No.

IN THE

Supreme Court of the United States

CLYDE ARMORY INC.,

Petitioner,

v.

FN HERSTAL S.A.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Seventh Amendment right to a civil jury trial for claims seeking legal (as opposed to equitable) relief is a bedrock constitutional guarantee. In recognition of that principle, a district court's refusal to grant a jury trial is generally reviewed with "utmost care" or "the most exacting scrutiny." *Dimick v. Scheidt*, 293 U.S. 474, 486 (1935); *City of Morgantown v. Royal Ins. Co.*, 337 U.S. 254, 258 (1949). In trademark cases, plaintiffs often seek to recover the profits an infringer has reaped by virtue of the disputed mark, often as a proxy for evaluating the damages resulting from the misuse. Following this Court's decision in *Dairy Queen v. Wood,* 369 U.S. 469 (1962), many jurisdictions have recognized such profits claims as legal in nature, thus giving rise to a Seventh Amendment right to a jury trial. Other jurisdictions, however, characterize such profits claims as equitable, and therefore hold that no right to a jury trial attaches. This case presents two interrelated questions arising from the district court's refusal to permit petitioner to assert a profits claim and thereby to obtain a jury trial.

The questions presented are:

1. Whether a district court's refusal to permit petitioner to amend the proposed pretrial order to assert a profits claim—thereby restoring petitioner's right to a jury trial in the wake of respondent's eleventh-hour withdrawal of its consent to a jury trial on all other claims—is reviewed for abuse of discretion or under the more exacting standard typically applied to orders that effectively deny the right to a jury trial.

2. Whether, under the logic of *Dairy Queen*—and as several lower courts have held, in conflict with several others—claims seeking a trademark infringer's profits are legal in nature and thus give rise to a Seventh Amendment right to a jury trial.

RULE 29.6 STATEMENT

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

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Clyde Armory Inc., respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a–38a) is reported at 838 F.3d 1071. The district court's bench trial order (App., *infra*, 39a–77a) is reported at 123 F. Supp. 3d 1356.

JURISDICTION

The judgment of the court of appeals was entered on September 27, 2016. On December 6, 2016, Justice Thomas extended the time for filing a petition for a writ of certiorari to and including January 25, 2017. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Seventh Amendment to the United States Constitution states:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in

> any Court of the United States, than according to the rules of common law.

The Lanham Act § 35, at 15 U.S.C. § 1117(a), states:

> 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.

STATEMENT

This Court has recognized the Seventh Amendment right to a jury trial as "a vital and cherished right, integral to our judicial system," and has required that "rulings of district courts granting or denying jury trials are subject to the most exacting scrutiny on appeal" and "any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Morgantown*, 337 U.S. at 258; *Dimick*, 293 U.S. at 486. Moreover, any exercise of discretion by a district court that may impinge upon that constitutional right "is very narrowly limited and must, wherever possible, be exercised to preserve jury trial." *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510 (1959); *see also* FED. R. CIV. P. 38(a) ("The right of trial by jury as declared by the Seventh Amendment to the Constitution—or as provided by a federal statute—is preserved to the parties inviolate.").

Petitioner seeks to clarify two interrelated questions regarding the constitutional right to a jury trial in trademark actions under Section 35 of the Lanham Act, 15 U.S.C. § 1117. The first question asks whether a district court's determination that a

party has purportedly forfeited its right to present a claim entitling it to a jury trial is a garden-variety question of trial procedure committed to the district court's discretion, when the request comes in response to an opponent's eleventh-hour withdrawal of its prior consent to try all claims to a jury. The second question is whether, following the reasoning of this Court's decision in *Dairy Queen*, a claim to recover a trademark infringer's profits is a legal claim—giving rise to a Seventh Amendment right to a jury trial—or is purely equitable and thus subject to disposition by a bench trial.

The decision below failed to confront the disagreement among the lower courts, based on the erroneous conclusion that the district court's refusal to allow that claim to be presented was subject only to abuse-of-discretion review. As explained below, the Eleventh Circuit was wrong. This Court should grant review to clarify the more exacting scrutiny to be applied when a district court's order denies a party the jury trial it clearly sought and to resolve the longstanding disagreement regarding the nature of a profits claim in the wake of *Dairy Queen*. These questions are of fundamental importance to parties in trademark disputes who seek to preserve their constitutional right to a jury trial.

* * * * *

This is a trademark case. The principal issue in dispute was which party had established its trademark right first. Petitioner is an independent, locally-owned firearms dealer based in Athens, Georgia. App., *infra*, 40a. In 2006, petitioner developed its own after-market rifle stock product to be used with certain rifles made by Sturm Ruger &

Co., Inc. *Id.* at 48a–49. Petitioner collaborated with Sage International, Ltd., to design and manufacture its rifle stock. *Id.* To commemorate that collaborative effort, petitioner named its rifle stock SCAR-Stock, which was an acronym for Sage Clyde Armory Rifle Stock. *Id.* at 49.

In 2004, respondent—a large, multi-national firearms manufacturer and distributor—was awarded a contract by a division of the U.S. military known as U.S. Special Operation Command ("SOCOM"), which held an open competition for a contract to manufacture a rifle SOCOM called the SCAR, an acronym for Special Operations Forces Combat Assault Rifle. *Id.* at 40a–41a. In 2005, respondent began supplying SCARs to SOCOM, for which SCAR was merely the weapon's description and not a source-identifier. *Id.* at 41a. Respondent did not sell commercially available rifles bearing the SCAR acronym to civilian consumers until 2008. *Id.* at 47a.

Because neither party held a federal registration for their respective mark at the relevant time, the dispute turned on their respective common law trademark rights. As relevant here, the common law recognizes rights based on the use in commerce of an unregistered but distinctive mark, which establishes in the minds of consumers the source of the goods on which the mark is used. When two marks are so similar that they are likely to cause consumer confusion as to the source of the goods, the senior party owns rights to the mark based on its priority of use, and may enjoin the junior party from using a competing mark on the same or related goods. The parties here conceded that the simultaneous use of

their respective marks would create a likelihood of confusion and, as such, the prevailing party would be the one that established priority of use. *Id.* at 11a.

Respondent filed the initial complaint alleging that petitioner's use of its SCAR-Stock mark infringed respondent's SCAR mark. Complaint at 1, *FN Herstal, S.A., v. Clyde Armory, Inc.*, 123 F. Supp. 3d 1356 (2015) (No. 3:12-CV-00102-CAR) (hereinafter "D. Ct. Doc."), ECF No. 1. Petitioner filed a counterclaim, alleging that respondent's use of SCAR infringed petitioner's SCAR-Stock mark. Counterclaim at 1, D. Ct. Doc., ECF No. 38. In their respective pleadings, both parties sought relief commonly associated with trademark infringement claims under Section 35 of the Lanham Act, 15 U.S.C. § 1117, including actual damages, recovery of the infringer's profits, and injunctive relief. Both parties also made demands for a jury trial pursuant to Rule 38(a) of the Federal Rules of Civil Procedure. Amended Complaint & Answer to Amended Complaint, D. Ct. Doc., ECF Nos. 73–74. In the months leading up to trial, the district court issued an order setting out the pretrial schedule for the case. Order for Pretrial Conference, D. Ct. Doc., ECF No. 110. Among other things, the order required the parties to collaborate on a joint proposed pretrial order. At the time, there was no doubt that the case would be tried to a jury. A form attached to the district court's order was titled "Proposed Pretrial Order—Jury." *Id.* Part I, at 1. It required the parties to address topics related to conducting a jury trial, such as conflicts with jurors, issues for determination by the jury, the types of damages each side sought, and the parties' proposed voir dire questions, jury charges, and verdict form. *Id.* at 2-4.

Respondent and petitioner followed the prescribed outline in preparing the Joint Proposed Pretrial order. Each party prepared separate voir dire questions, separate proposed jury instructions, and separate verdict forms. Each of these items was to be submitted as an attachment to a jointly prepared proposed pretrial order.

On June 22, 2014, the parties submitted to the district court their Joint Proposed Pretrial Order, which memorialized the parties' intent to conduct a jury trial, but not present any claims for monetary relief to the jury. Petitioner was willing to forego all monetary relief, with its difficult proofs, as long as the case would still be tried to a jury by consent. On June 29, 2014, the district court conducted a final pretrial conference during which a significant number of issues discussed related to conducting a jury trial. Pretrial Conference, D. Ct. Doc., ECF No. 124. In other words, in the Joint Proposed Pretrial Order, both petitioner and respondent consented to trying this case to a jury, despite the lack of monetary relief sought by either side.

Following the final pretrial conference and before a pretrial order was entered by the court, respondent moved to strike the parties' jury demand and requested that the district court conduct a bench trial. App., *infra* 78a. This eleventh-hour about-face closely followed the appearance of new counsel for respondent. Notice of Att'y Appearance, D. Ct. Doc., ECF No. 112. Respondent's motion argued that only equitable relief was being sought by the parties, and, therefore, the case included no legal issues that required a jury trial. Motion to Strike at 1, D. Ct. Doc., ECF No. 127. Moreover, respondent argued, a

bench trial would be more efficient than a jury trial. *Id.* at 2. Petitioner argued that a bench trial would not be more appropriate or efficient than a jury trial, that respondent should not be permitted to upset the clear understanding and agreement of the parties, and that petitioner would be prejudiced because it had entered into a Proposed Pretrial Order and had prepared its case in anticipation of a jury trial. Response Re Motion to Strike at 8–12, D. Ct. Doc., ECF No. 129.

The district court granted respondent's motion. In a brief order, the court held that, although respondent had consented to a jury trial, "a party may unilaterally withdraw its consent to a jury trial." App., *infra*, 79a. The district court also held that petitioner would not be prejudiced by the lack of jury, despite the short notice, because the "parties have ten days before the trial is scheduled to begin, and a bench trial will likely require less preparation than a jury trial." *Id.* at 80a.

Petitioner then moved to amend the Joint Proposed Pretrial Order to re-assert its claim to respondent's profits, under Section 35 of the Lanham Act, 15 U.S.C. § 1117. Motion to Amend Proposed Pretrial Order, D. Ct. Doc., ECF No. 133. Petitioner sought thereby to restore its constitutional right to a jury trial, relying on this Court's holding in *Dairy Queen*.

The district court denied the motion. App., *infra* 85a. The court invoked its "broad discretion in determining whether or not a pre-trial order should be modified or amended," despite the fact that no pretrial order had yet been entered and the fact that respondent had already unilaterally modified that

proposed order by withdrawing its consent to a jury trial. *Id.* at 83a. The district court held that petitioner had waived its right to seek profits by not including the claim in the Proposed Pretrial Order. Then, in stark contrast to its earlier determination that petitioner was not prejudiced by the loss of a right to a jury trial, the court held that respondent would be prejudiced if petitioner was permitted to pursue its profits claims in light of the imminent trial date. *Id.*

The district court did, however, acknowledge the split in authority regarding whether a profits claim gives rise to a constitutional right to a jury trial. *Id.* at 84a. But in light of its refusal to allow the amendment, the district court declined to take a view. Rather, the court stated that, "[g]iven this split of authority, [it] is unclear whether [petitioner's] proposed amendment would provide [petitioner] with a right to a jury trial." *Id.* at 84a–85a.

The district court then entered a pretrial order. Pretrial Order, D. Ct. Doc., ECF No. 138. A three-day bench trial commenced on July 21, 2015, after which the court ruled for the respondent. App., *infra*, 39a–77a.

The court of appeals affirmed. As relevant here, the court affirmed the district court's orders allowing respondent to withdraw its agreement to conduct a jury trial but prohibiting petitioner from withdrawing its agreement not to pursue its profits claim. Examining the issue in piecemeal fashion, the court of appeals first held that "[a]lthough both FN and Clyde Armory originally sought *legal relief in the form of damages and the other party's profits*, they

both expressly waived all legal claims in their joint proposed pretrial order." *Id.* at 33a (emphasis added). The court of appeals then held that the district court correctly permitted respondent to withdraw its consent to a jury trial, stating that "nothing in Rule 39 restrains a party from withdrawing its consent to a jury trial that is not of right." *Id.* at 36a.

Finally, the court of appeals affirmed the district court's denial of petitioner's motion to amend the Proposed Pretrial Order. In its briefing to the court of appeals, petitioner had noted that the pretrial order was still just a *proposed* order that had not yet been *entered* by the court, *see*, *e.g.*, Petr's Br. 44, and argued that leave to amend should therefore be given freely. *See* Petr's Reply Br. at 9 ("Clyde Armory's [decision] to withdraw its profits claim was part of a *proposed* pretrial order which at the time had not been entered by the District Court"). The court ignored this distinction, stating that "[t]his Court has 'not hesitated to back up district courts when they put steel behind the terms of *pretrial orders and hold parties to them*.'") (emphasis added).[1]

The court of appeals did not address this Court's decisions—cited throughout petitioner's briefing, *see id.* at 44, 52—requiring the "most exacting scrutiny" of a denial of the constitutional right to a jury trial. Likewise, the court of appeals did not address

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[1] The court stated that petitioner had not argued that the proposed nature of the order made a difference. App., *infra*, 38a n.9. As noted above, however, that assertion is simply incorrect.

whether, particularly in light of *Dairy Queen*, a profits claim under Section 35 of the Lanham Act is legal in nature. Rather, the court of appeals simply rested on its conclusion that the district court had not abused its discretion in refusing to allow petitioner to assert a profits claim.

REASONS FOR GRANTING THE PETITION

This case presents a compelling vehicle for the Court to reaffirm the fundamental right to a jury trial in the face of eleventh-hour procedural maneuvering to deny that right. By allowing respondent unilaterally to withdraw its consent to jury trial, yet refusing to allow petitioner to restore its right to a jury trial by reasserting its profits claim, the courts below treated petitioner's induced forfeiture of its right to a jury trial as a mine-run matter of pretrial procedure, subject to judicial discretion, rather than a constitutional matter deserving "the most exacting scrutiny." That fundamental procedural error led the lower courts to dodge the question whether a trademark claim for profits is a legal claim that establishes the right to a jury trial. The lower courts are sharply divided on this issue. While some courts accept the plain meaning of *Dairy Queen* as providing the right to a jury trial for a profits claim ("we think it plain that [a] claim for a money judgment is a claim wholly legal in its nature however the complaint is construed"), *Dairy Queen*, 369 U.S. at 477, other courts would deny the right to a jury trial, dramatically curtailing Seventh Amendment rights in trademark cases.

I. ORDERS THAT DENY A PARTY'S RIGHT AND CLEARLY EXPRESSED DESIRE FOR A JURY TRIAL SHOULD BE REVIEWED WITH THE "MOST EXACTING SCRUTINY"

In the Joint Proposed Pretrial Order submitted to the district court, the parties agreed to conduct a jury trial but to forego presenting claims for monetary relief. While the district court permitted respondent unilaterally to withdraw from its agreement to conduct a jury trial, the district court did not afford petitioner the same latitude to withdraw its agreement not to present a claim for profits. That fundamentally asymmetrical treatment of the parties' commitment to a jury trial unfairly denied petitioner the constitutional right to a jury trial.

Both the district court and court of appeals, however, mistook the decision not to allow petitioner to reassert its profit claim—and the consequent restoration of its right to a jury trial—purely as a matter of pretrial procedure, subject to ordinary judicial discretion, rather than a question of constitutional significance. This case presents an excellent vehicle for this Court to reaffirm that judicial decisions effectively denying a party its constitutional right to a jury trial that the party clearly intends to preserve are not matters of judicial discretion, but rather must be scrutinized with the "utmost care" and reviewed with "the most exacting scrutiny." *Dimick*, 293 U.S. at 486; *City of Morgantown*, 337 U.S. at 258.

A. The Seventh Amendment Right to a Jury Trial in Civil Cases Is of Fundamental Importance

"The federal policy favoring jury trials is of historic and continuing strength." *Simler v. Conner*, 372 U.S. 221, 222 (1963). Indeed, the "founders of our Nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption." *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 343 (1979) (Rehnquist, J., dissenting). This Court has vigilantly protected trial by jury, acting time and again to ensure that a party so entitled is not deprived of its right. *Id.* at 339–346 (discussing the history of the right to a jury trial and the Court's jurisprudence thereof). This case presents another and much-needed opportunity to exercise that vigilance.

The right to trial by jury has long been recognized as sacred. "[T]he first Continental Congress had unanimously resolved that 'the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law.'" *Id.* at 340, n.3 (quoting 1 Journals of the Continental Congress 69 (1904)). The Declaration of Independence itself specifically identifies one of England's chief offenses warranting independence as "depriving us in many cases, of the benefits of Trial by Jury." *Id.* And its author, Thomas Jefferson, stated: "I consider [trial by jury] as the only anchor yet imagined by man, by which a government can be held to the principles of its constitution." *Id.* at 343,

n. 10 (quoting 3 The Writings of Thomas Jefferson 71 (Washington ed. 1861)).

The historic entrenchment of the right to a jury trial is further explained in *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433 (1830), where the Court recounted that "[o]ne of the strongest objections originally taken against the constitution of the United States, was the want of an express provision securing the right of trial by jury in civil cases." *Id*. at 446. "As soon as the constitution was adopted," the Court explained, "this right was secured by the [*S*]*eventh* [*A*]*mendment of the constitution* proposed by congress; and which received an assent of the people so general, as to establish its importance as a fundamental guarantee of the rights and liberties of the people." *Id*. (emphasis added). "The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy." *Id*.

Since *Parsons*, this Court has repeatedly granted review to safeguard the fundamental right against erosion. In *Scott v. Neely*, 140 U.S. 106 (1891), for example, the Court struck down the application of a state statute permitting the recovery of debt by attachment to property in a court of equity, rather than by a jury in a court of law. The Court explained that the fundamental right to a jury trial "cannot be dispensed with, *except by the assent of the parties entitled to it*." *Id*. at 109–110 (emphasis added). Similarly, in *Dimick*, 293 U.S. 474, the Court held that a trial court could not, instead of granting plaintiff's request for a new jury trial, increase the amount of damages awarded by the jury

without the plaintiff's consent, reasoning that such an action would transgress the plaintiff's fundamental right to a jury trial and noting that "any seeming curtailment of the right to a jury trial should be *scrutinized with the utmost care*." *Id.* at 486 (emphasis added). So too, was the result in *Beacon Theatres,* which held that, in a case presenting both equitable and legal issues, a court must strive to ensure that the fundamental right to a jury trial is not lost through the court's prior determination of equitable issues. 359 U.S. at 511. The Court explained that, "[s]ince the right to jury trial is a constitutional one, . . . discretion is very narrowly limited and must, *wherever possible, be exercised to preserve jury trial*." *Id.* at 510 (emphasis added).[2]

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[2] The Court in *Parsons* watched encroachments on the fundamental right to jury trial with "great jealousy," and subsequent decisions of the Court expressed the protection of the trial by jury in equally lofty terms. In *Hodges v. Easton*, 106 U.S. 408 (1882), the Court reversed the judgment of the lower court with concern that the court, rather than the jury, had resolved factual questions contrary to the right to jury trial, stating "*every reasonable presumption should be indulged against [the right to jury trial's] waiver*." *Id.* at 412 (emphasis added). Subsequent decisions of the Court echoed that view. *See, e.g., Slocum v. N. Y. Life Ins. Co.*, 228 U.S. 364, 385 (1913); *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937).

B. Decisions Denying a Jury Trial in the Face of a Party's Clear Intent to Preserve that Right Must Be Reviewed with the Most Exacting Scrutiny

In light of the fundamental and cherished nature of the right to a jury trial, this Court has rightly imposed strict protections against encroachments on that right. *See Parsons*, 28 U.S. at 446 ("[E]very encroachment upon [the right to a jury trial] has been watched with great jealousy."). Although the standard has taken various formulations, the essence is that the fundamental right to a jury trial may be limited only in the rarest of circumstances, and any denial of that right must be closely scrutinized. This case demonstrates the clear need for this Court to reaffirm those strict safeguards.

The demanding scrutiny applied to such disputes has been recognized by this Court for decades. As the Court held in *Dimick* more than eighty years ago, "[m]aintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be *scrutinized with the utmost care*." 293 U.S. at 486 (emphasis added). Over the years, this level of scrutiny was similarly articulated in numerous decisions. *See, e.g., Foust v. Munson S.S. Lines*, 299 U.S. 77, 84 (1936); *Beacon Theatres,* 359 U.S. at 501. In *City of Morgantown*, 337 U.S. 254 (1949), the Court put a finer point on it: "rulings of the district courts granting or denying jury trials are *subject to*

the most exacting scrutiny on appeal." *Id.* at 258 (emphasis added).[3]

C. The Decision Below Violates These Fundamental Protections by Reviewing the District Court's Refusal to Allow Petitioner to Assert a Claim Guaranteeing a Jury Trial Only for Abuse of Discretion

By choosing to view this issue as a matter of judicial discretion, rather than one of constitutional significance, the courts below departed from long-standing principles demanding greater scrutiny for such fundamental decisions. Had the courts below followed this Court's Seventh Amendment jurisprudence by, among other things, indulging every reasonable presumption against petitioner's purported waiver of its right to a jury trial (as this Court required in *Hodges*, 106 U.S. at 412), or scrutinizing the seeming curtailment of petitioner's right to a jury trial (as this Court required in *Dimick*, 293 U.S. at 486), then petitioner's right to a jury trial would have been upheld.

There is no dispute that both petitioner and respondent had demanded, and were entitled to, the right to a jury trial at the outset of this case. Nor is it reasonably disputed that both petitioner and

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[3] In *Morgantown*, this Court affirmed the appellate court's dismissal of the case because the issue was not appealable. But *Morgantown's* description of the standard applicable to denial of a party's jury trial rights was entirely accurate.

respondent maintained their respective rights to a jury trial throughout the case up to and including the summary judgment stage. And in preparing for trial, the parties jointly submitted a Proposed Pretrial Order in which they jointly requested a jury trial but limited their respective demands for relief to a permanent injunction in favor of the prevailing party. Petitioner's decision to forgo its claim for damages and recovery of profits was based on the understanding, as stipulated in the Joint Proposed Pretrial Order, that the case would be tried by a jury. Moreover, that understanding was borne out in the Final Pretrial Conference, where the primary topics of discussion among counsel and the district court related to conducting a jury trial.

Following the Final Pretrial Conference, however, the district court granted respondent's motion to strike the jury demand, permitting respondent unilaterally to dissolve the parties' stipulation to conduct a jury trial despite the absence of claims to monetary relief. Yet, the district court denied petitioner's motion to amend the Proposed Pretrial Order, not allowing petitioner to reclaim its right to seek profits in order to restore its right to a jury trial, citing judicial expediency and a purported lack of prejudice to petitioner related to conducting a bench trial.

Respondent would have this Court believe that, in seeking to reassert its profits claim and restore its right to a jury trial, petitioner was in effect seeking to be relieved from a waiver of its jury trial right or excused from a court order. That argument, if correct, would implicate the abuse of discretion standard invoked by the court of appeals. But

petitioner did not waive its right to a jury trial. Rather, it entered into a preliminary agreement with respondent, memorialized in the Joint Proposed Pretrial Order, to exchange its *right* to a jury trial (through omitting its legal claims in favor of equitable ones) for a formal agreement between the parties to *consent* to jury trial. Petitioner did not waive anything; respondent simply withdrew its consent to jury trial at the eleventh hour. Similarly, petitioner did not seek relief from an order of the district court, which might properly have implicated the abuse-of-discretion standard. Rather, petitioner sought to revive its profits claim and re-invoke its *right* to a jury trial before the final pretrial order was entered. District courts do not have virtually unfettered discretion to prevent a party from obtaining a jury trial that it clearly sought.[4]

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[4] As a general rule, changes in position of the type exhibited by respondent are foreclosed by principles such as judicial estoppel, which provides that "[w]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (quoting *Davis v. Wakelee*, 156 U.S. 680, 689 (1895)). In this case, respondent had previously agreed to a jury trial without damages, only to withdraw from that agreement at the eleventh hour when it was perceived to be to respondent's strategic advantage to do so. The prejudice to petitioner was palpable, insofar as petitioner received neither the jury trial it desired nor the profits claim it could have otherwise sought. Given the fundamental legal error in the lower court's failure to apply exacting scrutiny to the district court's decision, it is not

In this respect, the courts below elevated the court's discretion to allow respondent to withdraw its consent to jury trial above the fundamental right petitioner had in having its case tried by a jury. In so doing, the courts below failed to indulge in every presumption against finding a waiver of the right to a jury trial as required by this Court's precedent. *See Hodges*, 106 U.S. at 412. Indulging such presumptions would have included recognizing that once respondent withdrew its consent to jury trial—the basis of petitioner's purported forfeiture of its profits claim—petitioner should have been allowed to restore its jury right by reasserting its profits claim.

II. THE LOWER COURTS DISAGREE AS TO WHETHER A TRADEMARK CLAIM FOR PROFITS IS A LEGAL CLAIM THAT ESTABLISHES THE RIGHT TO A JURY TRIAL

A. A Right "Clothed in Uncertainty"

As numerous commentators have recognized, "[w]hether a party to an action in federal court for trademark infringement or unfair competition may demand a jury trial by 'right' has been clothed in uncertainty ever since the United States Supreme Court's 1962 decision in *Dairy Queen, Inc. v. Wood*." Bruce S. Sperling, *The Right to Jury Trial in a*

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necessary to revisit the district court's remarkable conclusion that petitioner was not prejudiced by respondent's failure to abide by the terms of the Proposed Pretrial Order.

Federal Action for Trademark Infringement or Unfair Competition, 62 Trademark Rep. 58, 58 (1972); quoted thirty years later in Mark A. Thurmon, *Ending the Seventh Amendment Confusion: A Critical Analysis of the Right to a Jury Trial in* Trademark Cases, 11 Tex. Intell. Prop. L.J. 1, 3 (2002). Tellingly, while the authors cited above disagree about the proper outcome, they are in full agreement about the prevailing confusion on this issue. Compare id. at 7 with Sperling, supra, at 65-66.

This disagreement largely reflects diverging views regarding this Court's decision in Dairy Queen, which held that a trademark owner's "money claim" for an "accounting" is a legal claim giving rise to a right to trial by jury. Dairy Queen, 369 U.S. at 477-78. The plaintiff in *Dairy Queen* was a franchisor who alleged that the defendant-franchisee breached a contract to pay for the exclusive use of a trademark, that the contract was thereby terminated, and that defendant's use post-breach was therefore infringing. *Id.* at 473-75. Plaintiff sought a temporary and permanent injunction against defendant's infringement, an accounting of defendant's profits, and money due for the breach of contract. *Id.* at 475; *McCullough v. Dairy Queen, Inc.*, 194 F. Supp. 686, 687 (E.D. Pa. 1961). Defendant sought a jury trial for the breach of contract and trademark infringement claims, but the district court denied that demand because it deemed the claims to be purely equitable (or, if legal, merely "incidental" to equitable issues). *Dairy Queen*, 369 U.S. at 470. Defendant sought mandamus in the Court of Appeals for the Third Circuit, which was denied. *Id.* This Court "granted certiorari because

the action of the Court of Appeals seemed inconsistent with protections already clearly recognized for the important constitutional right to trial by jury in [the Court's] previous decisions." *Id.*

The central dispute before this Court was whether respondents' request for a money judgment was "unquestionably legal," as petitioner claimed, or "purely equitable," as respondents contended. *Id.* at 476-77. This Court reversed and remanded, holding that a request for money judgment was a legal claim, regardless of the language in which the request was cast: "The respondents' contention that this money claim is 'purely equitable' is based primarily upon the fact that their complaint is cast in terms of an 'accounting,' rather than in terms of an action for 'debt' or 'damages.' But *the constitutional right to a trial by jury cannot be made to depend upon the choice of words used in the pleadings*." *Id.* at 477-78 (emphasis added). Therefore, whether the claim was for recovery of money owed under the contract ("for the entire period both before and after the attempted termination") or money owed solely for infringement ("on the theory that the contract, having been breached, could not be used as a defense to an infringement action even for the period prior to its termination"), it was wholly legal in nature. *Id.* at 476-77.

B. Post-*Dairy Queen*, the Lower Courts Have Divided over Whether Trademark Profits Claims Are Legal or Equitable

This Court's review is needed to resolve persistent uncertainty among the lower courts as to whether a trademark plaintiff's claim for profits is legal in nature, thus giving rise to a Seventh Amendment jury trial as of right. The decisions fall into three camps. The first recognizes profits as legal relief providing a right to a jury trial. The second views profits as establishing a right to a jury trial where the profits sought are a proxy measuring damages. The third denies a right to a jury trial where profits are characterized as "disgorgement" under an unjust enrichment theory.

1. *Some Courts Hold that Trademark Profits Claims Are Legal Regardless of the Theory Underlying the Remedy*

Several lower courts have held that a profits claim in a trademark case is legal and thus gives rise to a right to a jury trial. *See Adidas Am., Inc. v. Payless Shoesource, Inc.*, 546 F. Supp. 2d 1029 (D. Ore. 2008); *Ideal World Mktg. v. Duracell, Inc.*, 997 F. Supp. 334 (E.D.N.Y. 1998); *Grove Fresh Distribs. v. New England Apple Prods. Co.*, 1991 U.S. Dist. LEXIS 258 (N.D. Ill. 1991); *Oxford Indus. Inc. v. Hartmarx Corp.*, 15 U.S.P.Q.2d 1648 (N.D. Ill. 1990). These courts read *Dairy Queen* to compel that result. "After *Dairy Queen*, it is clear that a claim for an accounting of profits is treated as the equivalent of a claim for damages for jury trial purposes." *Adidas*,

546 F. Supp. 2d at 1087; *see also id.* ("[T]he Supreme Court has held that a claim for an accounting of profits in a trademark infringement action is a legal claim for relief, and thus gives rise to a right to a trial by jury"); *Grove Fresh*, 1991 U.S. Dist. LEXIS at *9 ("[F]or purposes of determining a right to trial by jury, an accounting is a legal claim for damages") (citing *Dairy Queen*, 369 U.S. at 478).

Relatedly, these courts recognize that, in the trademark context, a profits claim far more closely resembles a traditional damages action than one for restitution. In *Oxford Industries*, for example, the court first held that "*Dairy Queen* did not distinguish between a claim for damages and a claim for profits." 15 U.S.P.Q.2d at 1653. Noting that *Dairy Queen* rejected the argument that "the action was equitable because it sought an 'accounting,'" *id.* at 1652-53, the court held that "[a]s a practical matter, an award of profits is really a surrogate for damages." *Id.* at 1654. Indeed, as one court observed, while unjust enrichment and damages may reflect different reasons for awarding profits, the court "simply cannot conclude that a right as fundamental as the Seventh Amendment right to a jury trial can be made to depend upon subtle distinctions between the two rationales, distinctions that appear to be the accidental result of the traditional schism between law and equity rather than distinctions that have any tangible or practical significance." *Ideal World*, 997 F. Supp. at 339. And the court discerned no statutory basis for treating damages and profits differently with respect to the role of a jury in

awarding such compensation. *Id.* at 339-40.[5]

2. *Some Courts Hold that Trademark Profits Claims Are Legal When Brought as a Proxy for Damages*

A second group of courts holds that trademark profits claims sometimes are legal claims entitling the plaintiff to a jury—namely, when the profits sought serve as a proxy for damages. *See Ferring Pharms., Inc. v. Braintree Labs., Inc.*, 2016 U.S. Dist. LEXIS 172227 (D. Mass. 2016); *SharkNinja Op. LLC v. Dyson Inc.*, 2016 U.S. Dist. LEXIS 144842 (D. Mass. 2016); *Daisy Grp., Ltd. v. Newport News, Inc.*, 999 F. Supp. 548 (S.D.N.Y. 1998). As one of these courts reasoned, a profits claim might be based on different rationales: damages, unjust enrichment, or

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[5] The Third and Ninth Circuit Courts of Appeals have taken a similar position in patent and copyright cases, respectively, likewise relying on *Dairy Queen*. *See Kennedy v. Lakso Co.*, 414 F.2d 1249, 1253 (3d Cir. 1969) ("no distinction can be drawn which would justify recognition of the right to jury trial for 'damages' and its denial in a claim for 'profits' on the theory that 'damages' are recoverable in an action at law whereas 'profits' have their origin in equitable principles which hold the infringer a trust for the patent holder….[T]he underlying issue remains essentially the same"); *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1174-75 (9th Cir. 1977) (holding that an accounting of profits is a legal remedy with a right to a jury trial). The Ninth Circuit has inexplicably taken a contrary view in a trademark case, failing to confront *Krofft*. *See Fifty-Six Hope Rd. Music, Ltd. v. A.V.E.L.A., Inc.*, 778 F.3d 1059, 1075 (9th Cir. 2015).

deterrence. *Daisy Grp.*, 999 F. Supp. at 552. The question whether the claim is legal, thus entitling the plaintiff to a jury, "depends on which of these three theories provides the basis for the requested profits award." *Id.* Because the plaintiff in that case sought profits as "a rough proxy measure of its damages" or a "surrogate for damages," the remedy was fundamentally compensatory and legal in nature and therefore plaintiff was entitled to a jury. *Id.* The two other decisions have each acknowledged the rationale where certain evidence (similar products, no adequate remedy at law, and direct competition) is produced to support the proxy-for-damages theory, although it ultimately found the evidence[6] in both cases insufficient. *SharkNinja*, 2016 U.S. Dist. LEXIS at *13; *Ferring*, 2016 U.S. Dist. LEXIS at *4-5. Yet in both cases, the court denied the motion to strike the jury demand, reasoning that the court would treat the jury verdict as advisory if the nonmovant were later unable to provide factual support for the right to a jury trial.[7]

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[6] The court requires a plaintiff claiming profits as a proxy for damages to show the case involves similar products competing directly and no adequate remedy at law. *Ferring*, 2016 U.S. Dist. LEXIS 17222.

[7] Similarly, the Fifth Circuit has taken the "proxy for damages" approach in a patent case, relying on *Dairy Queen* to reject a distinction between "damages in a legal sense and requesting an equitable accounting wherein damages may be determined," on the basis of the pleading. *Swofford v. B & W, Inc.*, 336 F.2d 406, 410 (5th Cir. 1964). "The profits which were recoverable in equity against an infringer of a patent were compensation for the injury the patentee had sustained from

3. *Some Courts Hold that Trademark Profits Claims Are Equitable in All Circumstances*

Other courts hold that a trademark profits claim is equitable in all cases, thus providing no right to a jury trial. *See Fifty-Six Hope Rd. Music, Ltd. v. A.V.E.L.A., Inc.*, 778 F.3d 1059 (9th Cir. 2015); *Gucci Am., Inc. v. Bank of China*, 768 F.3d 122 (2d Cir. 2014); *Ferrari S.P.A. v. Roberts*, 944 F.2d 1235 (6th Cir. 1991); *Playnation Play Sys., Inc. v. Velex. Corp.*, 2016 U.S. Dist. LEXIS 121209 (N.D. Ga. 2016); *Arctic Cat, Inc. v. Sabertooth Motor Grp., LLC*, 2016 U.S. Dist. LEXIS 105583 (D. Minn. 2016). For example, the Ninth Circuit – without acknowledging its contrary reading of *Dairy Queen* in the copyright context in *Krofft* – concluded there is no right to have a jury calculate profits because "[a] claim for disgorgement of profits under § 1117(a) is equitable, not legal." *Fifty-Six Hope Rd.*, 778 F.3d at 1075. Despite the fact that the plaintiff in *Dairy Queen* sought an accounting of profits, not damages, the Ninth Circuit relied on language in a copyright statutory damages case wherein "the Supreme Court characterizes the *Dairy Queen* claim as a legal claim for damages (not disgorgement of profits)." *Id.* (citing *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 346 (1998)). Because the court

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the invasion of his rights. Such profits were considered the measure of the patentee's damages. It was very early recognized that, though called 'profits, they are really damages.'" *Id.* at 411 (citing *Mowry v. Whitney*, 81 U.S. (14 Wall.) 620, 653 (1871).

regarded all profits claims as actions for disgorgement, such claims would always be equitable and not tried to a jury.

These courts generally seek to distinguish *Dairy Queen*. One court characterized *Dairy Queen* as a damages case, in which the plaintiff did not seek an award of profits. *Gucci*, 768 F.3d at 133 (2d Cir. 2014). For this reason, the court concluded that "*Dairy Queen* does not abrogate the longstanding treatment of an accounting of *profits* as an equitable remedy." *Id.* at 132 (emphasis in original).

Some of these courts have characterized profits as merely disgorgement, holding that *Dairy Queen* did not change the fact that disgorgement is traditionally an equitable remedy. *See, e.g.*, *Playnation*, 2016 U.S. Dist. LEXIS at *11; *Arctic Cat*, 2016 U.S. Dist. LEXIS at *15-16; *G. A. Modefine S.A. v. Burlington Coat Factory Warehouse Corp.*, 888 F. Supp. 44 (S.D.N.Y. 1995);[8] Similarly, the Sixth Circuit, in a case where the plaintiff sought "an

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[8] These cases, like *Fifty-Six Hope Road*, rely on *Feltner* for the proposition that *Dairy Queen* was a "damages" case. *See Playnation*, 2016 U.S. Dist. LEXIS at *11; *Arctic Cat*, 2016 U.S. Dist. LEXIS at *15. That reference in *Feltner*, however, was in a parenthetical supporting the simple point that damages is a legal claim, not (incorrectly) labeling *Dairy Queen* as a damages case. Indeed, at least one lower court has read *Feltner* as supporting a jury right for "profits that could be described as damages," thus suggesting that *Feltner* actually supports the proxy for damages rationale. *See Black & Decker Corp. v. Positec USA Inc.*, 118 F. Supp. 3d 1056, 1065 (N.D. Ill. 2015).

equitable accounting,"[9] held there was no right to a jury trial because the plaintiff "requested only equitable relief[:] an injunction and disgorgement of profits." *Ferrari S.P.A.*, 944 F.2d at 1248. The court did not, however, cite or discuss *Dairy Queen*, but appeared to rely only on the language of the complaint in describing the relief sought.

This widespread disagreement among the lower courts calls out for this Court's review. The need is particularly acute given those courts' divergent readings of *Dairy Queen*, which remains the central (but apparently insufficient) source of guidance on this question. Respectfully, more is needed. Moreover, this uncertainty appears to have contributed to the district court's refusal to grant petitioner leave to amend the Proposed Pretrial Order to assert the profits claim in the first place. App., *infra.* at 85a. Clarity as to the nature of the profits claim will prevent trial courts from so casually refusing a party's efforts to retain its Seventh Amendment rights.

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[9] While the appellate court's opinion does not use this phrase, this is how the request for relief was identified in the lower court. *See Ferrari S.P.A. v. Roberts*, 739 F. Supp. 1138, 1140 (E.D. Tenn. 1990).

III. THOSE COURTS THAT REFUSE TO RECOGNIZE PROFITS CLAIMS AS LEGAL ARE WRONG

A. Denying a Jury Trial for Profits Claims Misconstrues *Dairy Queen*

Those lower courts that refuse to recognize a right to a jury trial for profits claims either misread Dairy Queen or reject the Court's reasoning. Neither basis, of course, is sufficient justification for the rule at issue.

In many instances, the confusion stemming from *Dairy Queen* appears to result from courts' failure to read the Court's decision with appropriate care. To be sure, the word "profits" does not appear in the Court's decision, while there are several generic references to "damages." *See Dairy Queen*, 369 U.S. at 476-77. But *Dairy Queen* was not a damages case. Indeed, the Court's use of the term "accounting," *id.* at 475, 477-78, undoubtedly refers to the profits claims, which is what the plaintiff actually sought. *See McCullough*, 194 F. Supp. 686 at 687. That fact is indisputable from the district court's opinion in that case, which explained that the plaintiff was seeking "a declaration that the licensing contract is null and void; an accounting of profits illegally obtained by the defendant since 1954 to date; and a permanent injunction." *Id.* Nowhere does the Court suggest that the plaintiff's claim for profits was actually a damages claim using "accounting" in a procedural rather than remedial sense. The plaintiff sought profits, the lower court ruled on profits, and this Court spoke plainly of an accounting for those profits. Although the opinion's terminology was

perhaps imprecise, there is no support for suggesting that *Dairy Queen* concerned merely a damages remedy.

Some courts would limit the holding to *Dairy Queen*'s facts, arguing that the only reason the Court found a right to a jury trial was that one of the claims was for breach of contract. *See Phillips v. Kaplus*, 764 F.2d 807, 814 (11th Cir. 1985) (characterizing plaintiff's claim in *Dairy Queen* as "really a legal claim for breach of contract"). But this Court's opinion appears to foreclose that suggestion. After noting that the complaint "might possibly be construed to set forth a claim for recovery based completely on either one of these two theories-that is, a claim based solely upon the contract . . . or a claim based solely upon the charge of infringement," the Court held that it was unnecessary to resolve the ambiguity because there was a right to a jury trial either way. *Dairy Queen*, 369 U.S. at 476-77. "[W]e think it plain that their claim for a money judgment is a claim wholly legal in its nature however the complaint is construed." *Id.* at 477.

More fundamentally, the central teaching of *Dairy Queen* is that courts should not focus on the semantics of how a particular claim is phrased. In holding that the plaintiff was entitled to a jury trial regardless of the theory (contract or infringement), the Court explained, "[t]he respondents' contention that this money claim is 'purely equitable' is based primarily upon the fact that their complaint is cast in terms of an 'accounting,' rather than in terms of an action for 'debt' or 'damages.' But the constitutional right to trial by jury cannot be made to depend upon the choice of words used in the

pleadings." *Id.* at 477-78. Rather, a "claim for a money judgment is a claim wholly legal in its nature however the complaint is construed." *Id.* at 477. It is more important to look at the relief sought—a money judgment—than the terminology. In focusing on the Court's use of the phrase "accounting for damages" to describe the relief at issue, courts violate the very instruction this Court provided.

Professor McCarthy misconstrues the holding even more seriously, asserting in his treatise that "[t]he majority of courts have read the *Dairy Queen* case as concerning *'legal' damages for breach of contract*, not an accounting of profits from trademark infringement." 6 J. Thomas McCarthy, *McCarthy on Trademarks* § 32:124 (4th ed. 2016) (emphasis added). But the cases he cites do not say this; they hold that the plaintiff sought contract damages and trademark damages. Both readings of *Dairy Queen* are incorrect, but even the cases that read the infringement remedy as damages and not profits do not reduce the case to contract damages. *See Gucci*, 769 F.3d at 133 (*Dairy Queen* plaintiffs sought "amounts owed under a contract and damages for trademark infringement"); *Fifty-Six Hope Rd.*, 778 F.3d at 1075 (describing the claim in *Dairy Queen* as a legal claim for damages under the Lanham Act). In any event, as noted above, this Court explained that the result *did not* depend on whether the complaint claimed breach of contract or trademark infringement or both. *Dairy Queen*, 369 U.S. at 476-77.

B. Denying a Jury Trial for Profits Claims Is Inconsistent with the Lanham Act

In three principal respects, the text and structure of the Lanham Act confirm that profits claims are legal claims. First, profits and damages are grouped together (along with costs) in Section 1117(a), which addresses all the available monetary remedies. Profits are not discussed in Section 1116, which addresses the equitable remedy of injunctive relief. As one court has explained:

> Congress recognized the difficulty of computing appropriate compensation for trademark infringement, and directed the court to combine damages *and* profits to achieve a just result. That profits were combined with damages in Section 1117 into a single monetary recovery which constitutes 'compensation,' rather than included in Section 1116, the section authorizing injunctions, suggests that Congress considered an award of profits more in the nature of damages than as incidental to equitable relief.

Oxford, 15 U.S.P.Q.2d at 24-25.

Second, this classification is reinforced by the characterization of both profits and damages as "compensation and not a penalty." In other words, both grant monetary relief to make the plaintiff whole for its loss, not to punish the defendant for its bad behavior. Despite the many cases that generally refer to a profits claim as disgorgement, in the Lanham Act context that is a poor fit. There is

nothing in the text to connect the statutory profits remedy with unjust enrichment. In the plain words of the statute, both profits and damages constitute compensation. Holding that a profits claim affords a right to a jury trial, one court noted that the phrase "compensation and not a penalty" supported its "conclusion that an award of profits is intended to be compensatory and is therefore akin to a legal damages remedy." *Ideal World*, 997 F. Supp. at 339.

Third, any suggestion that profits are decided by the court just because the statute says that "the court" shall assess them-that is, it does not say a jury may assess them-fails to account for the fact that it also says "the court" shall assess damages. It is well settled that damages entitle the trademark plaintiff to a jury, so any literal reading of "court" in Section 1117(a) would lead to an insoluble dilemma. As Justice Scalia explained in the context of another statute, "court" can sometimes mean "judge," but "it also has a broader meaning, which includes both judge and jury." *Feltner*, 523 U.S. at 356 (Scalia, J., concurring).

IV. THE QUESTIONS PRESENTED ARE IMPORTANT

The Seventh Amendment right to a civil jury trial is a bedrock principle of American jurisprudence. Both questions presented here evidence lower courts' willingness to chip away at this right. This Court's review is needed to protect the right against incursions based on inattention or expediency.

Indeed, a jury trial is especially important in the trademark context. Recent government statistics

show that the majority of trademark cases that go to trial are heard by a jury. U.S. District Court—Civil Cases Terminated by Nature of Suit and Action Taken, During the 12-Month Period Ending September 30, 2015, *available at* http://www.uscourts.gov/sites/default/files/data_tables/C04Sep15.pdf. Parties seek jury trials primarily because trademark infringement cases hinge upon judgments about consumer perception: a finding of infringement requires a finding that consumers are likely to be confused as to source. Juries are uniquely well positioned to make this highly contextual determination. This Court recently recognized as much:

> Application of a test that relies upon an ordinary consumer's understanding of the impression that a mark conveys falls comfortably within the ken of a jury. Indeed, we have long recognized across a variety of doctrinal contexts that, when the relevant question is how an ordinary person or community would make an assessment, the jury is generally the decisionmaker that ought to provide the fact-intensive answer.

Hana Fin., Inc. v. Hana Bank, 135 S. Ct. 907, 911 (2015) (holding that whether two marks may be tacked for purposes of determining priority is a jury question).

Accordingly, the weakening of a party's right to a jury trial is a particularly important issue in trademark cases. There is no justification for deferring to district courts' refusal to allow a party to take steps to protect the jury trial it clearly sought.

Nor is there a sound basis to tolerate the widespread confusion in the lower courts on the nature of the underlying profits claim. Until there is clarity as to whether this remedy is legal or equitable, the right to a jury trial is sacrosanct in some jurisdictions but nonexistent in others.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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