No. 16-936

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the district court correctly determined that Petitioner extinguished any right it had to a jury trial when it (a) responded "N/A" to the damages portion of the district court's proposed pretrial order form, (b) stated "[n]either party is seeking damages" on the same form, and (c) expressly agreed at the pretrial conference that "[o]bviously the request here is for injunctive relief … [which is not] something the jury needs to do," and—there not being any legal claims and thus no jury-trial right in existence prior to trial—properly ordered this case to be tried without a jury because all of the parties' claims were equitable in nature.

RULE 29.6 STATEMENT

FN Herstal, S.A. ("FNH" or "Respondent") is owned by Westpavia, SA. No publicly traded company owns 10% or more of its stock.

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INTRODUCTION

From a narrow procedural holding, Petitioner strains to manufacture two sweeping issues: a constitutional issue concerning the right to a jury trial and a doctrinal issue—reached by neither court below—concerning whether a claim for profits under the Lanham Act sounds in equity or law. The first issue was extinguished when Petitioner expressly relinquished all claims for monetary relief before trial. The second did not serve as a basis for either of the rulings below and thus is inappropriate for a writ of certiorari.

The holding by the district court, as affirmed by the Eleventh Circuit, that Petitioner explicitly waived any right it had to a jury trial when it affirmatively disclaimed damages, neither raises questions of unsettled federal law nor conflicts with any precedent of other courts of appeals or of this Court. And Petitioner's dissertation on the Seventh Amendment jury-trial right is divorced from the fundamental procedural facts of this case. Contrary to Petitioner's make-believe claim that the parties entered into an agreement to try this case by a jury, no such agreement occurred—a fact made manifest by the absence of any memorialization of Petitioner's fiction anywhere in the record. Also false is Petitioner's claim that it was "induced [into a] forfeiture of its right to a jury trial …." Pet. at 11, 19. There simply was no quid pro quo whatsoever whereby Petitioner agreed to drop its claims for monetary relief in exchange for FNH's consent to a jury trial. Petitioner waived its monetary-relief claims on its own volition without any involvement from FNH when Petitioner sent to FNH a first draft of the parties' proposed pretrial order a few days before it was due; in its

draft, Petitioner had abandoned its damages claims. No support exists for Petitioner's false "induced forfeiture" claim because nothing of this sort occurred.

Petitioner further ignores its unequivocal representations at the pretrial conference, which made clear that the *only* relief Petitioner would pursue at trial was injunctive relief—a quintessentially equitable remedy that does not require a jury. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 719 (1999). Specifically, at the pretrial conference, Petitioner expressly agreed with the court's statement that "[o]bviously the request here is for injunctive relief … [which is not] something the jury needs to do." App. 11a, n.2; Dkt. 128 at 6:24-7:6.[1] Later, Petitioner stated "[t]here's not damages issue[s] here anyway." *Id.* 30:4. These pretrial concessions flatly eliminated any jury-trial right, making patently permissible the district court's decision to hold a bench trial.

Because Petitioner so deliberately disavowed its monetary-relief claims, neither the district court nor the Eleventh Circuit reached the issue of whether a claim for profits under the Lanham Act is equitable or legal. Accordingly, this issue is inappropriate for a writ of certiorari. *See*, *e.g.*, *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 201–02 (2012). Had the courts below reached this issue—stemming from Petitioner's misguided effort to resurrect its jury-trial right by moving to amend the proposed pretrial order to assert a claim for

1. All citations to "Dkt." are to the district court docket at *FN Herstal, S.A. v. Clyde Armory, Inc.*, No. 3:12-cv-102-CAR (M.D. Ga.).

profits (*not* a legal claim for money damages)—they would have found that the courts of appeals uniformly have held that a trademark claim for an accounting for profits is equitable in nature, not legal, and thus does not give rise to a jury-trial right. Indeed, every court of appeals squarely to address this issue has decided that profits claims under the Lanham Act are equitable and thus create no right to a jury trial. The exaggerated significance Petitioner assigns to anomalous district court decisions does not articulate a reason for granting a writ of certiorari.

Nor was Petitioner prejudiced by the district court holding a bench trial instead of a jury trial. In addition to the sound reasons set forth by the courts below, App. 36a-37a, 80a, 83a-84a, the absence of any prejudice is made clear by the fact that Petitioner sought from the Eleventh Circuit a reversal *without* remand for a jury trial.

The Eleventh Circuit's decision in this case is closely constrained to the facts and firmly rooted in longstanding procedural principles. Accordingly, this Court should deny the Petition.

STATEMENT

I. FNH's Rights In The SCAR Trademark

In 2003, the U.S. Special Operations Command ("USSOCOM") issued a once-in-a-generation solicitation to design a new assault-rifle system for Special Operations Forces such as Navy SEALs, Army Rangers, and Green Berets. App. 3a. Hailed as the first open competition since the M16 trials of the mid-1960s, USSOCOM sought a modular assault-rifle system capable of replacing multiple

weapons and adapting to various combat situations. FNH and several other firearms manufacturers competed in the solicitation. *Id.*

From the beginning, FNH decided to brand the rifles it submitted with the trademark SCAR, drawing on the double entendre from the military's use of that term (among others) and the everyday meaning of "scar" as a mark left by the healing of injured tissue. FNH's advertisements drew on the meaning of "scar" through slogans like "BATTLE SCARS." And FNH imprinted its rifles with the SCAR mark. *Id.* 3a-4a.

In 2004, USSOCOM declared Respondent the winner of the competition, awarded FNH a ten-year contract, and placed a large order for SCAR-brand firearms. *Id.* 4a. FNH's sales and shipments of SCAR rifles to the U.S. military from 2004 onward constituted extensive use of the SCAR mark. They also powerfully publicized FNH's exclusive use of the SCAR trademark among other consumers, including law enforcement and civilian consumers who, through widespread media coverage, follow developments in military firearms and expect versions of those firearms will be made available to them. *Id.* From 2004 to 2006, FNH's military sales and extensive marketing efforts cemented FNH in consumers' minds as the exclusive maker of SCAR-brand rifles and established FNH's strong rights in its SCAR trademark. *Id.* 4a-6a.

II. Petitioner's Bad Faith Use Of SCAR-Stock

At a major 2006 firearms tradeshow, where FNH's SCAR rifle was the "the number one talked-about firearm," *id.* 5a, Petitioner met with Sage International

Ltd. to discuss developing a replacement stock for certain Ruger assault rifles, *id.* 7a. After the show, and well aware of FNH's use of the SCAR mark, Petitioner selected the mark "SCAR-Stock" or "SCAR-CQB-Stock"[2] for its replacement stocks. *Id.* 7a-8a. Petitioner's former Chief Operating Officer testified that Petitioner's intent in selecting this mark was "to take advantage of [FNH's] SCAR product name being on the market" and to "take advantage of marketing of the SCAR being a popular name already." *Id.* 8a.

Nevertheless, Petitioner began shipping SCAR-Stock products to consumers in September 2006. *Id.* It also began promoting SCAR-Stock stocks through print and digital advertising, and using the domain name www.scarstock.com to funnel Internet traffic to www.clydearmory.com. *Id.* 8a-9a.

III. District Court Proceedings

FNH's complaint asserted claims for, *inter alia*, federal trademark infringement and unfair competition, and state unfair competition and deceptive trade practices. Dkt. 73. In response, Petitioner conceded likelihood of confusion but claimed priority, alleging it somehow developed rights in SCAR-Stock before FNH developed rights in SCAR. Petitioner thus claimed FNH's use of SCAR infringed Petitioner's supposed rights in SCAR-Stock and asserted counterclaims for trademark infringement and cancellation of FNH's federal registrations for the SCAR trademark. Dkt. 74.

2. "CQB" stands for "close quarters combat."

On March 31, 2015, the district court entered a pretrial order, providing pretrial instructions and a proposed pretrial order form. Dkt. 110. On June 22, 2015, the parties submitted a proposed pretrial order. App 11a. The district court's pretrial order form asked for the "types of damages and the applicable measure of those damages"; *both parties responded* "*N/A*."[3] The parties further stated: "*Neither party is seeking damages* and the parties further agree that whichever party establishes its priority of rights will request to be entitled to the trademark registration(s) it has sought … and seek a permanent injunction against the other party." App. 11a. (emphasis added).

Petitioner wrongly asserts "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 a jury trial." Pet. at 19 (emphasis omitted). There was *no* "preliminary agreement" or "exchange," and the proposed pretrial order does not support Petitioner's claims.[4] Quite simply, "there was no negotiation on this issue"; instead, "Clyde Armory independently and unilaterally represented to the Court that it was not seeking remuneration in this case and that the only issues in the case were the parties' respective requests for injunctive relief and for trademark registration(s) to issue." Dkt. 134 at 2.

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3. Appellee's Appendix Vol. One ("Appellee App.") filed with the Eleventh Circuit in Case 15-14040, at 39.

4. *See* Appellee App. at 31-43.

Further, at the pretrial conference on June 29, 2015, Petitioner adopted the court's statement that "[o]bviously the request here is for injunctive relief." App. 11a, n.2.; Dkt. 128 at 6:24-7:6. Petitioner then affirmatively stated "[t]here's not damages issue[s] here anyway." *Id.* 30:4. Because it became clear in the proposed pretrial order and at the pretrial conference that the *only* relief either party sought was *equitable* in nature—and because the district court expressed its interest in preserving judicial (and juror) resources—FNH moved to strike the jury demand on July 6, 2015, one week after the pretrial conference. App. 11a. The district court granted that motion on July 10, 2015. *Id.* 11a, 78a-81a.

Petitioner subsequently moved to amend the proposed pretrial order. *Id.* 12a; Dkt. 133. Significantly, Petitioner did *not* seek to add a *legal* claim for *money damages*, but instead sought to add a claim for *profits*, an *equitable* form of relief under the Lanham Act. *Id.* Respondent opposed, and the district court held a telephone hearing, Dkt. 135, after which it denied Petitioner's motion, App. 82a-85a. Notably, the district court did not rule on the issue of whether a profits claim is equitable or legal. *Id.* 84a-85a.

Following trial, which took place from July 21-23, 2015, the district court issued its bench trial order, App. 12a, holding: FNH possessed trademark rights in SCAR before Petitioner began using SCAR-Stock (*id.* 72a); "ample evidence" showed Petitioner adopted SCAR-Stock in bad faith (*id.* 73a-74a); and FNH prevailed on its claims (*id.* 75a-76a).

IV. Court Of Appeals Ruling

The Eleventh Circuit unanimously affirmed the district court. Like the district court, the Eleventh Circuit carefully followed Federal Rules of Civil Procedure 38 and 39, its own precedent, and this Court's authority, preempting Petitioner's claims here.

> Rule 38 provides for a jury trial only where the right is "declared by the Seventh Amendment to the Constitution" or "provided by federal statute." Fed. R. Civ. P. 38(a). Rule 39(a) clarifies that, when a jury trial is demanded, the action must be tried by a jury on all issues so demanded "*unless ... the court, on motion or on its own, finds that on some or all of those issues there is no federal right to a jury trial.*" Fed. R. Civ. P. 39(a)(2).

App. 32a-33a (emphasis added). Following this Court's holding in *City of Monterey* that a jury-trial right does not exist for suits seeking only injunctive relief, 526 U.S. at 719, the Eleventh Circuit held that when the parties "expressly waived all legal claims in their joint proposed pretrial order and orally at the pretrial conference, choosing instead to … pursue injunctive relief, [they] *extinguish[ed] any right to a jury trial.*" App. 33a (emphasis added).

Because Petitioner no longer had any jury-trial right under Rule 38, the Eleventh Circuit properly reasoned "the district court correctly granted FN's motion to strike," *id.* 34a, observing that *even if FNH had at some point consented to a jury trial*, "Rule 38(d) precludes

withdrawing a jury demand only where there is the right to a jury trial"; and "nothing in Rule 39 restrains a party from withdrawing its consent to a jury trial that is not as of right," *id.* 36(a) (citing *Kramer v. Banc of Am. Sec., LLC*, 355 F.3d 961, 968 (7th Cir. 2004) and *Armco, Inc. v. Armco Burglar Alarm Co.*, 693 F.2d 1155, 1158 (5th Cir. 1982).

The Eleventh Circuit further upheld the district court's denial of Petitioner's motion to amend the proposed pretrial order based on the well-settled principle that courts of appeals "will not hesitate to back up district courts when they put steel behind the terms of pretrial orders and hold parties to them." App. 37a. The form provided in the district court's March 31, 2015, pretrial order (providing instructions for submitting a proposed pretrial order) unequivocally stated that representations parties make in the proposed pretrial order "supersede the pleadings." Dkt. 110 at 5. By stating in the proposed pretrial order that it was not seeking monetary relief, Petitioner indisputably failed to preserve its monetary-relief claims and, thus, waived them. The Eleventh Circuit properly affirmed the district court's adherence to its pretrial procedures—which the district court clearly announced in its March 31, 2015 pretrial order—over which the district court has sound discretion. App. 37a-38a.

In its final footnotes, the Eleventh Circuit made two further significant remarks. First, highlighting yet another waiver on Petitioner's part, the court noted that "*Clyde Armory [did] not argue that the standard for allowing amendment is different because the district court had not entered the proposed pretrial order at the time Clyde Amory moved to amend it.*" App. 38a, n.9 (emphasis added). Second, the Eleventh Circuit noted that

because it affirmed the denial of Petitioner's motion to amend the pretrial order on the basis of waiver, it "need not reach the issue of whether recovery of profits under [15 U.S.C.] § 1117(a) of the Lanham Act is an equitable remedy for which there is no right to a jury trial." *Id.* n.10.

REASONS FOR DENYING THE PETITION

I. PETITIONER HAD NO RIGHT TO A JURY TRIAL, AND THUS NO HEIGHTENED SCRUTINY IS REQUIRED

Petitioner's argument relies on its belief that the decisions below are subject to heightened scrutiny, on the theory that the right to trial by jury is so deeply valued in American jurisprudence that any decision to deny that right must be carefully restricted. Even if this were true without exception—and it is not—the principle is inapplicable here. Courts zealously protect the right to a jury trial *only where that right exists*. Because Petitioner waived any legal claims it had asserted, and purely equitable claims do not confer a jury-trial right, *Petitioner had no right to a jury trial* under well-settled law. There was thus no requirement that the Eleventh Circuit review with heightened scrutiny the district court's decisions to strike Petitioner's jury demand or deny its attempt to amend the pretrial order, and there is no requirement that this Court do so. Simply put, Petitioner unambiguously waived its jury-trial right, and no authority preserves the right under such circumstances.

A. Petitioner Had No Right To A Jury Trial

1. The Seventh Amendment Protects The Right To A Jury Only For Legal Claims

The Seventh Amendment provides that "*[i]n suits at common law*, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved…." U.S. Const. amend. VII. Longstanding authority, relied on by Petitioner here, makes explicit that the right to a jury trial arises *only with respect to legal claims*, not equitable ones: "The phrase 'common law,' found in [the Seventh Amendment], is used *in contradistinction to equity*…." *Parsons v. Bedford, Breedlove & Robeson*, 28 U.S. 433, 446, 7 L. Ed. 732 (1830) (emphasis added). Thus,

> By common law, [the framers] meant what the constitution denominated in the third article 'law;' not merely suits, which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, *in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered*….

Id. at 447 (emphasis added). Accordingly, "[i]t is well known, that in civil causes, in courts of equity … juries do not intervene, and that courts of equity use the trial by jury only in extraordinary cases to inform the conscience of the court." *Id*. at 446.

This well-settled authority makes clear that "[t]he basic consideration for determining when the right to a jury trial exists is the historical distinction between law and equity." *Phillips v. Kaplus*, 764 F.2d 807, 813 (11th Cir. 1985). As the Eleventh Circuit reaffirmed in this case, consistent with its own longstanding precedent and that of this Court, "[d]etermining whether a right to a jury trial exists [thus] turns on whether the claims were historically cognizable at law or considered equitable. App. 33a (citing *Phillips*, 764 F.2d at 813).

"For those claims which traditionally were cognizable at law, the right to a jury is generally preserved; for those claims which historically were considered equitable, no jury trial is mandated." *Phillips*, 764 F.2d at 813; *see also Ford v. Citizens & S. Nat'l Bank, Cartersville*, 928 F.2d 1118, 1122 (11th Cir. 1991) ("Purely equitable claims, even those involving factual disputes, are matters to be resolved by the court rather than a jury."); *Sheila's Shine Prods., Inc. v. Sheila Shine, Inc.*, 486 F.2d 114, 121-122 (5th Cir. 1973) ("[t]he right of trial by jury does not extend to cases historically cognizable in equity").

Putting a finer point on it, "[i]t is settled law that the Seventh Amendment does not apply" to suits seeking only equitable relief, such as an injunction. *City of Monterey*, 526 U.S. at 719. The Eleventh Circuit has long held the same: "There is no right to a jury trial … when the plaintiff[] seek[s] purely equitable relief such as an injunction." *Sheila's Shine*, 486 F.2d at 121-122; *see also CBS Broad., Inc. v. EchoStar Commc'ns Corp.*, 450 F.3d 505, 517, n.25 (11th Cir. 2006).

Petitioner asserts it had a jury-trial right because its counterclaim pleaded claims for damages and profits and made a jury demand. *See* Pet. at 17. But "[t]he right to trial by jury is determined by the issues, not by the pleadings." *Armco*, 693 F.2d at 1158. After their initial pleadings, neither party in this case pursued claims for damages or other legal relief. Instead, as Petitioner admits, both parties sought only to vindicate their trademark rights and pursue injunctive relief. Accordingly, the parties' proposed pretrial order "limited their respective demands for relief to a permanent injunction in favor of the prevailing party." Pet. at 18. Once the parties waived their legal claims capable of giving rise to a jury-trial right, neither could demand a jury, regardless of whether they did so "at the outset of this case." *Id.* at 17. Petitioner therefore was not entitled to a jury.

2. Petitioner Waived Its Damages Claims And Therefore Its Right To A Jury Trial

The Petition focuses on historical jurisprudence at the expense of a straightforward procedural history. Examining Petitioner's procedural conduct shows it unequivocally withdrew its damages claims—its only legal claims—not only in the proposed pretrial order but also at the pretrial conference, thereby waiving any right to a jury under clear precedent.

Petitioner contends it did not waive its right to a jury trial. Pet. at 18-19. But it does not dispute the law establishing waiver. A party can waive an issue "by failing to ensure that the issue is clearly preserved in the pretrial order." *Morro v. City of Birmingham*, 117 F.3d 508, 515 (11th Cir. 1997); *see also Hodges v. United States*, 597 F.2d

1014, 1017 (5th Cir. 1979). "Rule 16(e) of the Federal Rules of Civil Procedure provides that a pretrial order controls the subsequent action of the litigation. The parties are bound by their agreement to so limit issues and may not introduce at trial issues excluded in the pretrial order." *Randolph Cty. v. Alabama Power Co.*, 784 F.2d 1067, 1072 (11th Cir.) *modified on denial of reh'g*, 798 F.2d 425 (11th Cir. 1986). "If counsel fail to identify an issue for the court, the right to have the issue tried is waived." Fed. R. Civ. P. 16 advisory committee's note to 1983 amendment. Thus, "a pretrial order supersedes the pleadings," thereby "eliminating" any claims from those pleadings that are not preserved in the pretrial order. *State Treasurer of State of Michigan v. Barry*, 168 F.3d 8, 9-10 (11th Cir. 1999).

Petitioner's statements in the proposed pretrial order waived the damages claims Petitioner pleaded. App. 11a. Even before the proposed pretrial order, in its November 16, 2012, initial disclosures, Petitioner stated "N/A" for its "Computation of Damages." Dkt. 135 at 5. Those disclosures further failed to identify any damages witnesses, and none of Petitioner's subsequent discovery responses disclosed any such witnesses or information. Nor did Petitioner's motion for summary judgment (Dkts. 84, 90) mention any damages or profits claims. Thus, throughout the pendency of this case, Petitioner produced no evidence to support any claims that would give rise to a jury-trial right.

Moreover, at the pretrial conference, Petitioner expressly agreed that the only relief it sought was injunctive and the court would grant such relief, *not* a jury:

> THE COURT: Obviously the request here is for injunctive relief…. I mean, I see this as a matter of law as opposed to something the jury needs to do.
>
> [PETITIONER'S COUNSEL]: That is the Defendant's position.

App. 11a n.2. When Respondent clarified that an injunction was entirely equitable, Petitioner did not object. Dkt. 128 at 7:18-8:19. Petitioner later confirmed "[t]here's not damages issue[s] here anyway." *Id*. at 30:4. Thus Petitioner made clear it would not pursue damages, but only equitable relief.

"If counsel fail to identify an issue to the court, the right to have the issue tried is waived … The same policy applies to informing the trial court of the legal issues worthy of trial." *Lexington Ins. Co. v. Cooke's Seafood*, 835 F.2d 1364, 1368 (11th Cir. 1988) (internal citation and quotation marks omitted). Petitioner's legal claims thereby were eliminated before Respondent moved to strike Petitioner's jury demand. *Barry*, 168 F.3d at 9-10. The Eleventh Circuit properly concluded the parties "expressly waived all legal claims in their joint proposed pretrial order and orally at the pretrial conference, choosing instead to seek only vindication of their trademark rights and pursue injunctive relief, thus extinguishing any right to a jury trial." App. 11a, 33a.

3. Consent Does Not Create A Jury-Trial Right

For the reasons set forth above, Petitioner is wrong to assert the parties entered into a "preliminary agreement" or "exchange" leading into the pretrial conference. But even if Petitioner's fiction were fact,[5] consent to a jury trial does not create a right to a jury trial. As the courts below correctly held, consent to a jury trial may be withdrawn where there is no Seventh Amendment right to a jury.

Federal Rule of Civil Procedure 39 provides that, "[i]n an action not triable of right by a jury, the court, on motion or on its own: (1) may try any issue with an advisory jury; or (2) may, with the parties' consent, try any issue by a jury whose verdict has the same effect as if a jury trial had been a matter of right…." Fed. R. Civ. P. 39(c). As the district court correctly held, a party may withdraw its consent to a jury trial unilaterally when there is no jury-trial right, and consent alone does not establish such a right. Dkt. 132 at 2; *Kramer*, 355 F.3d at 968.

Because the Eleventh Circuit had not addressed whether a party unilaterally can withdraw consent to a

5. Nothing in the record (or out of the record) supports Petitioner's account. Certainly, in no instance did Respondent consent to a trial by jury on Petitioner's purely equitable claims, and when it was clear only such claims remained, Respondent quickly moved to strike the jury demand—which it could not have done previously, because the parties' legal claims were still technically pending. *See In re Christou*, 448 B.R. 859, 861-862 (Bankr. N.D. Ga. 2011) (plaintiff could not have opposed jury demand when it was made, but could unilaterally move to strike once the right to a jury was lost).

jury trial when no legal issues requiring a jury remain, the district court relied on the Seventh Circuit's decision in *Kramer*. Dkt. 132 at 2. In *Kramer*, shortly before trial, the defendant successfully moved to exclude the only legal claims in the case, then successfully moved to strike the jury demand. 355 F.3d at 967. Because the first motion eliminated any right to a jury trial, the Seventh Circuit held that the jury demand, even if established on consent (because both parties made jury demands), did not preclude the defendant from withdrawing its consent on the eve of trial. *Id.* at 967-68. The court noted that Rule 38(d) precludes withdrawing a jury demand *only where there is the right to a jury trial*. *Id.* at 968; Fed. R. Civ. P. 38(d). But, *Kramer* concluded, "there is no restraint in the text of Rule 39 on the ability of a party to withdraw its consent to a jury trial *that is not as of right*," and the withdrawal of consent thus was proper. 355 F.3d at 968 (emphasis added); Fed. R. Civ. P. 39. Here, the Eleventh Circuit adopted *Kramer's* reasoning, concluding that, "[w]hen no right to a jury trial exists and where no prejudice will result, a party may unilaterally withdraw its consent to a jury trial." App. at 36a.[6]

The Eleventh Circuit's adoption of *Kramer*'s reasoning is consistent with the Fifth Circuit's decision in *Armco*,

6. This holding is consistent with other circuits. *See*, *e.g.*, *3M Co. v. Mohan*, 482 F. App'x 574, 578 (Fed. Cir. 2012) ("3M was not required to obtain Mohan's consent in order to withdraw its jury demand because Federal Rule of Civil Procedure 38 does not apply when a party decides to proceed only on equitable claims."); *Emerson G.M. Diesel, Inc. v. Alaskan Enter.*, 732 F.2d 1468, 1471–72 (9th Cir. 1984) (a party having no right to jury trial could not rely on other party's prior consent to jury trial when that party withdrew its legal claims at pretrial conference).

where the defendant demanded a jury trial based on the plaintiff's claims for legal relief in the form of trademark infringement damages, and the Fifth Circuit held that the plaintiff could unilaterally waive its legal claims and strike the jury demand. *Armco*, 693 F.2d at 1158. "On the eve of trial," plaintiff moved to strike the defendant's jury demand because plaintiff no longer sought legal relief. *Id.* The district court proceeded with a jury in an advisory capacity only, later entering judgment contrary to the jury's findings. *Id.* On appeal, the defendant complained it was deprived of its right to a jury trial. *Id.* The Fifth Circuit disagreed, holding: "The right to trial by jury is determined by the issues, not by the pleadings." *Id.*

Substantial additional authority within the Eleventh Circuit also supports reliance on *Kramer.* At least one other court in the Eleventh Circuit has cited *Kramer* to allow unilateral withdrawal of consent to a jury trial. *See In re Christou*, 448 B.R. at 862 ("After the Proof of Claim was filed, Defendants lost their absolute right to a jury trial and as a result Plaintiff is entitled to unilaterally withdraw his consent to a jury trial in any forum."). Applying similar reasoning to *Kramer*, at least two other courts in the Eleventh Circuit have held that a plaintiff may drop its legal claims and strike the jury demand based on that unilateral withdrawal of consent to a jury trial. *Partecipazioni Bulgari*, No. 86-2516-CIV-RYSKAMP, 1988 WL 113346, at *3-*4 (S.D. Fla. May 23, 1988); *Ezell v. Mobile Cty. Pers. Bd.*, No. Civ.A. 76–154–H, 30 Fed. R. Serv. 2d 62, 1980 WL 324437 at *3 (S.D. Ala. March 18, 1980). District courts in other circuits recently have reached the same conclusion. *See*, *e.g.*, *Treemo, Inc. v. Flipboard, Inc.*, No. C13–1218–JPD, 2014 WL 4057162, at *6 (W.D. Wash. Aug. 15, 2014) ("Where a right to a

jury trial no longer exists, consent to withdraw the jury demand is no longer required."); *Williamson v. Recovery Ltd. P'ship*, No. 2:06-CV-292, 2011 WL 2181813, at *30 (S.D. Ohio June 3, 2011) ("because Plaintiffs would not otherwise be entitled as a matter of right to a trial by jury on their remaining claims, Plaintiffs' motion to withdraw will be granted"), *aff'd*, 731 F.3d 608 (6th Cir. 2013).

Federal courts thus consistently have held that, even where there may have been consent to a jury trial, a party may withdraw such consent unilaterally. When that occurs, no *right* to a jury trial exists, and the case may be tried without a jury.

B. Where No Jury-Trial Right Exists, There Is No Heightened Standard Of Review

Petitioner strains to insist that any denial of a jury demand must face "the most exacting scrutiny." Pet. at 12-20. Yet throughout its discussion, Petitioner fails to cite any case applying heightened scrutiny to a case like this one, where the party seeking a jury *had no right to demand one*. Because Petitioner had no right to a jury, the decisions below are not subject to heightened review, and they easily meet the applicable standard.

1. The Eleventh Circuit Affirmed The District Court Under The Correct Standards Of Review

Because Petitioner waived its legal claims, and thus its right to demand a jury, Respondent moved to strike the jury demand under Rule 39. Dkts. 127, 132. The district court granted the motion pursuant to that rule—as

district courts routinely have done. *See*, *e.g.*, *CPI Plastics, Inc. v. USX Corp.*, 22 F. Supp. 2d 1373, 1378 (N.D. Ga. 1995); *Partecipazioni Bulgari,* 1988 WL 113346 at *3-*4; *Ezell*, 1980 WL 324437 at *3.

The Eleventh Circuit was not required to apply "the most exacting scrutiny" to this decision. Pet. at 12. Instead, "[t]he decision by the district court to grant or deny [a Rule 39] motion is … reversible [on appeal] only for an abuse of discretion." *Parrott v. Wilson*, 707 F.2d 1262, 1267 (11th Cir. 1983); *see also Swofford v. B & W, Inc.*, 336 F.2d 406, 408-09 (5th Cir. 1964) ("Under [Rule 39] the court has a broad discretion in determining whether to relieve a party from waiver of jury trial, and its decision will be reversed only for abuse of discretion." (citation omitted)). Where, as here, the parties are not entitled to a jury trial, no heightened scrutiny is required. Nonetheless, the Eleventh Circuit reviewed the district court's grant of Respondent's motion to strike the jury demand *de novo* (App. 13a)—and still affirmed, given the well-settled authority on which the district court's order was based.

The Eleventh Circuit also properly reviewed the district court's decision to deny Petitioner's motion to amend the proposed pretrial order for an abuse of discretion. App. 14a. As the appeals court explained, it "has not hesitated to back up district courts when they put steel behind the terms of pretrial orders and hold parties to them." App. at 37a, quoting *Morro*, 117 F.3d at 515-16. "[F]or pretrial procedures to continue as viable mechanisms of court efficiency, appellate courts must exercise minimal interference with trial court discretion in matters such as the modification of its orders." *Hodges*, 597 F.2d at 1018. Indeed, Petitioner admits this was the proper standard of review:

> 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.*

Pet. at 18 (emphasis added). Given Petitioner's waiver of its damages and profits claims in the proposed pretrial order and at the pretrial conference, the district court's decision not to allow Petitioner's desperate attempt to resurrect its jury demand clearly met this standard; it was thus properly affirmed by the Eleventh Circuit.

2. Petitioner's Authorities Do Not Require Heightened Scrutiny Where No Right To A Jury Trial Exists

Petitioner's exploration of Seventh Amendment jurisprudence demonstrates this Court will defend the right to a jury trial *when it exists*.[7] But because none of the authority Petitioner cites goes beyond this undisputed principle, it is inapposite to this case.

Petitioner relies most heavily on *Dimick v. Scheidt*, 293 U.S. 474, 486 (1935), and *City of Morgantown v. Royal Ins. Co.*, 337 U.S. 254, 258 (1949), for its insistence that any claim to a jury trial must be reviewed under heightened

7. Petitioner's thorough treatment of the law on this point demonstrates it is well settled such that a writ of certiorari is unnecessary.

scrutiny. Neither of these cases addresses pretrial orders, profits claims, or an accounting, and neither is a trademark case. *Dimick* affirms a decision reversing the denial of a new trial—a procedurally distinct case in which a trial already had occurred. 293 U.S. at 475-76. It turned on damages for personal injury, and whether the trial court could condition a new trial on the parties' agreement to modify the amount of damages. *Id.* The case therefore was precisely about a legal claim for damages and their amount—a determination "so peculiarly within the province of the jury that the Court should not alter it.'" *Id.* at 480.

Morgantown similarly was concerned only with "[d]enial of the [jury trial] right *in a case where the demanding party is entitled to it*." 337 U.S. at 258. It found no such right to protect, affirming dismissal of an appeal from an order striking a jury demand and setting the case for a bench trial. *Id.* at 258-259. Indeed, it did not even reach the issue of whether the petitioner was entitled to a jury. *Id.* at 259. Thus, rather than protecting the sanctity of the jury trial, *Morgantown* protects the district court's ability to control whether there will be one.

Similarly, *Parklane Hosiery Co. v. Shore* extolled the virtues of the jury trial, but affirmed a decision holding that the petitioner's right to a jury trial would not allow it to relitigate an issue determined by a bench trial. 439 U.S. 322, 337 (1979). It thus demonstrates another instance where the right to a jury trial may be limited by the lower courts. *Parklane* relied in part on *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959), for the proposition that courts can resolve equitable issues without a jury even when this might be dispositive of issues involved in a legal

claim. *Id.* at 335. And while *Beacon Theatres* reversed the lower courts' denial of a jury trial, it did so under circumstances bearing no relation to the present case, noting that "the Federal Rules preserve inviolate the right to trial by jury in actions historically cognizable at common law, as under the Constitution they must. They do not create a right of trial by jury where that right 'does not exist under the Constitution or statutes of the United States.'" 359 U.S. at 518-519 (citing Fed. R. Civ. P, 39(a)). *Beacon Theatres* thus protected the jury-trial right only where it clearly existed, as in *Simler v. Conner*, another case petitioner cites for the "historic and continuing strength" of the policy favoring jury trials, though it was a contract damages case, a "traditionally 'legal' action" with no bearing on the present case. 372 U.S. 221, 223 (1963). Finally, *Hodges v. Easton* addressed a case where the claimant sought damages for a tort (conversion) and thus there was no question as to its right to a jury; no equitable claim was at issue. 106 U.S. 408, 412, 1 S. Ct. 307, 311, 27 L. Ed. 169 (1882).

Petitioner, then, amply establishes that the Seventh Amendment guarantee of the jury trial right is long cherished in our courts. It has no bearing on this case, however, because no jury-trial right existed when the district court struck the jury demand.

II. NEITHER COURT BELOW DECIDED WHETHER TRADEMARK PROFITS CLAIMS CREATE A JURY-TRIAL RIGHT

After the district court struck the jury demand based on Petitioner's (and Respondent's) clear waiver of legal claims for relief in the proposed pretrial order and at

the pretrial conference, Petitioner moved to amend the proposed pretrial order. In so doing, it did not request to resuscitate a legal damages claim, which could have revived a jury-trial right. Rather, it sought to reinstitute its claim for profits which, as discussed below, is an equitable claim and is thus incapable of creating a right to a jury trial.

Because both the district court and the Eleventh Circuit held the parties plainly waived all legal claims—representing in the proposed pretrial order and at the pretrial conference that the only relief sought was equitable relief—the courts below held no jury-trial right existed when Respondent moved to strike the jury demand. Accordingly, both courts correctly found it unnecessary to reach the issue of whether a profits claim is equitable or legal in nature. App. 38a, n10, 84a-85a.[8]

The Supreme Court does "not decide in the first instance issues not decided below," and thus should not decide the profits issue in this case. *Zivotofsky*, 566 U.S. 189, 201–02, citing *National Collegiate Athletic Assn. v. Smith,* 525 U.S. 459, 470, 119 S.Ct. 924, 142 L.Ed.2d 929 (1999); *see also Walters v. City of St. Louis, Mo.*, 347 U.S. 231, 233, 74 S. Ct. 505, 507, 98 L. Ed. 660 (1954) ("Of course, we will not undertake to review what the court below did not decide."). As this Court is well aware, it is one "of final review and not first view"; accordingly, it reviews thorough lower court opinions to create uniformity and provide guidance on the proper analysis, and, in the absence of such opinions, will at best remand issues to

8. Petitioner admits the courts below did not reach this issue. Pet. at 9-11.

the lower courts for further consideration. *Zivotofsky*, 566 U.S. 189, 201–02, citing *Adarand Constructors, Inc. v. Mineta,* 534 U.S. 103, 110, 122 S.Ct. 511, 151 L.Ed.2d 489 (2001) (*per curiam*).

In light of the fact that the courts below did not reach the profits issue—but instead resolved this case under well-established precedent that does not implicate the question of whether an award of profits under the Lanham Act is a legal or equitable remedy—this case does not raise the profits issue.

III. PETITIONER'S TRADEMARK PROFITS CLAIM WOULD NOT HAVE CREATED THE RIGHT TO A JURY TRIAL

Even if Petitioner had been allowed to restore its abandoned profits claim, such a claim would not have entitled Petitioner to a jury trial. Under this Court's precedent and across federal courts, a claim for profits under Section 35 of the Lanham Act, 15 U.S.C. § 1117(a), is understood as an equitable remedy for which there is no right to a jury trial. *See Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 259 (1916) ("[P]rofits are then allowed as an equitable measure of compensation."); *Ferrari S.P.A. v. Roberts*, 944 F.2d 1235, 1248 (6th Cir. 1991) ("Ferrari's complaint requested only equitable relief: an injunction and disgorgement of profits …. [such that it was] not entitled to a jury trial."); *Gibson Guitar Corp. v. Paul Reed Smith Guitars, LP*, 325 F. Supp. 2d 841, 851 (M.D. Tenn. 2004) ("The Seventh Amendment right to a jury does not extend to equitable relief."); *Empresa Cubana Del Tabaco v. Culbro Corp.*, 123 F. Supp. 2d 203, 206–209 (S.D.N.Y. 2000) (striking jury demand; "in

equity a court has the power to grant complete relief by awarding profits for unjust enrichment in trademark infringement suits"); *Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Utah Div. of Travel Dev.*, 955 F. Supp. 598, 605 (E.D. Va. 1997) ("[T]he disgorgement of defendant's profits … [is] wholly equitable and do[es] not create a constitutional jury trial right."); *G.A. Modefine S.A. v. Burlington Coat Factory Warehouse Corp.*, 888 F. Supp. 44, 45–46 (S.D.N.Y. 1995) ("[I]n the trademark infringement context, the remedy of disgorgement of profits is equitable in nature."); *Coca-Cola Co. v. Cahill*, 330 F. Supp. 354 (W.D. Okl. 1971) ("Plaintiff's claim is for injunctive relief and an equitable accounting, both historically suits in equity."); *Kimberly-Clark Corp. v. Kleenize Chem. Corp.*, 194 F. Supp. 876 (N.D. Ga. 1961) (striking jury demand when plaintiff only sought profits and other equitable relief); *see also* 5 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition ("McCarthy") § 30:59 (4th ed. 2017) ("An accounting of profits has traditionally been classified as an 'equitable remedy,' which means that there is no right to trial by a jury.").

Petitioner's attempt to conjure a circuit split on this issue based on increasingly isolated misinterpretations of this Court's decision in *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962), is misplaced. Although *Dairy Queen* once generated some uncertainty as to whether a claim for profits under the Lanham Act is a legal one for which the Seventh Amendment guarantees the right to a jury trial,[9] that uncertainty has long since faded. While

9. Petitioner's claim that the right to a jury trial is "clothed in uncertainty" after *Dairy Queen* is based on a 1972 trade

Dairy Queen led to some outlier decisions expanding the ruling to trademark profits claims, those cases interpret *Dairy Queen* incorrectly and have not generated lasting uncertainty among the circuit courts.

Instead, *every circuit court squarely to address this issue* has held that profits claims under the Lanham Act are equitable and thus create no right to a jury trial. *See Fifty-Six Hope Rd. Music, Ltd. v. A.V.E.L.A., Inc.*, 778 F.3d 1059, 1075 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 410 (2015) ("Contrary to Plaintiffs' argument, [*Dairy Queen*] does not broadly hold that a Lanham Act claim for disgorgement of profits is a legal claim. Rather, the Supreme Court characterizes the *Dairy Queen* claim as a legal claim for damages (not disgorgement of profits)."); *Gucci Am., Inc. v. Weixing Li*, 768 F.3d 122, 132 (2d Cir. 2014) ("*Dairy Queen* does not abrogate the longstanding treatment of an accounting of profits as an equitable remedy"); *Ferrari S.P.A.*, 944 F.2d at 1248 ("Ferrari's complaint requested only equitable relief: an injunction and disgorgement of profits …. [it thus was] not entitled to a jury trial.").

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publication, published just ten years after *Dairy Queen*. *See* Pet. at 20-21, citing Bruce S. Sperling, The Right to Jury Trial in a Federal Action for Trademark Infringement or Unfair Competition, 62 Trademark Rep. 58, 58 (1972). That a law review article quoted this language fifteen years ago in 2002 does not establish the claim; indeed, the article took the view that "*Dairy Queen* was a damages case," that the "profits remedy in trademark cases is equitable and does not create a right to a jury trial[, and that t]his conclusion is strongly supported by the historical treatment of the defendant's profits remedy," consistent with the emerging consensus in the circuit courts today. *See* Mark A. Thurmon, Ending the Seventh Amendment Confusion: A Critical Analysis of the Right to a Jury Trial in Trademark Cases ("Thurmon"), 11 Tex. Intell. Prop. L.J. 1, 8 (2002).

Accordingly, Professor McCarthy explains, citing decades-old district court cases, that only "*[a] small minority of courts* have read the *Dairy Queen* precedent to mean that in a trademark infringement suit, a claim for an accounting of the infringer's [profits] is a 'legal' (not equitable) claim entitling a party to a trial by jury on that issue." 6 McCarthy § 32:124 (emphasis added). Instead, "*[t]he majority of courts* … have said that where the trademark owner's claim is for injunctive relief and an accounting of profits, these are historically claims in equity to be decided by the judge, not a jury." *Id.* (emphasis added). "Thus, in a trademark infringement suit, the claim for a recovery of the infringer's profits is an equitable claim for the judge, not a jury." *Id.* There simply is no "persistent uncertainty" or "widespread disagreement among the lower courts [that] calls out for this Court's review." Pet. at 23, 29.

Petitioner would have this Court disregard the leading commentator on trademark law and every circuit court to address this issue—which was not decided below—to create a right where there is none, and to endorse a confused reading of *Dairy Queen*. There is no reason for the Court to take this approach, and the Petition should be denied.

A. *Dairy Queen* Does Not Hold That Trademark Profits Claims Create A Right To A Jury Trial

Although Petitioner does not clearly rely on any particular line of case law for its misinterpretation of *Dairy Queen*, it appears to endorse the few district court cases—almost none of them from the last fifteen years—holding *Dairy Queen* establishes that a trademark profits

claim is a legal claim, and thus carries a jury-trial right. Pet. at 23-25. Not only are those cases the minority, they are at odds with the plain language of *Dairy Queen*.

Contrary to Petitioner's mischaracterization and the minority of district courts that share it, *Dairy Queen* left unaffected the longstanding rule that a Lanham Act accounting for profits is an equitable remedy which does not give rise to a jury-trial right. The plaintiffs in *Dairy Queen* sought compensation for defendant's breach of a trademark licensing agreement. 369 U.S. at 475. They claimed the defendant had breached the contract by failing to pay agreed-upon sums for using the mark DAIRY QUEEN, and that continuing to use the mark after the license was terminated constituted trademark infringement for which they were owed *damages*. The plaintiffs ambiguously referred to all of the monetary relief sought as an "accounting," giving rise to a dispute over whether a jury-trial right existed. *Id.*

Noting that "[t]he most natural construction of the respondents' claim for a money judgment would seem to be that it is a claim that they are entitled to recover whatever was owed them under the contract … plus damages for infringement," the Court decided it need not resolve the ambiguity in the term "accounting," because at least part of the plaintiffs' claims was a *legal* breach-of-contract claim. *Id.* at 476-77. Because "it would be difficult to conceive of an action of a more traditionally legal character" than a breach-of-contract claim, the Court held a right to a jury trial existed. *Id.* at 476–79. Neither party sought, and this Court did *not address*, a claim for *profits* as provided for under the Lanham Act. Indeed, as Petitioner admits, the Court in *Dairy Queen* never even mentioned the term

"profits." Pet. at 30. Instead, every time it referred to the remedy at issue, it used the term "damages." Thurmon at 21. It therefore clearly did not hold that all requests for a disgorgement of profits in trademark infringement cases give rise to a jury trial. Instead, *Dairy Queen* "examined the plaintiffs' request for an accounting, determined that it was really a legal claim for breach of contract, and properly rejected [the] equitable characterization of the claim." *Phillips*, 764 F.2d at 814.

B. Overwhelming Authority Establishes That *Dairy Queen* Turned On A Legal Claim For Damages

This Court repeatedly has treated *Dairy Queen* as a damages case. In *Ross v. Bernhard*, it cited *Dairy Queen* as a case "where equitable and legal claims are joined in the same action, [and] there is a right to jury trial on the legal claims…." 396 U.S. 531, 537–38, 90 S. Ct. 733, 738, 24 L. Ed. 2d 729 (1970). The Court went on to cite *Dairy Queen* for the proposition that a jury trial right arises from a damages claim under a contract, even when equitable claims also are at issue. *Id.* at 542-543. In *Curtis v. Loether*, the Court cited *Dairy Queen* as an example of a "damages action" under a statute "to enforce 'legal rights' within the meaning of our Seventh Amendment decisions." 415 U.S. 189, 195, 94 S. Ct. 1005, 1009, 39 L. Ed. 2d 260 (1974). It further distinguished "disgorgement" as an equitable claim from such legal damages claims, plainly implying that *Dairy Queen* did not turn on the disgorgement of profits. *Id.* at 197. Justice Scalia cited *Dairy Queen* as a case where a cause of action for damages provided the right to a jury trial, even where equitable relief is also sought. *City of Monterey*, 526 U.S. at 730

(Scalia, J., concurring). He further cited *Dairy Queen* for the key proposition in the present case: that seeking only equitable relief "disentitles" the claimant to a jury. *Id.* at 726 n.1. In short, this Court's own precedent has long treated *Dairy Queen* as a case turning on legal relief in the form of contract damages.

The circuit courts are entirely in accord with this interpretation. Shortly after *Dairy Queen*, the Fifth Circuit dispelled any confusion, holding *Dairy Queen* and its progeny did *not* "foreclose from a nonjury determination a cause of action which, by its nature and as construed in the complaint, is traditionally equitable." *Local No. 92, Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers, AFL-CIO v. Norris*, 383 F.2d 735, 741 (5th Cir. 1967). *Local No. 92* affirmed the denial of a motion for jury trial because, although the relief sought—an accounting—contemplated an award of money, it was traditionally equitable relief that did not require a jury. *Id.* at 741-42. *Local No. 92* distinguished *Dairy Queen* as involving "*damages in the legal sense*," which therefore did not affect the longstanding rule that an accounting is an equitable remedy that does not provide either party the right to a jury trial. *Id.* at 740-41 (emphasis added). Instead, as the Eleventh Circuit later clarified, *Dairy Queen* merely "held that a request for a nominally equitable remedy could not be used to convert what was otherwise a legal claim into an equitable one in order to defeat the right to a jury trial." *Phillips*, 764 F.2d at 814 (holding no right to a jury trial exists for an accounting for profits in winding up a partnership).

More recent appellate decisions follow this logic. *Fifty-Six Hope Road Music* held that *Dairy Queen* turned on

a legal claim for damages rather than disgorgement of profits, and "[a] claim for disgorgement of profits under § 1117(a) is equitable, not legal." 778 F.3d at 1075. *Gucci America* explained "[p]laintiffs in *Dairy Queen* did not seek an award of profits, but amounts owed under a contract and *damages* for trademark infringement," concluding "there is no basis to conclude that the equitable character of [a claim for profits] is affected by the Court's treatment of the *legal* forms of monetary relief at issue in *Dairy Queen*." 768 F.3d at 132-33. And *Ferrari* concluded in the trademark-infringement context that the defendant was not entitled to a jury trial because the complaint requested only equitable relief—"an injunction and disgorgement of profits." 944 F.2d at 1248.[10] The circuits are thus in agreement with one another and with this Court: *Dairy Queen* does not alter the longstanding rule that trademark profits claims do not create a jury-trial right.

Petitioner canvases the case law citing *Dairy Queen* on this issue and finds some district court cases to support its position, though most of them are no more recent than the 1990s. But these are the exception, not the rule; the majority of cases—even among those Petitioner cites—and all of the appellate decisions on this issue follow the interpretation Respondent urges. Petitioner asks this Court to ignore its own precedent, the circuit courts, and the view of the leading trademark commentator to join a minority of district courts in misinterpreting a decades-

10. Notably, though the Sixth Circuit did not decide the issue, the district court in *Ferrari* denied a motion for a jury trial because the defendant had waived his prior jury demand by failing to object to its exclusion in the pretrial order. 944 F.2d at 1248.

old case whose meaning is well understood. For these reasons—and because this issue was not reached in either court below—the Court should deny the Petition.

CONCLUSION

For the foregoing reasons, the Court should deny the Petition for a Writ of Certiorari.

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