U.S. 831, 892 (2025) (Sotomayor, J., dissenting) ("It is a bedrock principle that parties who request a stay must show they will likely suffer irreparable harm absent such relief."); *Louisiana v. Am. Rivers*, 142 S. Ct. 1347, 1348 (2022) (Kagan, J., dissenting) (explaining a stay is exceptional and requires concrete proof of irreparable injury and that a likelihood of success is insufficient); *Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1316-17 (1983) (Blackmun, J., in chambers) ("An applicant's likelihood of success on the merits need not be considered, however, if the applicant fails to show irreparable injury from the denial of the stay."). So, if a movant fails to convincingly demonstrate irreparable harm will result without a stay of the mandate, then the Court denies a stay.

Cesari will not suffer any irreparable harm if this Court does not recall and stay the mandate. Cesari tries to manufacture three forms of irreparable harm. *See*

Appl. 20-23. None withstand scrutiny. Each are built on inapposite legal authorities and material factual misrepresentations.

A. Discharge of the appeal bond is not irreparable harm, and Cesari's argument is built on a blatant factual misrepresentation.

Cesari's primary argument is that Peju's appeal bond will be discharged without a stay. *Id.* 20-22; ECF No. 519 (appeal bond). As noted above, Cesari's misguided obsession with Peju's appeal bond is the impetus for its Application. *See id.* 1, 5, 10-12, 20-24. While it is true that the district court must now discharge Peju's appeal bond because the Second Circuit vacated the Judgment, that is true in essentially every case in which a money judgment is reversed or vacated because the bond was procured to secure a judgment that no longer exists. *Revlon, Inc. v. Carson Products Co.*, 647 F. Supp. 905, 906 (S.D.N.Y. 1986). Thus, Cesari asks this Court to convert an ordinary occurrence — money judgments are reversed or vacated all the time — into an extraordinary showing of irreparable harm. In other words, in Cesari's view, the irreparable harm prong would automatically be satisfied in every such case, contrary to this Court's basic teachings that stay relief is extraordinary. *See Teva Pharm. USA*, 572 U.S. at 1301-02 (Robert, C.J., in chambers).

Critically, Cesari fails to cite a single case holding that the discharge of an appeal bond constitutes irreparable harm. This is unsurprising because Cesari's argument, that the appeal bond securing the Judgment will be discharged without a stay, is fundamentally a complaint about monetary harm. And it is well-settled that if harm is compensable with money damages, then it is not irreparable. *Philip Morris USA Inc. v. Scott*, 561 U.S. 1301, 1304 (2010) (Scalia, J., in chambers); *Conkright v.*

Frommert, 556 U.S. 1401, 1403 (2009) (Ginsburg, J., in chambers); *Sampson v. Murray*, 415 U.S. 61, 90 (1974); *Daileader v. Certain Underwriters at Lloyds London Syndicate 1861*, 96 F.4th 351, 358 (2d Cir. 2024).

In *Teva Pharmaceutical USA*, Chief Justice Roberts held that an applicant fails to show that it is entitled to a recall and stay of the mandate when, if the applicant were to prevail before this Court, it will be able to recover damages from the respondent for past infringement. 572 U.S. at 1301-02 (Robert, C.J., in chambers). When that is the situation — even when the Court has already granted certiorari, as it had — then the applicant fails to show a likelihood of irreparable harm thereby warranting denial of a stay. *Id.* at 1301.

So too here. The district court entered the Judgment that disgorged $666,214 in Peju's profits for past trademark infringement. App'x 32a; *Peju II*, 693 F. Supp. 3d at 381, 401-05. If this Court were to grant certiorari, reverse, and reinstate the Judgment, Peju would be liable for and pay that sum (plus other sums due under the Judgment). Even more compelling, this is not even a situation where, absent a stay, there will be ongoing possible infringement that may give rise to irreparable harm. It is undisputed that Peju ceased using its LIANA mark more than **eight years ago** in July 2018. *Id.* at 383, 386. This case is purely about finite past profits, i.e., money.

Aware that it does not stand to incur irreparable harm, Cesari tries to squeeze its misplaced concerns into the narrow band of inapposite cases it cites where, absent a stay, the applicant would expend money that cannot later be recouped. *See* Appl. 21 (citing *Philip Morris USA Inc. v. Scott*, 561 U.S. 1301, 1304 (2010) (Scalia, J., in chambers); *Nat'l Institutes of Health v. Am. Pub. Health Ass'n*, 145 S. Ct. 2658 (2025)). And it does so by repeating the same factual misrepresentations to this Court that it made before the Second Circuit to try to induce it to stay its mandate.

Specifically, Cesari argues that Peju will not pay the Judgment if it is reinstated because, Cesari claims, Peju has refused for years to pay a $2,697.75 expert witness fee award. Appl. 5, 21. This is false, and the argument is meritless. In the district court's July 11, 2024 decision on attorneys' fees and costs, it awarded Cesari an expert witness fee which Peju had disputed (it was reduced from the $3,316.50 that Cesari demanded). *Peju III*, 2024 WL 3374358, at *10-11, *13. The next day, July 12, 2024, the district court entered the Judgment that included that witness fee. App'x 32a. The same day, Peju appealed the entire Judgment and then subsequently posted the appeal bond that stayed the Judgment pending appeal. ECF No. 498 (notice of appeal); ECF No. 519 (appeal bond); Fed. R. Civ. P. 62(b). Cesari had also stipulated it would refrain from execution on the Judgment while Peju's motion to approve security was pending. ECF Nos. 505, 507. The Second Circuit then vacated the Judgment in its entirety, such that no expert witness fee is now due. App'x 2a-13a. Thus, Peju never refused to pay the witness fee. Rather, Peju lawfully availed itself of its right to stay the payment as part of the Judgment, which is now vacated and not due. If the district court later awards the witness fee, Peju would of course pay it.[8]

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[8] Although the expert witness fee is not due in the wake of the Second Circuit's vacatur, Peju nevertheless offered on August 26, 2026 to pay Cesari its requested fee.

Despite these events, Cesari misrepresents that Peju refused to pay the witness fee for years after being ordered to do so: "Ordered to reimburse $2,697.75 in discovery costs it never appealed, Peju wrote, 'We won't be paying the invoice' — and three years of accruing interest has not changed its mind." Appl. 12, 21 (quoting ECF No. 480-4). As Cesari acknowledges, the email that it quotes was written on July 17, **2023**. Appl. 12; ECF No. 480-4. That was almost a full year **before** the district court's July 11, **2024** decision awarding the reduced witness fee. *Cesari*, 2024 WL 3374358. Yet, Cesari's informs the Court that Peju wrote this email **after** being ordered to reimburse the fee. Appl. 12, 21. Cesari's misrepresentation, done to shoehorn this matter into an inapposite line of cases and to baselessly place Peju in a negative light, is inexcusable.[9]

Stripped of its misrepresentation, Cesari provides no factual basis to begin to support its assertion that the Judgment amount would not later be recoverable absent a stay. Cesari's complete absence of factual support cannot carry its exceptionally heavy burden here. *See New York Times Co.*, 439 U.S. at 1332 (Marshall, J., in chambers); *Graddick*, 453 U.S. at 933; *Taylor*, 82 S. Ct. at 10-11 (Brennan, J., in chambers); *Magnum Imp. Co.*, 262 U.S. at 163-64; *see also Conkright*, 556 U.S. at 1403 (Ginsburg, J., in chambers) (denying a stay where the movant failed

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Peju did so to avoid needlessly expending any further time and resources on the non-issue. Incredibly, Cesari's counsel refused to accept Peju's offer of payment.

[9] The continued misrepresentation is even more inexcusable because Cesari made a similar misrepresentation to the Second Circuit, which Peju flagged. *See* 2d Cir. Dkt. No. 140.2 at 17-18; 2d Cir. Dkt. No. 138.1 at 18.

on the irreparable harm prong to establish that later recoupment would be impossible); *McBride v. CSX Transp., Inc.*, 611 F.3d 316, 318 (Ripple, J., in chambers) (denying a stay of the mandate for lack of irreparable harm where the movant failed to "explain, with any specificity, why it is unlikely that [the plaintiff] will be able to repay the judgment if it is reversed"). In any event, Peju has every intention to pay the Judgment if it is later reinstated by this Court. Cesari's expressions to the contrary are pure conjecture. Peju is not a fly-by-night operation; it is a California winery that demonstrated its financial wherewithal by posting $1.484 million in cash collateral to secure an appeal bond. *See* 2d Cir. Dkt. 136.1 at 18-19. Cesari falls far short of its heavy burden to come forth with facts showing that recovery from Peju will be impossible or at least very unlikely.

Moreover, the authorities on which Cesari relies do not apply here in any respect. In *Philip Morris USA*, Justice Scalia found irreparable harm because, absent a stay, the appellant would have had to pay several hundred million dollars to fund an anti-smoking campaign, a substantial portion of which would be expended on counseling, medical devices, and administrative expenses which would likely be unrecoverable. 561 U.S. at 1304-05 (Scalia, J., in chambers). Similarly, in *National Institutes of Health*, the Court held that, absent a stay, the government would not be able to recover grant money paid to the appellees if the government ultimately prevailed. 145 S. Ct. 2658. Justice Ginsburg denied the stay in *Conkright* for similar reasons that it would not be impossible to recover the funds, and payment would jeopardize the pension fund. 556 U.S. at 1403 (Ginsburg, J., in chambers). This case, however, stands in sharp contrast to the foregoing because this case does not involve a judgment requiring Cesari to pay Peju or to otherwise expend money absent a stay of the mandate. To the contrary, the Judgment had required Peju to pay — but it is now vacated such that Peju does not have to pay Cesari. Suffice to say, unlike these two cases, this is not a case where money is changing hands at all. So, there is no likelihood or prospect that funds cannot be recouped from Peju or someone else.

Ironically, Peju is the only party who will be irreparably harmed by having to expend funds that will never be recoverable if the Court grants a stay of the mandate. *See Conkright*, 556 U.S. at 1403 (Ginsburg, J., in chambers) (noting that irreparable harm could exist if funds paid "will be impossible" to recover). This is because Peju will incur yet another yearly 1.5% appeal bond premium payment of $22,271.49 on the bond's December 2, 2026 anniversary, which can never be recovered from the surety. 2d Cir. Dkt. 136.1 at 18-19. And this is to say nothing of the continued restraint of Peju's $1.484 million cash collateral for the bond that continues to be tied up until the bond is discharged — which should result given the Judgment's vacatur. *Revlon*, 647 F. Supp. at 906.

Cesari's reliance on the order in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 548 U.S. 936 (2006) is also misplaced. Appl. 6, 21. While *Leegin Creative* granted the same relief that Cesari seeks here, the short order is unexplained. 548 U.S. 936. There is no factual or legal basis supplied that can be analogized to this case. *See id.* Case law, of course, is useful only insofar as it can be compared to particular facts and law. Cesari cannot, as it does, merely identify the relief granted in one case and then claim entitlement to the same relief here. *See Taylor*, 82 S. Ct. at 10-11 (Brennan, J., in chambers) (requiring the movant to make an extraordinary showing to obtain a stay of the mandate). There is nothing in *Leegin Creative* stating, or even suggesting, that the Court viewed the discharge of a prevailing appellant's appeal bond as irreparable harm.[10]

In short, Cesari's argument about the appeal bond discharge is both legally incorrect and factually baseless.

B. Cesari's district court litigation argument is without merit.

Cesari's argument that it will be irreparably harmed by having to "relitigate" in the district court is also without merit. Appl. 22-23. First, Cesari's entire premise is wrong. It contends that it "holds an adjudicated right to preclusion" and that "the District Court must readjudicate preclusion." *Id.* 22, 23. Nothing could be more objectively incorrect. The Second Circuit adjudicated that issue preclusion does not apply here under *B&B Hardware*. App'x 7a-13a. And, by virtue of the judicial hierarchy that Cesari is so keen on reminding this Court of, *see* Appl. 13, **Peju** is the party that holds an adjudicated right to litigate; that is, the right to litigate whether there is any likelihood of confusion between the parties' marks in the manner prescribed under the Second Circuit's likelihood of confusion assessment laid down in *Polaroid Corp. v. Polarad Elecs. Corp.,* 287 F.2d 492 (2d Cir. 1961). This traditional *Polaroid* test never occurred because the district court erroneously held Peju liable

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[10] If anything, the only facts divinable from the Court's later merits opinion also show the order to be inapposite because *Leegin Creative* was a case where the Court of Appeals **affirmed** the monetary judgment. 551 U.S. 877, 884-85 (2007).

based on issue preclusion. App'x 17a-31a. As a result of this error, Peju is the party that suffered years of unwarranted litigation having been deprived of its opportunity to defend itself against liability unlike other infringement defendants. So it is Peju who possesses the right to vindicate itself from the charge of infringement.

Equally important, it is settled that continued litigation after an appeal, and the burdens that come with it, does not constitute irreparable harm. *See Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974) ("Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury."); *Commonwealth Oil Ref. Co. v. Lummus Co.*, 82 S. Ct. 348, 349 (1961) (Harlan, J., in chambers); *Am. Axle & Mfg., Inc. v. Neapco Holdings LLC*, 977 F.3d 1379, 1381 (Fed. Cir. 2020) (stating same, collecting cases, and observing the applicant "cited no authority suggesting that the prospect of further district court proceedings while the case is on review could constitute irreparable injury")); *Nara v. Frank*, 494 F.3d 1132, 1133 (3d Cir. 2007) (denying stay and noting the burden of preparing for trial while certiorari is pending is not irreparable harm). Re-commencing litigation in the district court is what occurs in most every case in which the judgment is reversed or vacated on appeal and remanded. To find the continuation of litigation to be irreparable harm — whatever the underlying claim or issue — would improperly transform a rather frequent occurrence into automatic grounds for extraordinary relief.

Cesari's reliance on *Coinbase, Inc. v. Bielski*, 599 U.S. 736 (2023) proves no more helpful to its cause. Appl. 5-6, 22. *Coinbase* is not an issue preclusion case. It concerns arbitration. But the Court would never know this from reading Cesari's characterization of the case because it creates a "mashup" from the text of the case and concepts underlying issue preclusion. *See* Appl. 22. The issue in *Coinbase* was whether a district court must stay the case pending an appeal of its denial of a motion to compel arbitration. 599 U.S. at 738. Answering in the affirmative, the Court commented that if a district court could move forward while the appeal was pending, "then many of the asserted benefits of arbitration (efficiency, less expense, less intrusive discovery, and the like) would be irretrievably lost — even if the court of appeals later concluded that the case actually had belonged in arbitration all along." *Id.* The Court's discussion has nothing to do with issue preclusion or the propriety of continuing district court proceedings once a court of appeals has reversed or vacated its decision, as is the situation here.

In fact, *Coinbase* cuts against Cesari's argument altogether. There, the Court observed that courts "often do not consider litigation-related burdens . . . to constitute irreparable harm" when they apply the standard test for a discretionary stay. *Coinbase*, 599 U.S. at 746 (quoting *Nken v. Holder*, 556 U.S. 418, 434-435 (2009); *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 244 (1980)). And this is to be distinguished from the situation where Congress affords parties a statutory right of appeal from a denial of a motion to compel arbitration, such that stays should be automatic. *See id.* In short, *Coinbase* affirms that the alleged harm Cesari asserts is not cognizable irreparable harm to justify a recall and stay of the mandate.

C. The district court is not addressing issue preclusion on remand.

Cesari's final argument for irreparable harm is its contention that the district court "must take up preclusion anew" or "readjudicate preclusion" under the Summary Order which would be the same issue this Court would be reviewing. Appl. 23. Again, Cesari is simply wrong. The Second Circuit held that issue preclusion does not apply to this case, period, full stop. App'x 7a-12a. The Summary Order is unequivocal. It agreed with Peju that the 2004 Decision never considered marketplace usage of the marks and, "because the issues before the TTAB and the district court were not the same, the district court should not have given preclusive effect to the TTAB's ruling on the likelihood of confusion." *Id.* 7a-9a, 12a. The 2004 Decision has no further relevance to the likelihood of confusion determination to be made as this case moves forward. Therefore, the district court will never again be addressing issue preclusion in this case. Rather, any likelihood of confusion analysis will proceed under the typical *Polaroid* factors after infringement discovery (that never started) is complete. *See, e.g.*, *Tiffany & Co. v. Costco Wholesale Corp.*, 971 F.3d 74, 84-95 (2d Cir. 2020) (assessing the *Polaroid* factors for likelihood of confusion).

Because the district court will not be revisiting issue preclusion on remand, nothing it does between now and the time the Court rules on Cesari's anticipated petition for certiorari will be relevant to or otherwise impede this Court's review. The partial summary judgment record and issue preclusion decision from 2017 has not changed since that time and will never change. *See Griffin v. Sirva Inc.*, 835 F.3d 283, 287 (2d Cir. 2016) (explaining that appellate "review is limited to the record presented to the district court at the time of summary judgment" and does not consider later-presented matters); *see also DeFries v. Union Pac. R.R. Co.*, 104 F.4th 1091, 1105 (9th Cir. 2024) (stating same), *cert. denied*, 145 S. Ct. 1426 (2025).

Accordingly, it is unclear what Cesari is referring to when it claims that "rulings entered while the petition is pending would recast the case's posture and arm Peju with objections to review that it does not now have." Appl. 23. What these rulings are or what new objections Peju would obtain relevant to this Court's review is left unexplained. There are none. Nothing the district court will do on remand will impact issue preclusion. Thus, the Court should reject this imagined basis of irreparable harm.

The case that Cesari relies on for this point, *Garrison v. Hudson*, 468 U.S. 1301 (1984) (Burger, C.J., in chambers), bears no resemblance to the present matter. *Garrison* stayed an impending retrial of a criminal defendant pending the state's certiorari petition after the appeals court reversed the respondent's prior murder conviction. 468 U.S. at 1301-02. The Court did so because the imminent retrial would extinguish and moot review on certiorari of the reversal, which was irreparable harm. *Id.* at 1302. Nothing remotely comparable would occur here on remand which leaves the 2017 summary judgment decision untouched. Rather, at most, some traditional discovery would commence, which does not moot certiorari in any manner.

Because Cesari failed to shoulder its heavy burden to prove irreparable harm absent a recall and stay of the mandate, Your Honor should deny the application.

CONCLUSION

Your Honor should deny Cesari's unwarranted renewed request for a recall and stay of the Second Circuit's mandate. Cesari does not approach the requisite extraordinary showing to satisfy its particularly heavy burden here. There is no chance that the Court will grant certiorari and reverse, nor is there even a whiff of irreparable harm that will be occasioned by the absence of a stay of the mandate. Cesari simply refuses to accept that it did not prevail on appeal after dragging Peju through years of meritless litigation. Justice Sotomayor previously denied this same undeserving Application. This "disfavored" duplicative application should also be similarly denied. Sup. Ct. R. 22.4.

Respectfully submitted,

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