No. 16-1365

In the
Supreme Court of the United States

LEE JASON KIBLER, d/b/a DJ LOGIC,

Petitioner,

v.

ROBERT BRYSON HALL, II; VISIONARY MUSIC GROUP, INC.; WILLIAM MORRIS ENDEAVOR ENTERTAINMENT, LLC; THREE OH ONE PRODUCTIONS, LLC; UMG RECORDINGS, INC., d/b/a DEF JAM RECORDINGS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOINT OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where all Circuit Courts of Appeal, including the Sixth Circuit, agree that summary judgment should be granted in a trademark case for lack of likelihood of confusion only when no reasonable jury could find a likelihood of confusion by balancing the likelihood of confusion factors, is there a circuit split reviewable in this matter?

2. Does a finding, as here, that no reasonable jury could find likelihood of confusion in balancing the likelihood of confusion factors, properly apply the summary judgment standard and respect the role of the factfinder?

3. Did Petitioner waive the alleged circuit split asserted in the Petition by failing to raise either the alleged circuit split or the alleged proper standard for balancing the likelihood of confusion factors in either the district court or the Sixth Circuit?

4. Where the Petition focuses on the alleged errors in the decisions below on the determination of the individual likelihood of confusion factors, and does not focus on the balancing of those factors, should the legal standard for the balancing of those factors be reviewed on this Petition?

5. Is this an appropriate case to review the alleged circuit split, where the Petition raises no factual disputes with respect to balancing the likelihood of confusion factors, but rather only raises issues as to factual findings on specific factors not presented for review by the Petition?

6. Is clearly erroneous the proper standard of review of a summary judgment decision by a district court?

PARTIES TO PROCEEDING

Respondents concur with the list of the parties to the proceedings set forth in the Petition.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Respondents state as follows:

Respondent Three Oh One Productions, LLC is a New York limited liability company, which has no parent corporation and no publicly held corporation owns 10% or more of its stock.

Respondent Visionary Music Group, Inc. is a New Jersey corporation, which has no parent corporation and no publicly held corporation owns 10% or more of its stock.

Respondent Robert Bryson Hall, II ("Hall") is a natural person.

Respondent UMG Recordings Inc., d/b/a/ Def Jam Recordings's parent company is Universal Music Group Holdings, Inc., a private Delaware corporation, which is owned by Universal Music Group, Inc., a private Delaware corporation, which is owned by Vivendi, S.A., a publicly-traded French corporation.

Respondent William Morris Endeavor Entertainment, LLC is a Delaware limited liability company, which has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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The opinion of the Court of Appeals (Pet. App. 1a-30a) is reported at 843 F.3d 1068. The opinion of the district court (Pet. App. 31a-45a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 13, 2016. On March 1, 2017, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including May 12, 2017, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

In affirming the district court's grant of summary judgment on Petitioner Lee Jason Kibler, d/b/a DJ Logic's ("Petitioner" or "Kibler") trademark infringement claims, the Sixth Circuit reviewed each likelihood of confusion factor in light of the undisputed facts. It found that two of the factors – the strength of Kibler's mark and the similarity of the marks – favored Respondents; that "scant" evidence of actual confusion "slightly" favored Kibler; and that the remaining factors were either neutral or not significant. *See* Petitioner's Appendix ("Pet. App.") at 6a-28a. Importantly, although the Petition focuses on the alleged errors made by the Sixth Circuit in affirming the district court's determinations of the individual likelihood of confusion factors (*see* Petition at 20-25), Petitioner does not seek review of any aspect of the Sixth Circuit's analysis of, or findings concerning, the individual likelihood of confusion factors. *See* Petition at i.

After reviewing each likelihood of confusion factor, the Sixth Circuit turned to balancing the factors. As noted above, of the eight likelihood of confusion factors, only one favored Petitioner Kibler, and only slightly. In balancing the factors, the Sixth Circuit expressly found that "no reasonable jury could find a likelihood of confusion based solely on a few instances of actual confusion." *See* Pet. App. at 28a. Because the evidence would not support a finding of likelihood of confusion by the factfinder at trial, the Court of Appeals affirmed the grant of summary judgment against Petitioner. *See id.*

The only alleged errors for which Petitioner seeks review pertain to the balancing of the likelihood of confusion factors: (1) whether the courts below erred by balancing the likelihood of confusion factors as a question of law rather than one of fact as in the majority of circuits, and (2) whether the Court of Appeals erred by applying the wrong standard of review when balancing the factors. *See* Petition at i.

The Petition should be denied. First, contrary to the premise of Petitioner's first question presented for review, the Sixth Circuit did ***not*** balance the likelihood of confusion factors as a question of law. Rather, the Sixth Circuit affirmed summary judgment only after applying the undisputed facts to the individual likelihood of confusion factors and determining that, in light of that evidence, ***no reasonable jury*** could find that there was a likelihood of confusion. That fact bound determination does not warrant this Court's review.

Indeed, the alleged circuit split posited by Petitioner is not implicated by this case. The Petition arises from the grant of summary judgment by the

district court. In the context of summary judgment, all circuits, including the Sixth Circuit, grant summary judgment on the likelihood of confusion only if no reasonable jury could find a likelihood of confusion when balancing the likelihood of confusion factors. The circuit split exists, if at all, only on review of a finding on likelihood of confusion after a trial on the merits or on a motion for a preliminary injunction. This Court should not resolve in the context of summary judgment an alleged circuit split that exists only in a different procedural setting.

Second, Petitioner admits that he failed at any time below to raise, or even state a position regarding, the alleged circuit split on, or the proper standard for, balancing the likelihood of confusion factors, thereby waiving the circuit split. *See* Petition at 6 n.4

Petitioner's only other question presented is whether the Court of Appeals erred by applying the wrong standard of review to balancing the factors, referring to the clearly erroneous standard for appellate review of fact findings after a trial. *See* Petition at 9, 32. Petitioner again ignores the procedural context of this case. This case was not resolved in the district court after findings by a factfinder at a trial, but rather on a motion for summary judgment. The district court determined that there were no genuine issues of material fact to be decided by a factfinder. Therefore, there were no fact findings to be reviewed on appeal under the clearly erroneous standard. The district court's grant of summary judgment is properly reviewed *de novo,* and Petitioner identifies no circuit split in that regard. The Court of Appeals therefore did not err by conducting *de novo* review.

A. Background

Petitioner Kibler is a disc jockey who performs under the trademark DJ LOGIC. *See* Pet. App. at 3a. It is undisputed that he has never had a recording contract with a major label and currently has no recording contract at all. Pet. App. at 3a, 9a, 32a. Kibler sold fewer than 300 albums in the three years preceding the November 9, 2015 summary judgment decision, and sold fewer than 60,000 albums over the course of the preceding sixteen years. Pet. App. at 9a.

Respondent Hall is a rapper who has performed under the trademark LOGIC since 2009. Respondent Three Oh One is Hall's personal company; Respondent Visionary Music Group is his management company; Respondent UMG Recordings, Inc. d/b/a Def Jam Recordings is his record label; and Respondent William Morris Endeavor Entertainment, LLC is his booking agent. Pet. App. at 3a, 32a, 33a.

Respondent Hall's first commercial album was released in October 2014, during fact discovery below. That album sold over 170,000 copies. Pet. App. at 4a. Before that album's release, Hall made several "mixtape" albums of his music available for free download on the internet; those albums have been downloaded 1.7 million times. In addition, Hall's YouTube videos have been watched 58 million times. Pet. App. at 19a.

In January 2014, Petitioner sued Respondents, alleging that Respondents' marketing of Hall's music under the name LOGIC violated the Lanham Act, and also asserting related state law claims. Pet. App. at

4a. Petitioner did not demand a jury trial. Petition at 16 n.11.

B. Petitioner Did Not Argue In The District Court That, Or Take Any Position Regarding Whether, The Balancing Of The Likelihood Of Confusion Factors Is A Question Of Fact

After the close of discovery, Respondents moved for summary judgment on the grounds that, among other things, there was no likelihood of confusion between "DJ LOGIC" and "LOGIC." In his opposition to summary judgment below, Petitioner addressed the individual likelihood of confusion factors described in *Frisch's Rests. Inc. v. Elby's Big Boy of Steubenville, Inc.*, 670 F.2d 642, 648 (6th Cir. 1982). However, Petitioner Kibler did not argue that, or take any position regarding whether, the balancing of those factors together is an issue of fact. Indeed, Petitioner did not even mention balancing the factors in his brief. *See* Sixth Circuit Brief of Petitioner (No. 15-2516, Doc. No. 23) at 26; Petition at 6 n.4.

Petitioner failed to offer evidence of the extent of marketing under his DJ LOGIC mark or the extent of any online popularity, such as how many YouTube video views or Twitter followers he has. Pet. App. at 10a. Petitioner also failed to offer any consumer survey evidence during the proceedings below. Pet. App. at 9a.

C. The District Court Properly Granted Respondents' Summary Judgment Motion After Finding That Petitioner Raised No Genuine Issue Of Material Fact Regarding Likelihood Of Confusion

The district court granted summary judgment to Respondents. In its opinion, the court analyzed each of the likelihood of confusion factors in light of the undisputed facts. Pet. App. at 34a. It found that two of the factors – the strength of the Petitioner's trademark and the similarity of the parties' trademarks – favored Respondents, one factor (evidence of actual confusion) provided some support for Petitioner, and the rest were neutral. Pet. App. at 41a.

Turning to balancing the factors, the court found that Petitioner had "raised no genuine issue of material fact regarding a likelihood of confusion":

> Because Plaintiff's evidence of actual confusion does not exceed a handful of instances in the context of the parties' careers, the Court holds it insufficient to overcome the overall weakness of Plaintiff's mark, its dissimilarity from Defendant Hall's mark, and the lack of support from other factors. In other words, the Court holds that Plaintiff has raised no genuine issue of material fact regarding a likelihood of confusion.

Id. The district court therefore granted summary judgment against Petitioner on his trademark infringement and related state law claims, applying

the same standard of review that all courts in the nation do in like circumstances.[1]

D. The Sixth Circuit Found That Only One Of The Eight Likelihood Of Confusion Factors Favored Petitioner, And Only Marginally

In his appeal to the Sixth Circuit, Petitioner again failed to raise any issues regarding whether balancing the likelihood of confusion factors is an issue of law or of fact. The only issue that Petitioner raised with respect to his infringement claim was "[w]hether the district court erred in granting defendants' motion for summary judgment … by failing to analyze the *Frisch* factors in the light most favorable to Plaintiff, the non-moving party." Petitioner's Sixth Circuit Brief at 1.

The Sixth Circuit affirmed the grant of summary judgment below after conducting a *de novo* review of the district court's grant of summary judgment. Pet. App. at 4a. In first analyzing the eight likelihood of confusion factors individually, the Court of Appeals found that Petitioner failed to "offer evidence that would permit a reasonable jury to determine that wide segments of the public recognize 'DJ LOGIC' as an emblem of his music," failed to evidence the extent of any internet-based popularity, had "low album sales," was unable "ever to secure a recording contract

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[1] The District Court also granted summary judgment on Petitioner's trademark dilution claim after finding that Petitioner failed to offer evidence sufficient to support a finding that his trademark was famous, a required element. Pet. App. at 42a. Although Petitioner unsuccessfully appealed that determination to the Sixth Circuit, the Petition raises no issue in that regard.

with a major label," and currently lacked a recording contract with anyone. Pet. App. at 10a, 12a.

Applying the "anti-dissection" rule, the Sixth Circuit agreed with the district court that, considering the marks in their totality, Petitioner's "DJ Logic" mark is significantly distinct from Hall's mark. Pet. App. at 16a-17a, 37a-38a.

Furthermore, the Court of Appeals found that Petitioner's evidence of actual confusion was "scant," noting that "[i]f LOGIC really threatened to confuse consumers about the distinctions between Hall and Kibler, one would see much more than ten incidents throughout [Hall's] 170,000 album sales, 1.7 million album downloads, and 58 million YouTube views. The fact that none of the incidents were purchases would further prevent a jury from finding that this [actual confusion] factor significantly helps Kibler." Pet. App. at 19a.

Thus, like the district court, the Sixth Circuit determined that the two factors of strength of the mark and similarity of the marks favored Respondents, that the factor of actual confusion evidence favored Petitioner, but only "marginally," and that the other factors were neutral or insignificant. Pet. App. at 28a. Petitioner has ***not*** asked this Court to review any aspect of the Sixth Circuit's findings in connection with any of the individual likelihood of confusion factors.

After analyzing the undisputed facts in connection with the likelihood of confusion factors, the Sixth Circuit addressed the balancing of the factors. The Court reiterated that "evidence of actual confusion favors Kibler only marginally," that "the strength of

plaintiff's mark and similarity of the marks favor defendants," and that the remaining factors were either neutral or insignificant. Pet. App. at 28a. The Court concluded that in light of that evidence, "no reasonable jury could find a likelihood of confusion," entitling Respondents to summary judgment:

> Because no reasonable jury could find a likelihood of confusion based solely on a few instances of actual confusion, defendants are entitled to judgment as a matter of law on Kibler's federal trademark infringement and related state law claims.

Id. Thus, the Sixth Circuit did ***not*** affirm the grant of summary judgment by balancing the factors as a question of law, but rather because no reasonable jury could find likelihood of confusion on the summary judgment record.[2]

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[2] There is no question that summary judgment may properly be granted in trademark infringement cases, including on the issue of likelihood of confusion, where there is no genuine dispute of material fact on likelihood of confusion; indeed, Petitioner concedes that. Petition at 10. Moreover, in the circuits upon which Petitioner relies for a circuit split, courts grant summary judgment on the issue of likelihood of confusion in proper cases. As the court explained in *Utah Lighthouse Ministry v. Found. for Apologetic Info. & Research*. 527 F.3d 1045, 1054-55 (10th Cir. 2008), in affirming summary judgment, "[alt]hough likelihood of confusion is a question of fact, it is amenable to summary judgment in that '[c]ourts retain an important authority to monitor the outer limits of substantial similarity within which a jury is permitted to make the factual determination whether there is a likelihood of confusion.' *Universal Money Ctrs. v. AT&T*, 22 F.3d 1527, 1530 n. 2 (10th Cir. 1994)". *See Venture Tape Corp. v. McGills Glass Warehouse*, 540 F.3d 56, 61-62 (1st Cir. 2008) (affirming summary judgment); *National Business Forms & Printing, Inc. v. Ford Motor Co.*, 671 F.3d 526, 533

REASONS FOR DENYING THE PETITION

The Petition should be denied for four independent reasons. First, the alleged circuit split on the balancing of the likelihood of confusion factors only exists with respect to post-trial review or review of a preliminary injunction ruling, not in connection with summary judgment decisions. That is to say, all circuits agree that the standard for balancing the likelihood of confusion factors on a motion for summary judgment is whether a reasonable jury could find a likelihood of confusion. The alleged circuit split therefore is not properly raised on this appeal from a summary judgment decision.

Second, Petitioner failed to raise the circuit split regarding balancing the likelihood of confusion factors – or whether balancing is a factual question or a question of law – that is the focus of his Petition in either the district court or the Sixth Circuit, thereby waiving that issue. Third, the Petition focuses on alleged errors in the decisions below on the likelihood of confusion factors, and not on the balancing of those

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(5th Cir. 2012) (affirming summary judgment); *Dorr-Oliver, Inc. v. Fluid-Quip, Inc.*, 94 F.3d 376, 382-84 (7th Cir. 1996) (directing entry of judgment dismissing likelihood of confusion claim); *Welding Servs., Inc. v. Foreman*, 509 F.3d 1351, 1360-61 (11th Cir. 2007) (affirming summary judgment on likelihood of confusion).

Rosetta Stone Ltd. v. Google, Inc., 676 F.3d 144, 155 (4th Cir. 2012), cited by Petitioner, is not to the contrary. There, the district court did not properly apply the summary judgment standard of review, but instead viewed the evidence much as it would during a bench trial. *Id*. Here, the district court properly applied the summary judgment standard.

factors. But the determination of the individual likelihood of confusion factors is not before this Court.

Finally, Petitioner's other question presented – challenging the standard of review applied by the Sixth Circuit to the balancing of the factors – again conflates review of a summary judgment decision and review of determinations by a factfinder after trial. The Sixth Circuit correctly reviewed the district court's summary judgment decision *de novo*. The clearly erroneous standard sought by the Petition does not apply to reviewing a summary judgment determination. Moreover, reviewing the district court's decision granting summary judgment against Petitioner on a clearly erroneous standard would have given the district court's determinations more deference, which would not change the result below.

As we shall now further demonstrate, the Petition should be denied.

I. This Case Does Not Present the Circuit Conflict Identified in the Petition

Petitioner argues that, unlike the other Circuit Courts, the Second, Sixth and Federal Circuits incorrectly treat the balancing of the likelihood of confusion factors as a question of law (or a mixed question of fact and law) to be decided by the court. *See* Petition at 2-3, 9. Petitioner requests that this Court determine that the balancing of the likelihood of confusion factors is a question of fact for the factfinder and that the Sixth Circuit erred here by analyzing it as a question of law. Certiorari should not be granted on this question because (a) the Sixth Circuit here analyzed the balancing of the factors as a question of fact, not one of law, and (b) the possible

circuit split raised by Petitioner arises only in the context of reviewing a judgment after trial or a preliminary injunction, not in the context of summary judgment as presented here.

A. The Sixth Circuit Balanced The Likelihood of Confusion Factors As A Question Of Fact

Even if this Court were to grant certiorari and conclude, as Petitioner seeks, that the balancing of the likelihood of confusion factors is an issue of fact, the judgment in this case would not be disturbed. The Sixth Circuit analyzed the balancing of the factors here as an issue of fact. Indeed, the Court of Appeals explicitly affirmed the grant of summary judgment only after finding, in connection with balancing the likelihood of confusion factors, that "no reasonable jury could find a likelihood of confusion based solely on a few instances of actual confusion." Such a determination – that "no reasonable jury could find" that an issue favors a party – inherently is a determination as a matter of fact. In particular, it is a determination that there is insufficient evidence for a factfinder to conclude that a certain fact – that Respondents' actions are likely to cause confusion – is true.

In fact, the Sixth Circuit did not rely upon or even cite the standard Petitioner seeks to challenge – that the likelihood of confusion factors should be balanced as a question of law – because the Sixth Circuit simply applied the basic principle that summary judgment should be granted in the absence of a disputed issue of material fact. While Petitioner notes the Sixth Circuit's observation that "[a]s part of de novo review, we have a duty to consider and weigh the relevant

facts in light of the *Frisch* factors" (Petition at 20), that reference clearly invokes the summary judgment standard, and not the question of how factors are to be balanced generally. Thus, even if this Court were to address the purported circuit split Petitioner invokes, this case would be the wrong vehicle, as neither court below even addressed the issue.

Therefore, the premise of Petitioner's circuit split issue is incorrect. The Sixth Circuit did not analyze the balancing of factors as a question of law, but rather as a question of fact, that is, whether any reasonable jury could find likelihood of confusion. Petitioner's request that this Court grant the Petition to determine whether the Sixth Circuit erred by treating the balancing of the likelihood of confusion factors as a question of law is based on a faulty premise and should therefore be denied.

B. There is No Circuit Split In The Context, Presented Here, Of The Standard For Determining Whether Summary Judgment Should Be Granted For Lack Of A Likelihood Of Confusion

Contrary to Petitioner's suggestion, there is no circuit split on whether the likelihood of confusion should be analyzed as a question of law or a question of fact on a motion for summary judgment. To the extent there is a circuit split, it is only in the different context of reviewing the result of a full trial or a preliminary injunction motion. On summary judgment, all circuits agree that the test is whether a reasonable jury could find likelihood of confusion.

Petitioner argues that, unlike other Circuit Courts, the Second, Sixth and Federal Circuits "still review

the balancing of the likelihood of confusion factors as a question of law or a mixed question of fact and law for decision by the court." Petition at 2-3, 9. In support of his assertion of different treatment in the Second, Sixth and Federal Circuits, Petitioner cites a single decision from each circuit. Petition at 2, n. 2. However, the Second and Sixth Circuit decisions cited are reviews of the grant of a preliminary injunction, and the Federal Circuit decision reviews the result of an administrative trial at the U.S. Trademark Trial and Appeal Board. *See Bristol-Myers Squibb Co. v. McNeil-P.P.C., Inc.*, 973 F.2d 1033, 1043 (2d Cir. 1992); *Frisch's Rest., Inc. v. Shoney's Inc.*, 759 F.2d 1261, 1264 (6th Cir. 1985); *Juice Generation, Inc. v. GS Enterprises LLC*, 794 F.3d 1334,1338 (Fed. Cir. 2015) (likelihood of confusion as a bar to registration).[3]

Petitioner does not cite to any summary judgment decision in which any circuit court analyzed the balancing of the factors as an issue of law rather than an issue of fact, and Respondents are not aware of any such case. Indeed, consistent with its sister circuits, the Second, Sixth and Federal Circuits treat the determination of likelihood of confusion as an issue of fact on summary judgment. *See ERBE Elektromedizin GmbH v. Canady Technology LLC*, 629 F.3d 1278, 1296 (Fed. Cir. 2010) ("***The factual issue of likelihood of confusion***, upon the undisputed intentional copying of this shade of blue, must be considered"); *Playtex Products, Inc. v. Georgia-Pacific*

[3] Although related, likelihood of confusion for registration under 15 U.S.C. § 1052(d) is a different issue than likelihood of confusion in an infringement context. See *B&B Hardware, Inc. v. Hargis Industries, Inc.*, 135 S. Ct. 1293, 1307 n.3 (2015).

Corp., 390 F.3d 158, 167 (2d Cir. 2004) ("we agree with Judge Baer that Playtex has failed to demonstrate a ***genuine issue of material fact*** about the likelihood of consumer confusion"), *superseded by statute on other grounds as recognized in Starbucks Corp. v. Wolfe's Borough Coffee, Inc.*, 588 F.3d 97, 107–08 (2d Cir. 2009); *Autozone, Inc. v. Tandy Corp.*, 373 F.3d 786, 807 (6th Cir. 2004) ("AutoZone did not present any ***genuine issues of material fact*** regarding the likelihood of confusion between AUTOZONE and POWERZONE."); *Stromback v. New Line Cinema*, 384 F.3d 283, 292 (6th Cir. 2004) (affirming denial of summary judgment, noting that "[t]he proper inquiry is whether the evidence is such that a ***reasonable jury*** could return a verdict for the plaintiff."); *Gray v. Meijer, Inc.*, 295 F.3d 641, 651 (6th Cir. 2002) ("the district court's finding that Gray has not raised a ***material issue of fact*** as to likelihood of confusion was not erroneous"); *Marketing Displays, Inc. v. TrafFix Devices, Inc.*, 200 F.3d 929, 933-934 (6th Cir. 1999) ("summary judgment for the plaintiff is appropriate if, upon consideration of all factors, the district court determines that ***no reasonable jury*** could fail to find that confusion of the marks would be likely"), *rev'd on other grounds*, 532 U.S. 23 (2001); *Jet, Inc. v. Sewage Aeration Systems*, 165 F.3d 419, 424 (6th Cir. 1999) ("a ***reasonable jury*** could not conclude that the marks JET and AEROB-A-JET are confusingly similar") (emphases added throughout).

As a result, there is no circuit split on the proper standard for balancing the likelihood of confusion factors on a summary judgment motion – all circuits view the test as whether a reasonable jury, balancing the factors, could find likelihood of confusion.

C. *Hana Financial* Does Not Change The Result Here; This Court Should Continue Its Refusal To Review The Alleged Circuit Split On Balancing The Likelihood of Confusion Factors

Petitioner suggests that the decision below is inconsistent with this Court's decision in *Hana Fin., Inc. v. Hana Bank*, 135 S. Ct. 907 (2015) ("*Hana Financial*"). That is incorrect. In *Hana Financial*, this Court held that a jury, not a judge, should determine the applicability of the "tacking" doctrine, under which the holder of a trademark may make certain modifications to its mark over time while retaining its priority position. The Court did not address the likelihood of confusion test, and more importantly, it did not alter the authority of a district court to grant summary judgment when no genuine dispute of material fact exists. To the contrary, the Court expressly stated that it held "only that, when a jury trial has been requested and when the facts do not warrant entry of summary judgment or judgment as a matter of law, the question whether tacking is warranted must be decided by a jury." *Id.* at 911. As noted above, Petitioner did not timely request a jury in this matter. Petition at 16 n.11.

In addition, the Petition acknowledges that this issue has been the subject of petitions since at least 1982. Petition at 3-4 & n.3. As we have shown, there is no circuit split regarding balancing the likelihood of confusion to resolve in the context of a summary judgment motion. There is no reason for this Court to vary from its prior refusals to review that alleged circuit split, especially in the inapplicable context of summary judgment.

II. Petitioner Waived The Alleged Circuit Split, And The Alleged Proper Basis For Balancing The Likelihood of Confusion Factors, By Failing To Raise Them In Either Court Below

Petitioner did not raise in either the district court or the Sixth Circuit the alleged circuit split or the alleged proper basis for balancing the likelihood of confusion factors for which he seeks this Court's review. Nowhere below did Petitioner address whether balancing the factors was an issue of law or fact, argue that Sixth Circuit law on the question was incorrect, indicate there was a circuit split on the issue, or argue that the district court improperly balanced the factors as a question of law rather than of fact. Indeed, Petitioner admits in his Petition that he "did not raise the issue of the conflict among the circuits in the district court or court of appeals." *See* Petition at 6 n.4.

This Court generally declines to consider an issue "raised for the first time in the petition for certiorari." *United States v. Ortiz*, 422 U.S. 891, 898 (1975). The Court's "traditional rule ... precludes a grant of certiorari when 'the question presented was not pressed or passed upon below.'" *United States v. Williams*, 112 S. Ct. 1735 (1992) (citation omitted).

Petitioner attempts to excuse his failure to raise the alleged circuit split below by arguing that "[b]oth courts are bound by the long-standing rule in the Sixth Circuit that balancing the Frisch factors is a question of law for the court." Petition at 6 n.4. However, that Petitioner allegedly seeks to change "long-standing" Sixth Circuit law does not justify failing to present his arguments to the courts below. Had he done so, the district court and/or the Sixth

Circuit – by panel or *en banc* – could have considered and addressed them. That would have provided a more relevant record for this Court to review.

Because Petitioner failed to raise the alleged circuit split or the proper standard for balancing the likelihood of confusion factors to either court below, Petitioner has waived the right to do so in this Court. That alone is sufficient reason for this Court to deny the Petition.

III. The Petition Focuses On The Alleged Errors In The Decisions Below On The Determination Of The Individual Likelihood Of Confusion Factors, And Not On The Balancing Of Those Factors

The Petition focuses on the alleged errors in the decisions below on the determination of the individual likelihood of confusion factors, and not on the balancing of those factors. *See* Petition at 20-25. If Petitioner was correct in his criticism of the determination of the individual likelihood of confusion factors – an issue not presented for review by this Court in the Petition – the result would have been far different in the district court and Sixth Circuit. But that criticism by Petitioner demonstrates beyond doubt why this Petition is not a proper vehicle for reviewing the alleged circuit split on the standard for balancing the likelihood of confusion factors.

IV. Petitioner Wrongly Claims That The Sixth Circuit Should Have Applied A Clearly Erroneous Standard Of Review; *De Novo* Review Is Proper On Appeal Of A Summary Judgment Decision

Summary judgment decisions by a district court are reviewed by every Court of Appeals under the *de novo* standard, whether the summary judgment decision concerns likelihood of confusion or any other issue. *See, e.g.*, *Davis v. Walt Disney Co.*, 430 F.3d 901, 903 (8th Cir. 2005) ("If the district court had made its determination of a likelihood of confusion following a bench trial, we would review it for clear error... Because the determination in this case was made at the summary judgment stage, however, we must conduct an independent analysis"); *Hornady Mfg. Co., Inc. v. Doubletap, Inc.*, 746 F.3d 995, 1008 (10th Cir. 2014) (affirming grant of summary judgment on likelihood of confusion on *de novo* review); *Dorpan, S.L. v. Hotel Melia, Inc.*, 728 F.3d 55, 64 (1st Cir. 2013) (grant of summary judgment concerning likelihood of confusion reviewed *de novo*); *Adidas Am. Inc. v. Calmese*, 489 Fed. Appx. 177 (9th Cir. 2012) (applying *de novo* standard to reviewing grant of summary judgment on likelihood of confusion); *Odom's Tennessee Pride Sausage, Inc. v. FF Acquisition, L.L.C.*, 600 F.3d 1343, 1345 (Fed. Cir. 2010) ("We review the board's decision to grant summary judgment *de novo*"); *Facenda v. N.F.L. Films, Inc.*, 542 F.3d 1007, 1024-25 (3d Cir. 2008) (same); *Board of Supervisors for Louisiana State University Agricultural and Mechanical College v. Smack Apparel Co.*, 550 F.3d 465, 474 (5th Cir. 2008) ("We review a district court's grant of summary judgment *de novo*"); *Welding Servs., Inc.*, 509 F.3d at 1361

(affirmed grant of summary judgment of no likelihood of confusion under *de novo* standard); *Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC*, 507 F.3d 252, 267 (4th Cir. 2007) (*de novo* review of summary judgment); *Stromback*, 384 F.3d at 292 (*de novo* standard of review applied to summary judgment); *CAE, Inc. v. Clean Air Engineering, Inc.*, 267 F.3d 660, 676 (7th Cir. 2001) (same); *Packman v. Chicago Tribune Co.*, 267 F.3d 628, 637 (7th Cir. 2001) (same); *Lucent Information Management, Inc. v. Lucent Technologies, Inc.*, 186 F.3d 311, 315 (3d Cir. 1999) ("We review the district court's order granting summary judgment *de novo*"); *Luigino's Inc. v. Stouffer Corp.*, 170 F.3d 827, 830 (8th Cir. 1999) (affirming summary judgment on likelihood of confusion following *de novo* review); *Resorts of Pinehurst, Inc. v. Resorts of Pinehurst Nat'l Corp.*, 148 F.3d 417, 420 (4th Cir. 1998) ("An appellate court reviews *de novo* the grant or denial of summary judgment…").

Petitioner suggests that, as a fact issue, balancing the likelihood of confusion factors should have been reviewed under the clearly erroneous standard. However, this argument ignores that there are no factual findings to review on summary judgment; there is merely the determination that there is no genuine issue of material fact that needs to be decided by the factfinder. Thus, the Sixth Circuit correctly reviewed the district court's summary judgment decision *de novo*, as every summary judgment decision must be reviewed.

Of course, in any event, Petitioner would not have been helped by a more deferential review of the district court's grant of summary judgment against

him. Clearly erroneous review of the district court's grant of summary judgment would not change the entry of judgment against Petitioner.

CONCLUSION

For all of the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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