

23-16060

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IN THE  
**United States Court of Appeals**  
FOR THE NINTH CIRCUIT

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LERNER & ROWE PC, an Arizona corporation,

*Plaintiff-Appellant,*

—v.—

BROWN ENGSTRAND & SHELY LLC, an Arizona corporation,  
DBA Accident Law Group; JOSEPH L. BROWN, an individual,

*Defendants-Appellees,*

—and—

DOES, 1-10, inclusive,

*Defendant.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

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**BRIEF FOR PLAINTIFF-APPELLANT**

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ANDREW M. GAGGIN  
LERNER & ROWE PC  
1100 North Wilmot Road  
Tucson, Arizona 85712  
(602) 977-1900

*Attorneys for Plaintiff-Appellant*

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## **DISCLOSURE STATEMENT**

Plaintiff-Appellant Lerner & Rowe PC (“Lerner & Rowe”) makes the following corporate disclosure in compliance with Federal Rule of Appellate Procedure 26.1:

Lerner & Rowe is a privately held corporation with no parent company. No publicly held corporation owns ten percent or more of its stock.

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## INTRODUCTION

Appellee-Defendant Brown Engstrand & Shely LLC, d/b/a The Accident Law Group, and Appellee-Defendant Joseph L. Brown (hereinafter collectively “Accident Law Group” or Defendants) have for a period of several years used, without authorization, Appellant-Plaintiff Lerner & Rowe’s protected trademarks as part of Accident Law Group’s internet advertising campaigns. Accident Law Group knowingly and intentionally used the Lerner & Rowe Marks as Google Ad keyword terms to mislead Lerner & Rowe’s existing and potential clients to Accident Law Group’s intake department. The result of this scheme has been source, affiliation, endorsement, and initial interest confusion among consumers specifically searching for Lerner & Rowe.

Accident Law Group’s own records show that Lerner & Rowe’s existing and prospective clients expressed confusion as to which firm they contacted. At a minimum, during the period at issue, 236 callers mentioned Lerner & Rowe by name to Accident Law Group’s intake department; Accident Law Group’s employees recorded that these consumers were “looking for” Lerner & Rowe, “calling for” Lerner & Rowe, that they “wanted” Lerner & Rowe, that they explicitly thought Accident Law Group was Lerner & Rowe, and that they reached Accident Law Group’s intake department via a Google or Internet search for Lerner & Rowe.

Despite the abundant evidence of actual confusion caused by Accident Law Group's illegal scheme of trademark infringement and unfair competition, the district court broke with Ninth Circuit precedent and held, as a matter of law, that Lerner & Rowe has no claim for trademark infringement. In doing so, the district court held that the 236 instances of callers who mentioned Lerner & Rowe by name to Accident Law Group's intake department constituted only *de minimis* confusion against the number of times Google showed the ads. The district court's ruling is contrary to established law in this Circuit regarding *de minimis* confusion, as well as a long line of decisions by this Court reversing summary judgment in trademark infringement cases, especially regarding the issue of likelihood of consumer confusion. See [\*JL Beverage Co., LLC v. Jim Beam Brands Co.\*, 828 F.3d 1098, 1105 \(9th Cir. 2016\)](#) ("Because the determination is based on a non-exhaustive, multi-factor, fact-intensive inquiry, [this Court has] cautioned against granting summary judgment in these cases.")

Accident Law Group's scheme is exactly the type of conduct courts have long recognized as supporting a claim for initial-interest confusion and unfair competition in search-engine cases. The district court's analysis of whether this scheme is permissible is contrary to the well-established, controlling case law. Following *de novo* review, this Court should reverse the district court's improper grant of summary judgment for Defendants and remand for further proceedings.

## **JURISDICTIONAL STATEMENT**

This is a trademark infringement case asserting a claim under the Lanham Act, 15 U.S.C. §§ 1114, 1117 and 1125, and Arizona law regarding Trademark Infringement, Unfair Competition, and Unjust Enrichment. The district court had jurisdiction over the federal claim pursuant to 28 U.S.C. § 1331 and supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367. Lerner & Rowe alleges Defendants have used Lerner & Rowe's registered marks as keywords for online search engine ads as part of a scheme to confuse consumers searching for Lerner & Rowe into instead calling Defendants by mistake.

## **ISSUES PRESENTED FOR REVIEW**

1. Did the district court err in holding that no reasonable jury, viewing the evidence and all inferences in Lerner & Rowe's favor, could find that Accident Law Group's use of Lerner & Rowe's protected trademarks as part of Accident Law Group's online advertising campaign created a likelihood of confusion, where Lerner & Rowe presented significant evidence that, (1) Lerner & Rowe's protected trademarks are commercially and conceptually strong; (2) Lerner & Rowe and Accident Law Group are direct competitors; (3) Lerner & Rowe and Accident Law Group use the same marketing channels; (4) Accident Law Group intentionally selected Lerner & Rowe's protected trademarks as Google Ad Keywords to target Lerner & Rowe's existing and potential customers; (5) the appearance of Accident Law Group's ads,

and their use of click-to-call ads, increased the likelihood of confusion among consumers searching for Lerner & Rowe; and (6) Accident Law Group's ads caused source, affiliation, and initial interest confusion among consumers specifically searching for Lerner & Rowe.

2. Did the district court err in holding that 236 documented instances of actual confusion are *de minimis* and not an appreciable amount of confusion.

3. Did the district court err in holding that no reasonable jury, viewing the evidence and all inferences in Lerner & Rowe's favor, could find that Accident Law Group's ads were anything other than "clearly labeled" with a "very low likelihood of confusion," where Lerner & Rowe presented evidence that (1) the ads are not segregated from the organic search results for Lerner & Rowe by any borders, bars, or shading; (2) the ads often appear above the results for Lerner & Rowe; (3) the ads are displayed in the same size, color, and style as the organic search results; (4) ads do not contain prominent text identifying the ads as belonging to Accident Law Group; (5) ads consist of generic terms that consumers could associate with any personal injury firm; (6) few ads contain a picture, or other visual signifier for Accident Law Group, and those ads that do contain a picture do not identify the person depicted; (7) Accident Law Group's conceptually weak trade name increases the likelihood of confusion among those searching for another firm by name; (8) the

use of click-to-call ads connect searchers to Accident Law Group's intake department rather than a clearly labeled website.

## **STATEMENT OF THE CASE**

### **I. Factual Background**

This appeal turns on whether Defendant-Appellees' use of Plaintiff-Appellant's marks to confuse consumers is actionable under the Lanham Act. Accident Law Group's scheme uses Lerner & Rowe's registered marks in keyword ads for Google searches made on desktop and mobile devices. Specifically, Accident Law Group uses Lerner & Rowe's Marks to manipulate search engine results and confuse consumers searching for Lerner & Rowe into instead calling Accident Law Group by mistake. This is especially true of Accident Law Group's "click-to-call" ads specifically targeted to mobile device users and Accident Law Group's vague ads with insufficient source identifiers.

The conduct at issue is not Accident Law Group's keyword bidding considered in a vacuum, but rather the effect of the keyword bidding in conjunction with the appearance and placement of Accident Law Group's advertisements, which are designed to confuse and misdirect consumers searching specifically for Lerner & Rowe and lure them into calling Accident Law Group by mistake.

**A. Lerner & Rowe is a well-known personal injury firm that advertises extensively to customers via its well-known trademarks.**

Lerner & Rowe, PC was established in 2005 by Glen Lerner and Kevin Rowe. (2-ER-463.) The firm provides legal services to injury victims throughout the state of Arizona and across the United States and has helped over 100,000 accident injury clients. (2-ER-463–464.) Lerner & Rowe has grown into one of the largest, most widely recognized and successful personal injury law firms in Arizona. Lerner & Rowe’s success is the result of years of hard work building a reputation for aggressively representing Arizona injury victims as well as the expense of significant effort and cost to build its reputation and name recognition throughout Arizona and the United States. (2-ER-464.)

Lerner & Rowe, PC owns Lerner & Rowe Law Group, which provides complimentary legal services to Lerner & Rowe Accident Attorneys, including criminal defense and bankruptcy. Lerner & Rowe, PC also operates Lerner & Rowe Gives Back, a nonprofit organization that has raised millions of dollars in secondary support for various philanthropic organizations. In 2022 alone, Lerner & Rowe Gives Back, in conjunction with Lerner & Rowe, raised and donated approximately \$1.7 Million. (2-ER-464.)

Since its founding, Lerner & Rowe has continuously used several trademarks to identify and promote the firm. Lerner & Rowe, PC and its owners and founders Glen Lerner and Kevin Rowe are the owner of all right, title, and interest in three



U.S. Federal trademark registrations implicated in this matter: “Lerner & Rowe” (No. 6059750); “Glen Lerner” (No. 4694934); and “Lerner & Rowe Gives Back LR” (No. 3977899). (Collectively, the “Lerner & Rowe Marks” or “Marks”). (2-ER-464–465; 2-ER-499–504). These trademarks are distinctive and serve to identify Lerner & Rowe to consumers. Lerner & Rowe has held long, continuous, exclusive use of the Marks, and has spent over \$100 million promoting and advertising its Marks in a variety of ways, including but not limited to, radio, television, various print publications, billboards, and other marketing materials. (2-ER-465; 2-ER-483–484.) Lerner & Rowe’s advertisements prominently incorporate the Marks and have enabled Lerner & Rowe to develop strong brand recognition in Arizona and nationwide. *Id.* As a result of Lerner & Rowe’s long use and promotion, the Marks have become distinctive to designate Lerner & Rowe and consumers widely recognize and associate the Marks with Lerner & Rowe. *Id.*

**B. Accident Law Group uses Lerner & Rowe’s Marks as part of a scheme, designed to confuse and deceive consumers searching specifically for Lerner & Rowe into calling Accident Law Group by mistake.**

Defendant-Appellee Brown Engstrand & Shely LLC, d/b/a Accident Law Group (also known as “ALG”) is a competitor to Lerner & Rowe, founded in 2015 by Defendant-Appellee Joseph L. Brown. Accident Law Group provides legal services to injury victims in Arizona and competes directly with Lerner & Rowe, providing similar services and using the same marketing channels. (2-ER-513).

Similar to Lerner & Rowe, Accident Law Group utilizes Google Ads (formerly known as Google Adwords) to drive web-traffic to their website and phone number. (2-ER-516–517.) However, as part of their online advertising campaign, Accident Law Group began purchasing Lerner & Rowe’s Marks as keywords in 2015 and continued to do so through at least May 2021. *Id.* As a result of this tactic (known as “conquesting”), Accident Law Group’s ads would prominently appear when potential clients searched for Lerner & Rowe by name. (3-ER-554–581.) Accident Law Group also targeted other competitor firms in a similar manner, but Lerner & Rowe was its main target. (3-ER-553; 5-ER-958.) Conversely, Lerner & Rowe has never targeted Accident Law Group or Joseph Brown with its ads. (2-ER-472; 2-ER-489–490.)

In addition to the placement of Accident Law Group’s ads, the nature of their ads further contributed to consumer confusion. Specifically, Accident Law Group’s ads: contained generic terms and phrases that customers could associate with any personal injury firm; insufficiently identified the ads as belonging to Accident Law Group; made no effort to compare or distinguish Accident Law Group from Lerner & Rowe; and utilized Google’s click-to-call ad feature, where ads prominently display a phone number, misleading customers to believe that calling that number will connect them with a representative of the firm they searched for (Lerner & Rowe). (3-ER-555; 3-ER-558–561; 3-ER-564–565.) Accident Law Group’s ad

campaign keyed to Lerner & Rowe's Marks was successful and effective. Defendants' ads caused significant, actual confusion among consumers searching for Lerner & Rowe and drove Lerner & Rowe's existing and potential clients to Accident Law Group's intake department. (3-ER-553; 5-ER-958-1204).

**C. Accident Law Group's ads caused substantial confusion among consumers searching for Lerner & Rowe's services.**

Accident Law Group's own records show that Lerner & Rowe's existing and prospective clients expressed confusion as to which firm (Lerner and Rowe or Accident Law Group) they had contacted. Specifically, 89 of Lerner & Rowe's existing or potential clients contacted Defendants and stated they were "looking for" Lerner & Rowe, "calling for" Lerner & Rowe, that they "wanted" Lerner & Rowe, or they stated explicitly that they thought Accident Law Group was Lerner & Rowe. (2-ER-451-453; 5-ER-959-1204). Another 87 existing or potential clients called Accident Law Group and stated the way they reached their intake department was via a Google or internet search for Lerner & Rowe. (2-ER-453; 5-ER-959-1204). Another 58 existing or potential clients mentioned Lerner & Rowe by name to Accident Law Group's intake department, but no additional context was recorded. (2-ER-453-454; 5-ER-959-1204). Accident Law Group's records indicate at least 236 instances of confusion and/or wrongful misdirection of Lerner & Rowe's existing and potential clients, many of whom became Accident Law Group's clients. (2-ER-451; 5-ER-959-1204).

Accident Law Group's records also evidence additional, however less extensive, confusion among Accident Law Group and its other competitors (not Lerner & Rowe) that Accident Law Group targeted with its Google Ad campaigns. Accident Law Group's records contain at least 123 instances of confusion and/or wrongful misdirection of their other competitors' existing and potential clients (in addition to Lerner & Rowe's existing and potential clients). (2-ER-455–456; 5-ER-959–1204). Despite the knowledge that their ads were causing confusion and wrongfully diverting customers searching for Lerner & Rowe (and other competitors), Accident Law Group declined to take simple steps that would have mitigated this confusion. (3-ER-554–581; 3-ER-599–605.) Instead, Accident Law Group intentionally engaged in a scheme to profit off of Lerner & Rowe's reputation and the strength of the Lerner & Rowe Marks.

## **II. Procedural History**

Lerner & Rowe filed its complaint against Defendants on September 9, 2021. (4-ER-922–940.) Defendants initially responded with a Motion to Join Google as a Party Under Rule 19 Pursuant to FRCP 12(b)(7), which was denied. (4-ER-906–917; 3-ER-782–786.) Defendants subsequently filed their Answer to the Complaint on April 4, 2022. (3-ER-773–781.)

Following bifurcated discovery as to liability only, the parties filed cross-motions for summary judgment as to Defendants' liability. On May 18, 2023, the

district court denied Plaintiff's Motion for Summary Judgment and granted partial summary judgment in favor of Defendants. (1-ER-93–115.) Defendants subsequently filed a Motion for Reconsideration, seeking summary judgment in full. On July 28, 2023, the district court granted Defendants' Motion for Reconsideration, granted summary judgment in full in favor of Defendants, and entered a final order. (1-ER-3–9.)

Lerner & Rowe initially appealed from the district court's grant of partial summary judgment in favor of Defendant, on June 19, 2023; this Court assigned Lerner & Rowe's initial appeal Case No. 23-15914. (1-ER-10.) On July 31, 2023, Lerner & Rowe filed an Amended Notice of Appeal that included the district court's final order; this Court assigned Lerner & Rowe's amended appeal Case No. 23-16060. (1-ER-2; 4-ER-941.) On September 11, 2023, this Court issued an Order, sua sponte consolidating cases 23-15914 and 21-16060 (Dkt. 10), then subsequently on September 29, 2023, in response to Lerner & Rowe's uncontested Motion to dismiss case voluntarily pursuant to FRAP 42(b), dismissed Case No. 23-15914 to allow this appeal to proceed as Case No. 23-16060. (Dkt. 11.) Lerner & Rowe's appeal seeks reversal of the district court's grant of Defendants' Motion for Summary Judgment, and vacatur of the judgment entered in Defendants' favor.

## SUMMARY OF THE ARGUMENT

Under Arizona and federal law, a trademark owner has the right to protect its marks from use by a competitor that confuses and deceives consumers. Lerner & Rowe commenced this suit to protect its marks from such a scheme. Accident Law Group's intentional use of Lerner & Rowe's registered Marks as part of their online advertising campaign was designed to confuse and deceive consumers specifically searching for Lerner & Rowe into mistakenly calling Accident Law Group instead.

Lerner & Rowe presented significant evidence supporting a finding of likelihood of confusion, evidencing infringement on Lerner & Rowe's protected trademarks. Among other things: (1) Lerner & Rowe's Marks are commercially and conceptually strong; (2) Lerner & Rowe and Accident Law Group are direct competitors; (3) Lerner & Rowe and Accident Law Group use the same marketing channels; (4) Accident Law Group intentionally selected Lerner & Rowe's protected trademarks as Google Ad Keywords to target Lerner & Rowe's existing and potential customers; (5) the nature and appearance of Accident Law Group's ads increased the likelihood of confusion among consumers searching for Lerner & Rowe; and (6) Accident Law Group's ads caused source, affiliation, and initial interest confusion among consumers specifically searching for Lerner & Rowe. Because a reasonable jury could find likelihood of confusion on this record, Lerner & Rowe is entitled to an opportunity to present its case at trial. In holding otherwise,

the district court improperly failed to credit evidence presented by Lerner & Rowe and failed to follow controlling Ninth Circuit law.

The following errors plainly warrant reversal:

- In holding that no reasonable jury could find that Accident Law Group’s use of the Lerner & Rowe Marks could result in a likelihood of confusion among consumers, the district court failed to properly credit the *Sleekcraft* factors that clearly favored Lerner & Rowe. [AMF Inc. v. Sleekcraft Boats, 599 F.2d 341, 348–49 \(9th Cir. 1979\)](#); [Network Automation, Inc. v. Advanced Sys. Concepts, Inc., 638 F.3d 1137, 1144 \(9th Cir. 2011\)](#).
- In holding that no reasonable jury could find that 236 documented instances of actual confusion are evidence a likelihood of confusion, the district court disregarded substantial evidence of actual confusion and ignored this Court’s binding authority that far fewer instances of actual confusion would weigh in favor of finding a likelihood of confusion. [Ironhawk Techs., Inc. v. Dropbox, Inc., 2 F.4th 1150, 1166 \(9th Cir. 2021\)](#).
- In holding that 236 documented instances of actual confusion are *de minimis* and not an appreciable amount of confusion, the district court substituted its own judgment for the jury’s regarding what constitutes an “appreciable” or “significant” number of confused consumers.

- In holding that no reasonable jury, viewing the evidence and all inferences in Lerner & Rowe’s favor, could find that Accident Law Group’s ads were anything other than “clearly labeled” with a “very low likelihood of confusion,” the district court failed to credit substantial evidence that Accident Law Group’s ads were not clearly labeled.
- In holding that no reasonable jury, viewing the evidence and all inferences in Lerner & Rowe’s favor, could find that Accident Law Group’s ads were anything other than “clearly labeled” with a “very low likelihood of confusion,” the district court substituted its own judgment for controlling precedent regarding the factors to be considered in determining “clear labeling.” [\*Multi Time Mach., Inc. v. Amazon.com, Inc.\*, 804 F.3d 930, 937–38 \(9th Cir. 2015\)](#).
- In holding that the typical consumer in this case, injured persons or their family members searching on Google for a personal injury attorney, are likely to exercise significant care and are not likely to be confused by Accident Law Group’s ads, the district court relied on its own speculation rather than evidence in the record and erred in failing to preserve that fact question for the jury.
- In holding that no reasonable jury could find that Accident Law Group’s use of the Lerner & Rowe Marks could result in a likelihood of confusion among



consumers, the district court failed to heed this Court’s admonition against granting summary judgment in trademark infringement cases requiring a non-exhaustive, multi-factor, fact-intensive inquiry. See [JL Beverage Co., LLC v. Jim Beam Brands Co.](#), 828 F.3d 1098, 1105 (9th Cir. 2016).

For these reasons, and as detailed further in this brief, the district court’s grant of summary judgment in favor of Accident Law Group must be reversed, and this case remanded for further proceedings. If adopted, the district court’s approach would severely erode the ability of trademark holders to protect against the misuse of their marks online.

### STANDARD OF REVIEW

“The decision to grant summary judgment in a trademark infringement claim is reviewed *de novo*, and all reasonable inferences are to be drawn in favor of the non-moving party.” [Multi Time Mach., Inc. v. Amazon.com, Inc.](#), 804 F.3d 930, 935 (9th Cir. 2015) citing [Surfvivor Media, Inc. v. Survivor Prods.](#), 406 F.3d 625, 630 (9th Cir. 2005). “Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whe[n] he is ruling on a motion for summary judgment. . . . The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.” [Anderson v. Liberty Lobby, Inc.](#), 477 U.S. 242, 255, 106 S. Ct. 2505, 2513, 91 L. Ed. 2d 202 (1986). This Court “must reverse summary judgment if genuine

issues of material fact remain such that [Accident Law Group] is not entitled to judgment as a matter of law.” [Interstellar Starship Servs., Ltd. v. Epix Inc.](#), 184 F.3d 1107, 1109 (9th Cir. 1999).

## ARGUMENT

### **I. The district court erred in ruling that no reasonable jury could find that Accident Law Group’s use of the Lerner & Rowe Marks could result in a likelihood of confusion among consumers.**

“This appeal turns in large part on whether the district court correctly applied the standard for deciding a motion for summary judgment.” [JL Beverage Co.](#), 828 F.3d at 1104. While the district court is expected to apply the correct standard in any case, the necessity to do so is heightened in cases turning on the likelihood of consumer confusion. Because the determination is based on a non-exhaustive, multi-factor, fact-intensive inquiry, the Ninth Circuit has cautioned against granting summary judgment in these cases.” [Id.](#), at 1105. (internal citations omitted).<sup>1</sup> The

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<sup>1</sup> See also, [Marketquest Grp., Inc. v. BIC Corp.](#), 862 F.3d 927, 935 (9th Cir. 2017) (reversing grant of summary judgment on trademark infringement claim); [JL Beverage Co.](#), 828 F.3d at 1112 (same); [Rearden LLC v. Rearden Com., Inc.](#), 683 F.3d 1190, 1219 (9th Cir. 2012) (same); [Fortune Dynamic, Inc. v. Victoria's Secret Stores Brand Mgmt., Inc.](#), 618 F.3d 1025, 1039 (9th Cir. 2010) (same); [Jada Toys, Inc. v. Mattel, Inc.](#), 518 F.3d 628, 634 (9th Cir. 2008) (same); [KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.](#), 408 F.3d 596, 608 (9th Cir. 2005) (same); [Thane Int'l, Inc. v. Trek Bicycle Corp.](#), 305 F.3d 894, 904 (9th Cir. 2002) (same); [Interstellar Starship Servs., Ltd. v. Epix Inc.](#), 184 F.3d 1107, 1112 (9th Cir. 1999) (same); [Dreamwerks Prod. Grp., Inc. v. SKG Studio](#), 142 F.3d 1127, 1132 (9th Cir. 1998) (same); see also 6 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 32:120 (5th ed. June 2020) (The Ninth Circuit “has been the most negative of all the

present case is not the rare outlier where no reasonably jury could find a likelihood of confusion. Rather, as this Court has repeatedly held, the district court should have let the jury assess and weigh the relevant, fact-intensive factors at trial.

To establish liability for trademark infringement under the Lanham Act, Lerner & Rowe must show: (1) it has a protectible ownership interest in the mark, and (2) defendant's use of the mark is likely to cause consumer confusion. [\*Network Automation\*, 638 F.3d 1137, 1144 \(9th Cir. 2011\)](#); 15 U.S.C.A. § 1114, 1125. There is no dispute Accident Law Group has used Lerner & Rowe's protected, federally registered marks. (2-ER-464–465; 2-ER-499–504); [15 U.S.C. § 1057\(b\)](#); [\*ReBath LLC v. Foothills Serv. Sols. Co.\*, No. CV-21-00870-PHX-DWL, 2021 WL 2352426, at \\*9 \(D. Ariz. June 9, 2021\)](#). Regarding the likelihood of confusion, the Ninth Circuit employs an eight-factor test known as the *Sleekcraft* factors; those factors are (1) strength of the mark; (2) proximity of the goods; (3) similarity of the marks; (4) evidence of actual confusion; (5) marketing channels used; (6) type of goods and the degree of care likely to be exercised by the purchaser; (7) defendant's intent in selecting the mark; and (8) likelihood of expansion of the product lines. [\*Network\*](#)

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circuits about summary dismissal of a trademark infringement case.”). Such reversals are so uncontroversial that this Court often reverses without a published opinion. See, e.g., [\*Moldex-Metric, Inc. v. McKeon Prod., Inc.\*, 596 F. App'x 567, 568 \(9th Cir. 2015\)](#); [\*His & Her Corp. v. Shake-N-Go Fashion, Inc.\*, 572 F. App'x 517, 518 \(9th Cir. 2014\)](#).

Automation, 638 F.3d at 1145 (citing Sleekcraft, 599 F.2d 341, 348–49 (9th Cir. 1979)).

This Court in *Network Automation* held that the most relevant *Sleekcraft* factors for a trademark infringement claim where, as here, one competitor uses another’s trademark as a search engine keyword to trigger the competitor’s own product advertisement, are: (1) the strength of the mark, (2) the evidence of actual confusion, (3) the type of goods and degree of care likely to be exercised by the purchaser, and (4) the labeling and appearance of the advertisements and the surrounding context on the screen displaying the results page. 638 F.3d at 1154. This Court expanded upon its reasoning regarding the labeling and appearance of the advertisements, and their context, in Multi Time Mach., Inc. v. Amazon.com, Inc., 804 F.3d 930, (9th Cir. 2015). In *Multi Time Machine*, this Court held that there is no likelihood of confusion where each product is “clearly labeled with the product’s name and manufacturer in large, bright, bold letters and includes a photograph of the item,” and (because Amazon was responding to a customer’s inquiry about a brand it did not carry by doing no more than offering the brands it did carry) the marks at issue did not appear among the search results. Id., at 938. As discussed below, the relevant factors under any Ninth Circuit test weigh in favor of a finding that Accident Law Group’s unauthorized use of Lerner

& Rowe's Marks is likely to cause consumer confusion. The district court clearly erred in reaching the opposite conclusion.

The *Network Automation* factors weigh in Lerner & Rowe's favor: (1) Lerner & Rowe's Marks are conceptually and commercially strong; (2) there is substantial evidence of actual confusion caused by Accident Law Group's ads keyed to Lerner & Rowe's Marks; (3) consumers lacking experience or sophistication in the field are confronted with Accident Law Group's advertisements when searching for Lerner & Rowe; and (4) the labeling, appearance, and nature of Accident Law Group's ads contribute to consumer confusion as they are not clearly distinguished from the results for a consumer's search for Lerner & Rowe.

The remaining *Sleekcraft* factors further weigh in Lerner & Rowe's favor: (1) the parties directly compete; (2) the parties use the same marketing channels; and (3) Accident Law Group intentionally used Lerner & Rowe's Marks to confuse and mislead Lerner & Rowe's existing and potential customers.

The additional guidance from *Multi Time Machine* regarding clear labeling and the context of the ads also weighs in Lerner & Rowe's favor: (1) Accident Law Group's ads do not highlight their name in large, bright, bold lettering; (2) few ads contain a picture, or other visual signifier for Accident Law Group, and those ads that do contain a picture do not identify the person depicted; and (3) Accident Law Group's ads are not segregated from the search results for Lerner & Rowe and often

appear above the results for Lerner & Rowe. It was clear error for the district court to conclude that no reasonable jury could find a likelihood of confusion based on the above.

Perhaps most egregiously, the district court erred in discounting Lerner & Rowe's evidence of substantial actual confusion caused by Accident Law Group's ads. Whereas this factor should have weighed unequivocally in Lerner & Rowe's favor, the district court incorrectly reasoned that "[e]ven if all 236 calls are considered evidence of actual confusion, the Court finds it de minimis." (1-ER-4; 1-ER-102.) Despite recent precedent in this Circuit that as few as one or two or three instances of actual confusion among potential customers are sufficient evidence for a reasonable jury to rely on when assessing a likelihood of confusion, the district court held that hundreds of instances of confusion were not appreciable. (1-ER-103-104); see e.g. [Ironhawk Techs., Inc. v. Dropbox, Inc.](#), 2 F.4th 1150, 1166 (9th Cir. 2021); [Stone Creek, Inc. v. Omnia Italian Design, Inc.](#), 875 F.3d 426, 433 (9th Cir. 2017); [S. California Darts Ass'n v. Zaffina](#), 762 F.3d 921, 930 (9th Cir. 2014). Upholding the district court's erroneous conclusion, and its ruling that Accident Law Group's scheme of using Lerner & Rowe's trademarks as keywords in their online ad campaign as permissible as a matter of law, would significantly diminish a trademark owner's rights to the use of its brand online and improperly stymie the owner's ability to protect consumers from these types of online schemes.

**A. Lerner & Rowe's Marks are distinctive and strong.**

The district court recognized, and Accident Law Group does not dispute, that Lerner & Rowe has a strong brand and strong trademarks. (1-ER-97–99.) “The scope of the trademark protection that [courts] give marks depends upon the strength of the mark, with stronger marks receiving greater protection than weak ones.” [\*Entrepreneur Media, Inc. v. Smith\*, 279 F.3d 1135, 1141 \(9th Cir. 2002\)](#); see also [\*Brookfield Commc'ns, Inc. v. W. Coast Ent. Corp.\*, 174 F.3d 1036, 1058 \(9th Cir. 1999\)](#). Lerner & Rowe's federally registered Marks are indeed strong, having acquired distinctiveness through secondary meaning after use in commerce for two decades in association with one of the largest personal injury law firms in Arizona, and the investment of over \$100 million in marketing. (2-ER-465; 2-ER-483–484); [\*Accuride Int'l, Inc. v. Accuride Corp.\*, 871 F.2d 1531, 1536 \(9th Cir. 1989\)](#) (Evidence of “extensive advertising, length of exclusive use, and uniqueness” may strengthen a mark); [\*Fortune Dynamic, Inc. v. Victoria's Secret Stores Brand Mgmt., Inc.\*, 618 F.3d 1025, 1034 \(9th Cir. 2010\)](#) (the commercial strength of a mark relates to “actual marketplace recognition.”).

Moreover, in a keyword case, the strength of a mark is probative of confusion. Because the Lerner & Rowe Marks are strong, “consumers searching for [Lerner & Rowe] are presumably looking for its specific [services], and not a category of [services].” [\*Network Automation\*, 638 F.3d at 1149](#). Consumers “therefore could

[have been] more susceptible to confusion when sponsored links appear[ed] that advertise[d]” Accident Law Group’s similar personal injury litigation services. *Id.*; see also (1-ER-98–99.) Accident Law Group’ use of Lerner & Rowe’s strong marks as search terms is strong evidence of a likelihood of confusion and this factor favors Lerner & Rowe.

**B. The confusion caused by Defendants’ ads is substantial and weighs strongly in favor of finding infringement.**

There is widespread recognition, in this Circuit and others, that “there can be no more positive or substantial proof of the likelihood of confusion than proof of actual confusion,” and “while very little proof of actual confusion would be necessary to prove the likelihood of confusion, an almost overwhelming amount of proof would be necessary to refute such proof.” *LHO Chicago River, L.L.C. v. Rosemoor Suites, LLC*, 988 F.3d 962, 968 (7th Cir. 2021); see also *Wreal, LLC v. Amazon.com, Inc.*, 38 F.4th 114, 139 (11th Cir. 2022); *Savin Corp. v. Savin Grp.*, 391 F.3d 439, 459 (2d Cir. 2004); *Country Floors, Inc. v. P'ship Composed of Gepner & Ford*, 930 F.2d 1056, 1064 (3d Cir. 1991). Indeed, this Court recently held that “[a] showing of actual confusion among significant numbers of consumers provides strong support for the likelihood of confusion.” *Multi Time Mach.*, 804 F.3d at 939, citing *Playboy Enterprises, Inc. v. Netscape Commc'ns Corp.*, 354 F.3d 1020, 1026 (9th Cir. 2004) (noting that a strong showing by the plaintiff in regard to this factor alone can reverse a grant of summary judgment); see also *Sleekcraft*, 599 F.2d



at 352, (“Evidence that use of the marks has already led to confusion is persuasive proof that future confusion is likely.”). The district court, therefore, clearly erred in failing to credit the evidence of actual confusion in this case in favor of Lerner & Rowe.

**i. Lerner & Rowe has proffered substantial evidence of actual confusion.**

The record is replete with evidence of actual confusion. Accident Law Group’s business records reflect pervasive consumer confusion as to source and affiliation – callers expressed confusion as to whether Accident Law Group is or is affiliated with Lerner & Rowe – as well as initial interest confusion – customers searched for Lerner & Rowe by name and but reached Accident Law Group’s intake department instead.

Accident Law Group’s call logs reveal that 30 of Lerner & Rowe’s existing or potential clients contacted Accident Law Group and stated explicitly that they thought Accident Law Group was Lerner & Rowe; another 21 existing or potential clients contacted Accident Law Group and stated they were “looking for” Lerner & Rowe; another 18 contacted Accident Law Group and stated they were “calling for” Lerner & Rowe; another 15 contacted Accident Law Group and stated they “wanted” Lerner & Rowe; another 5 contacted Accident Law Group and stated they were referred to Lerner & Rowe; another 47 contacted Accident Law Group and stated the way they reached them was via a Google search for Lerner & Rowe; another 40

contacted Accident Law Group and stated the way they reached them was via an internet search for Lerner & Rowe; another 25 mentioned Lerner & Rowe's commercials to Accident Law Group's intake department when asked "how did you find us?"; and another 34 existing or potential clients mentioned Lerner & Rowe by name to Accident Law Group's intake department but no additional context was recorded. (2-ER-451–454; 5-ER-959–1204). Based on the unambiguous law in this Circuit, the district court clearly erred in concluding that those documented instances of actual confusion not only did not weigh in favor of Lerner & Rowe, but instead weighed in favor of Accident Law Group.

**ii. Lerner & Rowe's evidence of actual confusion is more than sufficient to show a likelihood of confusion.**

It is well established in this Circuit that even a few instances of actual confusion are sufficient to create a genuine issue of fact to be weighed by a jury. In *Ironhawk Techs., Inc. v. Dropbox, Inc.*, this Court reversed a summary judgment ruling in favor of the defendant, holding that two witnesses, testifying that unidentified customers made uncorroborated statements of confusion, constituted appreciable evidence of actual confusion for a reasonable jury to rely on when assessing a likelihood of confusion under the totality of the circumstances. [2 F.4th 1150, 1166 \(9th Cir. 2021\)](#). In *Stone Creek, Inc. v. Omnia Italian Design, Inc.*, this Court reversed a finding of no likelihood of confusion, finding defendant liable for infringement, holding that "several instances of actual confusion ... cannot be

dismissed out of hand but must be considered in context and in light of the other evidence of likelihood of confusion. [875 F.3d 426, 433 \(9th Cir. 2017\)](#), citing [Daddy's Junky Music Stores, Inc. v. Big Daddy's Fam. Music Ctr., 109 F.3d 275, 284 \(6th Cir. 1997\)](#) (explaining that one instance of actual confusion “favors plaintiff at least to some extent”). In *JL Beverage Co., LLC v. Jim Beam Brands Co.*, this Court reversed a summary judgment ruling in favor of defendants where plaintiff offered only several individual instances of actual confusion (of debatable reliability and admissibility). [828 F.3d 1098, 1111 \(9th Cir. 2016\)](#). In *S. California Darts Ass'n v. Zaffina*, this Court affirmed summary judgment in favor of plaintiff where only one customer was confused as to whether plaintiff or defendant controlled the business at issue. [762 F.3d 921, 930 \(9th Cir. 2014\)](#). In that case, this Court affirmed the district court’s analysis of the *Sleekcraft* factors finding a likelihood of confusion based on, inter alia, the parties’ identical services and use overlapping channels for marketing and advertising, that defendant intentionally selected the marks to capitalize on plaintiff’s reputation, and that at least one third party had actually been confused by defendant’s use of the contested marks. *Id.* In *Rearden LLC v. Rearden Com., Inc.*, this Court reversed summary judgment in favor of defendants, finding a genuine issue of material fact with respect to the evidence of actual confusion factor, where the record contained two incidents that

“involve actual confusion on the part of a member of the relevant consuming public.” [683 F.3d 1190, 1217 \(9th Cir. 2012\)](#).

Recent authority from the District of Arizona supports the same conclusion, that even a few instances of documented actual confusion, let alone hundreds, should weigh in favor of the trademark holder. The court *State 48 Recycling Inc. v. Janes* held that “several customers” were confused by defendants’ use of the marks, weighed this factor in plaintiff’s favor, and granted plaintiff’s request for a preliminary injunction. [No. CV-22-00767-PHX-GMS, 2022 WL 1689414, at \\*6 \(D. Ariz. May 26, 2022\)](#). The court in *AAA Alarm & Sec. Inc. v. A3 Smart Home LP*, credited “several” instances of misdirected communications and one customer evaluation posted on the web concerning plaintiff that was actually intended for defendants as sufficient evidence to show that that actual confusion in the future is likely. [No. CV-21-00321-PHX-GMS, 2021 WL 3857417, at \\*6 \(D. Ariz. Aug. 30, 2021\)](#). In *Trident Inv. Partners Inc. v. Evans*, the Court held that two instances of actual confusion were sufficient to establish a likelihood of confusion in the default-judgment context. [No. CV-20-01848-PHX-DWL, 2021 WL 75826, at \\*7 \(D. Ariz. Jan. 8, 2021\)](#). Additionally, in *DeBell Windows Sys., Inc. v. Dabella Exteriors, LLC*, the court granted a preliminary injunction, weighing this factor in plaintiff’s favor based on four instances of actual confusion. [No. 320CV00420MMDWGC, 2020 WL 5632958, at \\*10 \(D. Nev. Sept. 21, 2020\)](#).

Other Circuits are in accord. In *AWGI, LLC v. Atlas Trucking Co., LLC*, the Sixth Circuit affirmed summary judgment in favor of plaintiff, affirming the lower court's determination that the factor weighed in favor of plaintiff where there were five instances of actual confusion. [998 F.3d 258, 267 \(6th Cir. 2021\)](#). In *Reply All Corp. v. Gimlet Media, LLC*, the Second Circuit weighed the factor as neutral where plaintiff offered two instances of actual confusion. [843 F. App'x 392, 398 \(2d Cir. 2021\)](#). In *Rosetta Stone Ltd. v. Google, Inc.*, the Fourth Circuit vacated the judgment for defendant based on 262 complaints to their customer care center expressing confusion, weighed against over 100,000 ad impressions. [676 F.3d 144, 158 \(4th Cir. 2012\)](#).

The above cases are easily contrasted with the rare instances in which this Court has affirmed judgment in favor of defendants; in each of those rare instances the plaintiff offered no evidence of actual confusion. See [Lodestar Anstalt v. Bacardi & Co. Ltd.](#), [31 F.4th 1228, 1261 \(9th Cir.\)](#), *cert. denied sub nom. Anstalt v. Bacardi & Co. Ltd.*, 143 S. Ct. 428, 214 L. Ed. 2d 235 (2022) (plaintiff “presented no evidence of actual confusion” among consumers of its products); [Multi Time Mach.](#), [804 F.3d at 933](#) (“here, there is no evidence of actual confusion”); [Falcon Stainless, Inc. v. Rino Companies, Inc.](#), [572 F. App'x 483, 486 \(9th Cir. 2014\)](#) (“there was no evidence of actual confusion”); [Tokidoki, LLC v. Fortune Dynamic, Inc.](#), [473 F. App'x 522, 524 \(9th Cir. 2011\)](#) (“there was no evidence of actual confusion.”).

Given that Lerner & Rowe has proffered substantial evidence of actual confusion, far more than the few examples this Circuit and others have recognized as a threshold sufficient to survive summary judgment, the district court's failure to credit these examples of confusion as weighing in favor of Lerner & Rowe constitutes clear error.

**iii. Lerner & Rowe's evidence of actual confusion represents the minimum of confusion caused by Defendants' ads.**

Furthermore, Accident Law Group's records reflect a *minimum* of the confusion actually caused, as "[t]he law recognizes that random instance of confusion often go unreported or unrecorded," and "[o]thers who were confused and later learned of their deception will often not bother to report the fact. § 23:12. *Proof of actual confusion is not necessary*, 4 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 23:12 (5th ed.). The district court erred in failing to credit this point, in spite of recent precedent that should have guided its analysis:

Dansons notes that Traeger Grills only proffers evidence that six different people, representing less than one-tenth of one percent of the total number of people who viewed the relevant social media posts, commented on them expressing what could be interpreted as confusion regarding the relationship between Dansons and Traeger Grills. Dansons' argument is unavailing. **Though only a minor percentage of the total number of people who viewed the posts went on to comment about their confusion, it does not follow that only a minor percentage of the audience was confused.** On the contrary, it is possible that individuals were so confused by the posts that they assumed an affiliation between Traeger Grills and Dansons and found no need to clarify their relationship.

*Traeger Pellet Grills, LLC v. Dansons US, LLC*, 421 F. Supp. 3d 876, 883–84 (D. Ariz. 2019) (emphasis added) (citations omitted). The court in *Traeger* found, at the preliminary injunction stage, that the trademark holder showed likelihood of success on the merits of its trademark infringement claim because the trademark holder established likelihood of confusion based on “various examples of actual confusion,” a strong mark, parties who were direct competitors, use of identical marks, use of identical marketing channels in which goods were sold to same class of purchasers, and the alleged infringer adopting the mark with exhibited intent to capitalize on trademark holder’s goodwill. *Id.*, at 882–85. Here, the district court assessed the same factors – Lerner & Rowe’s strong mark, the documented evidence of actual confusion, the parties being direct competitors and using the same marketing channels, and Accident Law Group intentionally using the Lerner & Rowe Marks and capitalizing on the associated goodwill – and not only reached the opposite conclusion from the *Traeger* court, but also went further to say that *no reasonable jury* could find a likelihood of confusion caused by Accident Law Group’s ads. (1-ER-111.)

Moreover, in comparing the number of confused calls recorded by Accident Law Group’s intake department against the total number of times Google ran Accident Law Group’s ads to support its conclusion of *de minimis* confusion, the district court completely ignored *Traeger*’s precedent that, “[t]hough only a minor

percentage of the total number of people who viewed the posts went on to comment about their confusion, it does not follow that only a minor percentage of the audience was confused.” [Id., at 884](#). The district court also acknowledged that the Ninth Circuit has never explicitly defined what it means by an “appreciable” or “significant” number of confused consumers, but then substituted its own judgment for the jury’s and concluded, without citing any authority in support, that 236 instances of confusion were merely a few “isolated instances” insufficient to show an “appreciable” or “significant” amount of consumer confusion. (1-ER-103–104.) The district court’s conclusion regarding *de minimis* confusion is the result of clear error and must be reversed. The factor regarding evidence of actual confusion weighs strongly in Lerner & Rowe’s favor.

**C. The appearance of Defendants’ ads, and the context on the screen weighs in favor of a likelihood of confusion.**

This Court in *Network Automation* shifted the focus of one of the traditional *Sleekcraft* factors – the similarity of the marks – in the keyword advertising context to instead assess “what the consumer saw on the screen and reasonably believed, given the context.” [Network Automation, 638 F.3d at 1153](#). In *Network Automation*, this Court took into consideration that “Google and Bing have partitioned their search results pages so that the advertisements appear in separately labeled sections for ‘sponsored’ links,” highlighted the importance of “clearly segregating the sponsored advertisements from the objective results,” and looked to the appearance



of the ads as a whole, beyond merely the text of the ad. [\*Id.\*, at 1154.](#); see also [\*Playboy Enterprises\*, 354 F.3d at 1030.](#)

This Court then expanded its analysis of the appearance and context of how search results and ads are displayed in *Multi Time Machine*. In that case, this Court explained in detail<sup>2</sup> the reasons supporting its conclusion that Amazon’s displayed results were “clearly labeled.” Each part of Amazon’s page – the search bar, the breadcrumb, the “Related Searches” bar and text, and the other product listings – is clearly segregated by text of different size and color and by bars and borders of different colors. [\*Multi Time Mach.\*, 804 F.3d at 933.](#) This Court specifically drew attention to the fact that “[t]he gray bar separates the product listings from the “breadcrumb” and the “Related Searches” field.” [\*Id.\* at 934.](#) Among the “Related Searches” entries, each of the products for sale is labeled in large font by brand name and model number and accompanied by a photograph of the item. [\*Id.\*](#)

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<sup>2</sup> Consumers who searched on Amazon.com for the term “mtm special ops” were directed to a results page that displayed the searched-for term (in both the search query box at the top of the page and again directly below, in a “breadcrumb” which displays the original query in quotation marks to provide a trail for the consumer to follow back to the original search) and then, directly below, a “Related Searches” field, which provides the consumer with alternative search queries in case the consumer is dissatisfied with the results of the original search. Directly below the “Related Searches” field is a gray bar containing text (e.g., “Showing 10 Results”), and then directly below the gray bar, the other related product listings. [\*Multi Time Mach.\*, 804 F.3d at 933–34.](#) “MTM watches are not listed on the page for the simple reason that neither Amazon nor MTM sells MTM watches on Amazon.” [\*Id.\*, at 934.](#)

**i. Defendants’ ads are not clearly labeled.**

Notably, none of the elements that this Court cited in *Network Automation Multi Time Machine* as the basis “clear labeling” are present in this case:

- Accident Law Group’s ads are not segregated from the organic search results for Lerner & Rowe by any borders, bars, or shading; (3-ER-554–581.)
- Accident Law Group’s ads appear *above* the organic search results for Lerner & Rowe’s name, as opposed to below the “breadcrumb” (the only other place where the searched-for mark is displayed) and the “Related Searches” bar; *Id.*
- There is no clear text identifying Accident Law Group’s ads as “Related Results;” *Id.*
- Accident Law Group’s ads are displayed in the same size, color, and style as the organic search results for Lerner & Rowe: small black font URL, large blue font hyperlink text (that may or may not identify the source of the advertisement), small black font text containing various text; *Id.*
- Few of Accident Law Group’s ads contain a picture, and those that do contain one do not identify the person in the photo. *Id.* Joseph Brown, who’s headshot sometimes appears accompanying Accident Law Group’s ads, testified that Accident Law Group’s marketing efforts are not focused on distinguishing Accident Law Group’s based on Brown’s appearance. (2-ER-515; “If you

look at the billboards you never find my face ... I'm not as arrogant as most of the lawyers. I don't need to be recognized on the street.”).

In numerous instances, the only feature of Accident Law Group’s ads that informs the searcher of the source of the advertisement is Accident Law Group’s URL, which appears in the smallest font size and is not even an active hyperlink. (3-ER-554–581.) Other Accident Law Group ads employ the “click-to-call” feature and exacerbate consumer confusion by connecting mobile searchers telephonically to Accident Law Group’s intake department rather than to a clearly labeled website. (3-ER-555; 3-ER-558–561; 3-ER-564–565.) The confusing nature of the ads themselves are in addition to Defendants’ conceptually weak, chameleon-like trade name, “Accident Law Group,” which lacks the distinctive qualities that would alert an unfamiliar searcher that it is a separate business, unaffiliated with the firm that they searched for by name.<sup>3</sup> (3-ER-599–605.)

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<sup>3</sup> Each of the competitor watch brands displayed under Amazon’s “Related Searches” section – “Luminox, Chase–Durer, TAWATEC, and Modus” – are, like “Lerner & Rowe,” distinctive and suggestive, and their conceptual strength entitles them to greater trademark protection than a mark, like “Accident Law Group,” that is merely descriptive. [Multi Time Mach., 804 F.3d at 933.](#); [Entrepreneur Media, Inc., 279 F.3d at 1141.](#)

**ii. Defendants’ trade name contributes to the confusion caused by their ads.**

Where a trade name or brand name is generic or merely descriptive, it does not function as a designation of source, and its advertisements keyed to competitors’ trademarks should expressly distinguish the advertiser from the trademark owner. *See Brookfield*, 174 F.3d at 1066; *Playboy Enterprises*, 354 F.3d at 1030. Accident Law Group’s ads keyed to Lerner & Rowe’s Marks lack such distinguishing features. For example, they do not contain disclaimers that Accident Law Group is not affiliated with their targeted competitors, or words or symbols (such as TM, SM, or ®) that would alert a viewer that “Accident Law Group” is a separate, distinct brand, rather than a unit of Lerner & Rowe or an entity related to Lerner & Rowe. (3-ER-554–581; 3-ER-599–605.) Because none of those visually distinctive characteristics are present in Accident Law Group’s ads keyed to Lerner & Rowe’s Marks, it cannot be said that Accident Law Group’s ads are “clearly labeled.” *See Multi Time Mach.*, 804 F.3d at 939. Instead, searchers are more likely to be confused as to whether Lerner & Rowe, the firm they searched for, has endorsed, or is affiliated with, the ad for Accident Law Group presented to them ahead of the organic search results. *Id.*; (2-ER-491; 2-ER-492.)

The Fifth Circuit recently addressed a similar case, where a personal injury firm in Texas sued a competitor using a similarly generic trade name. In *Jim S. Adler, P.C. v. McNeil Consultants, L.L.C.*, 10 F.4th 422 (5th Cir. 2021), plaintiffs brought

suit for trademark infringement against a lawyer-referral website and call center owned by defendants doing business as “Accident Injury Legal Center.” The facts and issues in *Adler* are strikingly similar to the present matter: Adler spends significant amounts of money marketing his law practice and has consistently used several trademarks in his advertisements; defendants purchased Google keyword ads for the Adler marks, ensuring that an advertisement for Accident Injury Legal Center appeared when a user performed a Google search using an Adler mark as a search term; Accident Injury Legal Center’s advertisements are designed to display generic terms that consumers might associate with any personal injury firm; and their “click-to-call” advertisements cause the user’s phone to make a call rather than visit a website. [Id. at 425](#). The Fifth Circuit held that the generic nature of Accident Injury Legal Center’s ads was relevant because “it enhances rather than dispels the likelihood of initial interest confusion.” [Id. at 429](#).

Accident Law Group’s ads, like Accident Injury Legal Center’s ads, use generic text and a generic name to contribute to consumer confusion rather than distinguish itself from its competitors. There is a triable issue as to whether the appearance of Accident Law Group’s online advertisements and their surrounding context would cause an ordinary consumer to erroneously conclude that there is an association between Accident Law Group and Lerner & Rowe, and the district court erred in holding otherwise.

**iii. Google has changed the display of search results to make ads appear more like organic results.**

In the years since *Network Automation* and *Multi Time Machine* were decided, Google has repeatedly changed both its page layout and how it identifies paid advertisements. Google once had but removed the contrasting background shades of ads, removed borders around ads, removed the separate columns for ads and organic results, matched the color of ads to organic results, and added small logos for ads and “favicons” for organic results that are visually similar and located in the same place. (3-ER-650–718.) Each of these changes hinders a Google users’ ability to discern what is a paid ad and increases the likelihood of consumer confusion. Even the savviest Google user must constantly learn and relearn how to distinguish between ads and organic results. *Id.*

Additionally, internet searchers have been conditioned to assume the higher results by order are more germane to their search and expect that searching for a specific attorney by name will result in that attorney’s information being displayed at the top of the list of search results. [\*Network Automation\*, 638 F.3d at 1149–50](#); (2-ER-491; 2-ER-492.) Links down the screen or beyond the first page are essentially invisible without time and related search costs being incurred by the user and, thus, are often not viewed. This fact is why businesses are willing to pay more for the virtual real estate at the top of the list. See Daniel Gervais, Martin L. Holmes, Paul W. Kruse, Glenn Perdue, Caprice Roberts, *Is Profiting from the Online Use of*

*Another's Property Unjust? The Use of Brand Names As Paid Search Keywords*, 53 IDEA: The Intellectual Property Law Review 131, 135 (2013); see also [Rosetta Stone](#), 676 F.3d at 150–51 (advertisements, while topping the list of search results, are not based solely on a relevancy algorithm, but rather on keywords purchased by the highest-bidding advertiser).

Not only must the consumer scroll past unsolicited results in order to even find the desired one, but they may also alternatively assume based on the prominence of the results that the advertising firm is affiliated with the searched-for firm, or that an ambiguous website link or phone number in the top result spot will connect them to their desired attorney when it actually connects them to the advertiser. (2-ER-491; 2-ER-492.) This confusion as to affiliation is of particular concern here because Defendants, Brown Engstrand & Shely LLC and Joseph L. Brown, advertise under a chameleon brand. “Accident Law Group” as a trade name is generic, or at most descriptive and is therefore more easily confuses a searcher into believing they are affiliated with another firm, *especially* a firm like Lerner & Rowe that has a related entity with a similar name that predates Accident Law Group by several years, Lerner & Rowe Law Group. (3-ER-599–605.)

**D. Whether the typical consumer is likely to be confused is a fact-question properly addressed by a jury.**

In the absence of facts to the contrary, the consumer in a likelihood-of-confusion analysis is “the typical buyer exercising ordinary caution.” [Network](#)

[Automation](#), 638 F.3d at 1152. The Court should only apply a higher standard only if the buyer “has expertise in the field” or “when the goods are expensive.” *Id.* In this case, the typical consumer does not have expertise in the legal field, and the services offered by both Lerner & Rowe and Accident Law Group are not expensive; both parties advertise their legal services on a contingency basis with no cost up front to the client. (2-ER-522.) Therefore, no heightened standard of consumer sophistication is warranted here.

There is no evidence in the record that the consumers who search for and hire a personal injury attorney via a Google search are so sophisticated or careful as to avoid confusion. To the contrary, both parties acknowledge that most of their clients have little or no experience with the legal field, have no previous experience hiring an attorney, and are often calling a personal injury attorney for the first time following an accident where they, or a family member, suffered and injury. (2-ER-477–478; 2-ER-528–529; 3-ER-601–602.) The Supreme Court has repeatedly acknowledged the interest in protecting this class of customer, “unsophisticated, injured, or distressed lay person[s]” whose “very plight” makes them “more vulnerable to influence” from deceptive forms of attorney advertising. See, e.g., [Ohralik v. Ohio State Bar Ass'n](#), 436 U.S. 447, 465, 98 S. Ct. 1912, 1923, 56 L. Ed. 2d 444 (1978), accord [Fla. Bar v. Went For It, Inc.](#), 515 U.S. 618, 625, 115 S. Ct. 2371, 2376, 132 L. Ed. 2d 541 (1995) (crediting petitioner's argument concerning



the “special vulnerability” of “victims or their families”). The Court has also recognized that certain forms of attorney advertising may invade accident victims' privacy, “even when no other harm materializes.” [Ohralik, 436 U.S. at 465-466.](#)

Nevertheless, the district court inappropriately injected its own speculation as to what degree of care the typical customers relevant to this case typically exercise, and how that may impact the likelihood of confusion. (1-ER-102–105.) The district court erred in substituting its judgment for the jury’s, as reasonable jury could credit Lerner & Rowe’s contention that the typical consumer in this case is not so sophisticated or careful as to avoid the confusion caused by Accident Law Group’s ads. See e.g., [Select Comfort Corp. v. Baxter, 996 F.3d 925, 937 \(8th Cir.\), cert. denied sub nom. Dires, LLC v. Select Comfort Corp., 142 S. Ct. 561, 211 L. Ed. 2d 351 \(2021\)](#) citing [Friedman v. Sealy, Inc., 274 F.2d 255, 261–62 \(10th Cir. 1959\)](#) (“the construction of sleep equipment is not a matter of common knowledge and the consumer buys infrequently. He is thus forced to rely on his memory, more than his inspection, for the recall of names, guarantees, and endorsements. Under such circumstances, confusion can easily arise.”).

The district court clearly erred in finding that no reasonable jury, viewing the evidence and all inferences in Lerner & Rowe’s favor, could find that Accident Law Group’s use of Lerner & Rowe’s protected trademarks as part of Accident Law Group’s online advertising campaign created a likelihood of confusion. The

*Sleekcraft* factors identified as most relevant to this type of case in *Network Automation* either weigh in favor of Lerner & Rowe (strong mark, evidence of actual confusion, insufficiently distinct labeling of the ads) or at worst present an issue of fact to be resolved by a jury (whether the typical consumer is so sophisticated or careful that they would avoid confusion).

**E. The remaining *Sleekcraft* factors further support finding a likelihood of confusion.**

As noted above, the *Sleekcraft* factors must be considered in their entirety, with an eye for which factors are most important in any particular case. “Some factors are much more important than others, and the relative importance of each individual factor will be case-specific.” [Multi Time Mach, 804 F.3d at 936](#) citing [Brookfield, 174 F.3d at 1054](#). When this Court considers and weighs the *Sleekcraft* factors, after correcting the district court’s clear errors and keeping in mind this Court’s reluctance to affirm summary judgment on the basis of likelihood of confusion, the conclusion is inescapable: this Court must reverse and remand because a reasonable jury could find a likelihood of confusion.

**i. Lerner & Rowe and Accident Law Group are direct competitors.**

“Related goods are generally more likely than unrelated goods to confuse the public as to the producers of the goods.” [Network Automation, 638 F.3d at 1150](#). When two entities provide similar services, there is a greater likelihood of confusion because consumers may “mistakenly assume there is an association between” the

two entities. *Id.* That is precisely the case here. Defendants readily admit they compete with Lerner & Rowe. (2-ER-514–515.) There is no dispute that Lerner & Rowe and Accident Law Group offer similar services and are competitors. This factor weighs in Lerner & Rowe’s favor.<sup>4</sup>

**ii. Lerner & Rowe and Accident Law Group use the same marketing channels.**

Where two entities use the same marketing channels, particularly the internet or television, the likelihood of confusion increases. [Network Automation, 638 F.3d at 1151](#); [GoTo.com, Inc. v. Walt Disney Co., 202 F.3d 1199, 1207 \(9th Cir. 2000\)](#) (internet or television marketing is “particularly susceptible to a likelihood of confusion”). There is no dispute that Lerner & Rowe and Accident Law Group use the same marketing channels, including local radio and television advertising, outdoor ads (e.g., billboards), websites, and Google Ads. (2-ER-513.) The overlap in marketing channels, along with the fact that Lerner & Rowe and Accident Law Group use those same channels to offer similar services, indicates a likelihood of confusion. [GoTo.com, 202 F.3d at 1207 \(9th Cir. 2000\)](#); [Sleekcraft, 599 F.2d at 353](#)

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<sup>4</sup> The *Sleekcraft* factor regarding the expansion of product lines is moot in this case because Lerner & Rowe and Accident Law Group “already compete to a significant extent,” and such competition renders the likelihood of expansion in product lines factor to be “relatively unimportant.” [Network Automation, 638 F.3d at 1153](#); [Brookfield, 174 F.3d at 1060](#). However, any weight given to the factor regarding expansion favors Lerner & Rowe, as Accident Law Group has grown its business significantly during the years that they targeted Lerner & Rowe’s Marks with their Google Ad keywords. (2-ER-524.)

(Plaintiff's and Defendants' "convergent marketing channels" increase the likelihood of confusion in this case.) This factor weighs in Lerner & Rowe's favor.

**iii. Accident Law Group used Lerner & Rowe's Marks.**

Accident Law Group uses Lerner & Rowe's exact Marks as keywords to manipulate search engine results and confuse consumers. A defendant's use of marks identical to the plaintiff's in connection with search-engine advertising creates a "strong likelihood of confusion." [\*Binder v. Disability Grp., Inc.\*, 772 F. Supp. 2d 1172, 1176 \(C.D. Cal. 2011\)](#). Because the marks at issue are identical, the exact Lerner & Rowe Marks, this factor favors Lerner & Rowe.

**iv. Accident Law Group intentionally used Lerner & Rowe's Marks to confuse and mislead Consumers.**

Accident Law Group has shown intent to confuse consumers by using Lerner & Rowe's Marks in commerce for a continuous period of several years. The Ninth Circuit "presume[s] . . . that the public will be deceived" when an infringer adopts a mark similar to another's. [\*Sleekcraft\*, 599 F.2d at 354](#). This Court in *Multi Time Machine* acknowledged this as well, "[a] defendant's intent to confuse constitutes probative evidence of likely confusion: Courts assume that the defendant's intentions were carried out successfully." [\*Multi Time Mach\*, 804 F.3d at 940](#).

Accident Law Group's use of Lerner & Rowe's Marks and intent to deceive consumers searching for Lerner & Rowe by name weighs in favor of finding infringement, especially in light of Accident Law Group's indifference to the

confusion expressed by hundreds of callers who stated they reached them by doing a search for Lerner & Rowe. (2-ER-451–454; 5-ER-959–1204). Defendants may argue there is ambiguity in *some* of these statements, but they cannot deny that in response to hundreds of callers mentioning other firms by name, and Lerner & Rowe in particular, they did nothing to prevent that from happening, and instead capitalized on that confusion. (2-ER-451–454; 5-ER-959–1204). This suggests, “at a minimum, that defendants do nothing to alleviate confusion ... this factor provides some evidence of an intent to confuse on the part of defendants.” [Playboy Enterprises, 354 F.3d at 1029](#); see also [Philip Morris USA Inc. v. Liu, 489 F. Supp. 2d 1119, 1123 \(C.D. Cal. 2007\)](#) (granting summary judgment of willful violation of the Lanham Act against defendant who “willfully blinded himself to facts that would put him on notice that he was infringing another's trademarks, having cause to suspect it.”); [Earthquake Sound Corp. v. Bumper Indus., 352 F.3d 1210, 1217–18 \(9th Cir. 2003\)](#) (granting summary judgment against defendant who “deliberately chose not to make a reasonable effort to ascertain whether it might actually be infringing,” despite being alerted to the possibility of infringement).

The Ninth Circuit presumes an intent to deceive “where the alleged infringer adopted his mark with knowledge, actual or constructive, that it was another's trademark.” [Brookfield, 174 F.3d at 1059 \(9th Cir. 1999\)](#); see [Acad. of Motion Picture Arts & Scis. v. Creative House Promotions, Inc., 944 F.2d 1446, 1456 \(9th](#)

[Cir. 1991](#)) (When one party deliberately adopts another's trademark “to obtain advantage from the other's good will,” intentional infringement is presumed). That is precisely the case here; Defendants were aware of Lerner & Rowe, the services Lerner & Rowe offers, Lerner & Rowe’s competitive position within the same industry, and for years used Lerner & Rowe Marks as part their own advertising campaigns. (2-ER-516–517.) This factor therefore weighs in Lerner & Rowe’s favor, and “[a]lthough not necessary to a finding of likelihood of confusion, a defendant's intent to confuse may alone be sufficient to justify an inference that there is a likelihood of confusion.” [Viacom Int'l v. IJR Cap. Invs., L.L.C., 891 F.3d 178, 195 \(5th Cir. 2018\)](#)).

Proper analysis of *Sleekcraft* factors supports a finding of likelihood of confusion, contrary to the district court’s holding. Even if this Court were to conclude that an odd factor may favor Accident Law Group, a reasonable jury considering the totality of the *Sleekcraft* factors could still find a likelihood of confusion.

As this Court has repeatedly emphasized, summary judgment is strongly disfavored when the issue is consumer confusion. [JL Beverage Co., 828 F.3d at 1105](#). The district court failed to heed this admonition, usurped the jury’s function, and its clear error must be reversed.

## CONCLUSION

Lerner & Rowe respectfully requests that the Court reverse the district court's grant of summary judgment and remand the case to the district court for additional proceedings and trial.

Date: November 9, 2023

LERNER & ROWE, PC

By: /s/ Andrew M. Gaggin

Andrew M. Gaggin, Esq.

1100 North Wilmot Road

Tucson, Arizona 85712

(602) 977-1900

[agaggin@lernerandrowe.com](mailto:agaggin@lernerandrowe.com)

*Attorneys for Plaintiff-Appellant*

## STATEMENT OF RELATED CASES

Appellant is aware of no related case to disclose pursuant to Ninth Circuit Rule 28-2.6.

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LERNER & ROWE, PC

By: /s/ Andrew M. Gaggin  
Andrew M. Gaggin, Esq.  
1100 North Wilmot Road  
Tucson, Arizona 85712  
(602) 977-1900  
[agaggin@lernerandrowe.com](mailto:agaggin@lernerandrowe.com)

*Attorneys for Plaintiff-Appellant*



**CERTIFICATE OF COMPLIANCE WITH FRAP 32(a) AND NINTH  
CIRCUIT RULE 32-1**

Pursuant to F.R.A.P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening brief is proportionately spaced, has a typeface of 14 points or more and contains 10,740 words, including footnotes. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: November 9, 2023

LERNER & ROWE, PC

By: /s/ Andrew M. Gaggin  
Andrew M. Gaggin, Esq.  
1100 North Wilmot Road  
Tucson, Arizona 85712  
(602) 977-1900  
[agaggin@lernerandrowe.com](mailto:agaggin@lernerandrowe.com)

*Attorneys for Plaintiff-Appellant*

## CERTIFICATE OF SERVICE

I hereby certify that on November 9, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: November 9, 2023

LERNER & ROWE, PC

By: /s/ Andrew M. Gaggin

Andrew M. Gaggin, Esq.

1100 North Wilmot Road

Tucson, Arizona 85712

(602) 977-1900

[agaggin@lernerandrowe.com](mailto:agaggin@lernerandrowe.com)

*Attorneys for Plaintiff-Appellant*