No. _____

In the Supreme Court of the United States

THERMOLIFE INTERNATIONAL, LLC, MUSCLE BEACH NUTRITION, LLC,

Applicants

v.

BPI SPORTS, LLC

APPLICATION TO THE HONORABLE ELENA KAGAN FOR AN EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, Applicants ThermoLife International, LLC and Muscle Beach Nutrition, LLC state that they have no parent corporations and that no publicly held company owns 10% or more of either Applicant's stock.

To the Honorable Elena Kagan, Associate Justice of the Supreme Court of the United States and Circuit Justice for the United States Court of Appeals for the Ninth Circuit:

Pursuant to Supreme Court Rule 13.5, Applicants ThermoLife International, LLC and Muscle Beach Nutrition, LLC respectfully request that the time to file a petition for a writ of certiorari in this matter be extended for twenty-nine days to and including December 15, 2026. The decision below is *ThermoLife International, LLC v. BPI Sports, LLC*, 186 F.4th 1176 (9th Cir. 2026). On August 18, 2026, the U.S. Court of Appeals for the Ninth Circuit issued its opinion on Applicants' appeal of an award of attorney's fees under the Lanham Act and as "costs" under Federal Rule of Civil Procedure 41(d). App. 1a–27a. The court issued a corrected opinion on August 24, 2026. Applicants did not request rehearing at the Ninth Circuit. Subsequently, the Ninth Circuit granted BPI Sports, LLC's motion for appellate attorney's fees and expenses (on grounds distinct from the Rule 41(d) question to be presented here). The proceeding to determine the amount of appellate fees and expenses remains pending before the Ninth Circuit.

Absent an extension of time, Applicants' petition would be due on November 16, 2026. This Application is filed at least ten days before that date. *See* S. Ct. R. 13.5. This Court would have jurisdiction over the judgment under 28 U.S.C. § 1254(1).

BACKGROUND

This case presents an important and acknowledged conflict among the courts of appeals concerning the correct scope of Federal Rule of Civil Procedure 41(d),

namely whether a court can award attorney's fees as "costs" under Rule 41(d). In the underlying divided decision, the Ninth Circuit expressly recognized that the courts of appeals have adopted materially different interpretations of whether attorney's fees may be awarded as Rule 41(d) "costs" and, if so, under what circumstances. *See* App. 15a. The division between the Ninth Circuit majority and dissent deepens the existing conflict and creates an important question warranting this Court's review. App. 20a, 22a–27a; *see also* Joseph Myles & Lionel Lavenue, *Unpacking the Circuit Split Over a Federal Atty Fee Rule*, Law360 (June 27, 2024) ("The circuit courts that have addressed Rule 41(d) at the appellate level are split as to whether attorney fees are included as part of those 'costs.'").

Here, the dispute between Applicants and BPI Sports, LLC commenced in 2018 in the U.S. District Court for the District of Arizona. *See* App. 4a. The dispute concerned false-advertising and unfair-competition claims brought first by ThermoLife. *Id.* ThermoLife alleged that BPI Sports misbranded and falsely advertised sports-nutrition products competing in the marketplace with products utilizing ThermoLife's patented amino-acid nitrate technology. *Id.*

After BPI Sports filed its own false-advertising action against ThermoLife in the Southern District of Florida in 2019, ThermoLife voluntarily dismissed the Arizona action and then filed a similar action (including an additional Florida state-law claim) in the Southern District of Florida in 2020, adding Muscle Beach Nutrition as an additional plaintiff. App. 6a–7a. Notwithstanding that both actions were then in Florida (the home state of BPI Sports), BPI Sports moved to transfer the 2020

Florida action to Arizona. After transfer back to Arizona, the district court later dismissed Applicants' complaint with prejudice. App. 7a. The dismissal was affirmed in a separate appeal. *ThermoLife Int'l, LLC v. BPI Sports, LLC*, No. 21-15339, 2022 WL 612669 (9th Cir. Mar. 2, 2022). BPI Sports then moved to recover attorney's fees incurred in both the 2018 and 2020 actions. App. 7a.[1]

The district court granted fees pursuant in part to the Lanham Act and in part to Rule 41(d). App. 7a–8a. As pertinent here, the district court held that Rule 41(d) authorized recovery of attorney's fees associated with the previously dismissed 2018 action because, in the district court's view, Rule 41(d)'s use of "costs" includes attorney's fees when there is an underlying statute that authorizes fee shifting, such as the Lanham Act. The district court awarded more than $486,000 in attorney's fees. App. 8a.

On August 18, 2026 (and later corrected on August 24, 2026), a divided panel of the Ninth Circuit affirmed the district court's fee-entitlement ruling. App. 4a. The majority acknowledged that "a circuit split has emerged as to whether attorney's fees may be awarded as costs under Rule 41(d)(2)." App. 12a. The panel catalogued the "varying approaches" taken by the circuits, starting with an Eighth Circuit *per curiam* decision from 1980. App. 15a–19a. Adopting an interpretation not previously established in the Ninth Circuit, the panel held that attorney's fees may be recovered under Rule 41(d) whenever the statute underlying the litigation authorizes fee

[1] For the case that was litigated in Florida, Applicants ultimately prevailed after appeal. *See BPI Sports, LLC v. ThermoLife Int'l LLC*, Nos. 2023-1068, -1625, -1112, 2025 WL 1683234 (Fed. Cir. June 16, 2025).

shifting. App. 20a ("As a matter of first impression in this circuit, we now join our sister circuits in holding that attorney's fees may be recovered as part of costs under Rule 41(d) if the statute underlying the litigation provides for the award of attorneys' fees.").

Judge Miller dissented. App. 22a–27a. In his view, "[b]ecause no statute or rule authorizes a district court hearing one case to award fees for a different case," Judge Miller would have vacated the district court's order. App. 22a. While he agreed that fees were properly awarded under the Lanham Act for the 2020 litigation, he also concluded that "there is no textual basis to interpret 'costs' in Rule 41(d) as incorporating fees in this context." App. 24a. The dissent further observed that *Marek v. Chesny*, 473 U.S. 1 (1985), counsels against the majority's reasoning and conclusion. App. 23a–25a.

REASONS FOR GRANTING AN EXTENSION OF TIME

The time to file a Petition for Writ of Certiorari should be extended for twenty-nine days for these reasons establishing good cause:

1. This case presents an important issue requiring a carefully prepared and thoroughly researched petition. The issue concerning whether Rule 41(d) allows for the assessment of attorney's fees as "costs" has developed over the years, and the circuit courts have split on the issue. *See* App. 15a. This case thus presents a rare opportunity for the Court to resolve this long-standing legal divergence. Preparing a thorough petition addressing this mature circuit split requires additional time to present the issues to the Court.

2. Good cause further exists because undersigned counsel is in the process of identifying potential co-counsel who may provide additional assistance with the preparation and filing of the petition for a writ of certiorari. The significance of the issue to be presented likely warrants the assistance of additional counsel.

3. Additionally, undersigned counsel for Applicants has a significant docket with several upcoming deadlines, including an upcoming oral argument on November 4, 2026, in *Centripetal Networks, LLC v. Keysight Technologies, Inc.*, No. 25-1715 (Fed. Cir.).

4. An extension is further warranted because the modest additional time will permit potential *amici curiae* to evaluate this case and consider how they might best assist the Court's review. The anticipated question of whether Rule 41(d) provides for recovery of attorney's fees as "costs" is of wide interest, as evidenced by the mature circuit split. The views of *amici* would aid the Court's consideration of the anticipated petition.

5. Lastly, the modest extension would also not prejudice Respondent or prevent the Court from considering the petition before its summer recess.

CONCLUSION

For the foregoing reasons, Applicants respectfully request that the time to file their Petition for a Writ of Certiorari in this matter be extended by twenty-nine days to and including December 15, 2026.

Date: October 30, 2026

Respectfully submitted,



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