Case No. 23-16060

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LERNER & ROWE PC, an Arizona corporation,
Plaintiff-Appellant,

v.

BROWN ENGSTRAND & SHELY LLC, dba ACCIDENT LAW GROUP, an Arizona corporation; JOSEPH L. BROWN, an individual,
Defendants-Appellees.

Appeal from a Decision of the United States District Court
for the District of Arizona
Case No. CV-21-01540-PHX-DGC

ANSWERING BRIEF

Maria Crimi Speth (012574)
mcs@jaburgwilk.com
Aaron K. Haar (030814)
akh@jaburgwilk.com
Jaburg & Wilk, P.C. (00096400)
3200 N Central Avenue, Suite 2000
Phoenix, Arizona 85012
(602) 248-1000

Attorneys for Defendants-Appellees

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

DISCLOSURE STATEMENT

No publicly held corporation owns 10% or more of the stock of Joseph Brown & Associations, LLC, formerly known as Brown Engstrand & Shely LLC, the Appellee in this matter.

JURISDICTIONAL STATEMENT

This Court has jurisdiction under 28 U.S.C. §1291 because it is an appeal of a final decision of the District Court. Appellant timely filed a notice of appeal following a final order that disposed of all parties' claims.

ISSUES PRESENTED FOR REVIEW

Issue 1: Under the Lanham Act, did the District Court properly grant summary judgment for an advertiser when its keyword advertising did not display the plaintiff competitor's trademark, its ads were clearly labeled with its own trademark, and the alleged actual-confusion evidence amounted to 0.2% of the total ad impressions?

Issue 2: Under the Lanham Act, does a claim against an advertiser who pays a search engine to display its ads among search results lack the requisite element of "use" of the mark in commerce if the ad never displays the accused mark to consumers?

SUMMARY OF THE ARGUMENT

This case concerns whether companies are free to pay Google to serve their ads along with search results for a competitor. Appellant/Plaintiff Lerner & Rowe's own search-engine expert acknowledges this is a common and legitimate practice. Lerner & Rowe even admits to engaging in such practices itself.

Yet Lerner & Rowe repeatedly accuses Appellees/Defendants Joseph Brown & Associations, LLC dba The Accident Law Group and Joseph Brown (collectively, "Accident Law Group" or "ALG") of engaging in an "illegal scheme" intended to "deceive consumers" and "profit off Lerner & Rowe's reputation."

Despite this biting language, Accident Law Group merely engaged in keyword advertising, wherein it paid to serve its ads along with search results for Lerner & Rowe. None of the accused ads displayed Lerner & Rowe's trademark—or anything remotely close to it. The ads all included the bolded word "**Ad**" in the top left corner, making it clear to viewers they were encountering an advertisement. They all displayed ALG's federally registered trademark ACCIDENT LAW GROUP. And the ads were all partitioned from other ads and organic results—either by pronounced white space or by separate boxes.

This type of keyword advertising is the equivalent of a company paying a grocery store to place its products on the shelf directly next to a competitor's product. *See* Eric Goldman, *Brand Spillovers*, 22 Harv. J.L. & Tech. 381, 400 (2009) ("Google has, in practice, displaced the retailer in these sales. True, third-party retailers technically make the ultimate sale, but Google has controlled all of the meaningful facets of the consumer experience—just as a retailer would control the experience offline."). Like competing products on a shelf, Google's indexing provides shoppers options.

The seminal treatise on trademark law, McCarthy on Trademarks, states that "[c]ourts almost always find no likelihood of confusion if all that defendant has done is use another's mark as a keyword to trigger an ad for defendant in which the other's trademark does not appear." J. Thomas McCarthy, 5 McCarthy on Trademarks and Unfair Competition ("McCarthy") § 25A:7 (5th ed.) (collecting cases). That is exactly what the District Court did here.

Notably, Google's broad-match algorithm recognizes the relatedness of search terms and will serve an ad for a company in a competitor's search results even when the company only paid for a generic keyword, like "personal injury lawyer." This is why Lerner & Rowe also shows up in search results for Accident Law Group, despite its claim that it does not pay for Accident Law Group as a keyword. And this fact creates yet another challenge for Lerner & Rowe, which cannot show a causal connection between ALG's conduct (as opposed to Google's conduct) and the alleged likelihood of confusion.

Lerner & Rowe must prove that an "appreciable" number of relevant consumers are likely to be confused by the advertisements. The only evidence Lerner & Rowe has martialed in support of its claims are (1) its expert's suggestion that Accident Law Group's "chameleon-like" name is confusing and will cause people to believe it is affiliated with Lerner & Rowe, and (2) a strained interpretation of ALG's call logs showing that a statistically immaterial number of callers mentioned Lerner & Rowe.

The call logs, which are ambiguous, are also hearsay within hearsay. Despite having relevant contact information, Lerner & Rowe did not obtain a single declaration or deposition from any of the people it now claims were confused. Yet it argues that every entry mentioning Lerner & Rowe is evidence of confusion—including where the log clearly notes the client was "referred by Lerner & Rowe."[1] Most of the entries are ambiguous, and a factfinder can only speculate as to whether callers were actually confused.

Nevertheless, even assuming all 236 callers were actually confused, spread over five years and placed against the background of the total opportunities for confusion, this raw number melts away to an insignificant number. Courts have held that limited instances of confusion may be discounted as *de minimis* when context demonstrates there are significant opportunities for confusion. This is a unique case wherein the total number of opportunities for confusion is explicitly quantified (via Google Ad data), giving the Court an unusual level of insight and certainty in evaluating the facts of the case. The Google Ad data demonstrates there were 109,322 total ad impressions (the number of times ALG's ads were displayed to someone who searched for Lerner & Rowe). Comparing these ad impressions to the 236 call-log entries, the alleged instances of confusion amount to only 0.214% (two-tenths of one percent) of the total opportunities for confusion.

---

[1] The parties' principals used to refer business to each other.

Importantly, these are real and undisputed numbers.

Accident Law Group also commissioned a consumer survey that further bolsters the conclusions from the real data. The survey determined the net rate of confusion was near zero and *de minimis* at best.

Ultimately, the evidence demonstrates the accused ads are clearly labeled and consumers are not likely to be confused. As Lerner & Rowe must show consumer confusion is probable (not just possible), the District Court properly granted summary judgment for Accident Law Group.

STATEMENT OF THE CASE

Defendant Joseph Brown formed Defendant law firm in 2015. (2-ER-524). Since 2017, Accident Law Group has spent over $1 million each year on advertising, including $4.6 million in 2021 and more than $17.5 million over the last several years building the ACCIDENT LAW GROUP brand. (2-ER-525-527; 3-ER-854). ALG owns federal registrations for the marks ACCIDENT LAW GROUP and ALG + design. U.S. Reg. Nos. 5,337,381; 5,380,747. (1-ER-262).

Among its various marketing activities, Accident Law Group engages in keyword advertising. ALG purchases various generic terms as well as the names of some of its competitors. This is a common strategy, and, in fact, Google recommends that advertisers buy competitors' names as part of a robust keyword-advertising campaign. (1-ER-272; 1-ER-281-82). The practice causes Google to serve ALG's ads along with search results for competitors. Lerner & Rowe acknowledges this is a common tactic and has even engaged in such keyword-advertising campaigns itself. (2-ER-307-10). Lerner & Rowe's own search-engine expert agrees this type of keyword advertising is a legitimate practice. (3-ER-613).

Notably, Google will serve ALG's ads with search results for Lerner & Rowe, regardless of whether ALG specifically paid for the name as a keyword. (2-ER-565; 2-ER-305; 2-ER-311-12; 2-ER-323, 328-29). Google's broad-match algorithm recognizes the relatedness of search terms and will serve an ad for a company in a competitor's search results even when the company may have only paid for a generic keyword. (*Id*.) Between January 1, 2017 and December 31, 2021, Google also served ALG's ads to consumers who typed "Lerner and Rowe" based on ALG paying for the keywords accident attorney, accident lawyer, accident injury lawyer, accident law group, auto accident attorney, injury lawyer, car wreck attorney, Carl Engstrand, and Joe Brown. (*Id*.) Lerner & Rowe admits that if ALG did not pay for Lerner & Rowe as a keyword, but an ALG ad is served when a consumer searches for Lerner & Rowe, this is *not* use of its trademark by ALG. (2-ER-305).

Accident Law Group's ads never use the LERNER & ROWE trademark and never mention or reference Lerner & Rowe in any way. (2-ER-566-93). They all include ALG's federally registered trademark, either in the banner or in the URL (<accidentlawgroup.com>). (*Id*.)

Accident Law Group stopped paying for Lerner & Rowe's name as a keyword in May 2021. (2-ER-530). Lerner & Rowe served a demand letter related to keyword advertising in August 2021. (2-ER-344-53). Nevertheless, Lerner & Rowe filed a lawsuit in September 2021 to force ALG to adopt "negative keywords," which would preclude Google's broad-match algorithm from ever presenting ALG's competing ads. (4-ER-1096). This demand exposes the anticompetitive nature of this lawsuit: A larger firm exploiting its greater resources to force competitors out of legitimate marketplace competition.

ARGUMENT

The District Court properly granted summary judgment on grounds no reasonable jury could conclude an appreciable number of consumers are likely to be confused by Accident Law Group's competing ads. This Court should affirm.

I. THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT.

Although the determination of likelihood of confusion is a fact-intensive inquiry and a grant of summary judgment on the issue is generally disfavored, summary judgment is appropriate when there is no genuine issue of material fact and no reasonable jury could find for the nonmovant. There are many examples of courts granting and affirming summary judgment in such cases, even when several factors favor plaintiff. *See, e.g.*, *Lodestar Anstalt v. Bacardi & Co. Ltd.*, 31 F.4th 1228 (9th Cir. 2022), *cert. denied sub nom. Anstalt v. Bacardi & Co. Ltd.*, 143 S. Ct. 428 (2022) ("[N]o reasonable trier of fact could "find that confusion is 'probable,' not merely 'possible.'"); *Arcona, Inc. v. Farmacy Beauty, LLC*, 976 F.3d 1074 (9th Cir. 2020); *Multi Time Mach., Inc. v. Amazon.com, Inc.,* 804 F.3d 930, 935 (9th Cir. 2015) ("Indeed, in several trademark cases, we have concluded that there is no likelihood of confusion as a matter of law and affirmed the district court's grant of summary judgment in favor of the defendant."); *Tokidoki, LLC v. Fortune Dynamic, Inc.*, 473 Fed. Appx. 522, 524 (9th Cir. 2011); *Applied Info. Scis. Corp. v. eBAY, Inc.*, 511 F.3d 966 (9th Cir. 2007); *Surfvivor Media, Inc. v. Survivor Prods.*, 406 F.3d 625 (9th Cir. 2005); *M2 Software, Inc. v. Madacy Entm't*, 421 F.3d 1073 (9th Cir. 2005); *see also* McCarthy § 32:120 ("A defendant may prevail on summary judgment if it shows a lack of any triable issue of fact on likelihood of confusion, due, for example, to the totally dissimilar nature of the goods or services involved or the completely dissimilar marks.").

And, in fact, it is common for courts to grant summary judgment in cases involving keyword advertising, as is the case here. *See, e.g.*, *Boost Beauty, LLC v. Woo Signatures, LLC*, 2:18-CV-02960-CAS-EX, 2022 WL 409957 (C.D. Cal. Feb. 7, 2022); *Sen v. Amazon.com, Inc.*, 16-CV-1486-JAH, 2020 WL 4582678 (S.D. Cal. Aug. 10, 2020), *aff'd*, 20-55857, 2021 WL 6101385 (9th Cir. Dec. 21, 2021); *Lasoff v. Amazon.com, Inc.*, 741 Fed. Appx. 400 (9th Cir. 2018); *Multi Time Mach., Inc. v. Amazon.com, Inc.*, 804 F.3d 930, 935 (9th Cir. 2015); *Int'l Payment Servs. v. CardPaymentOptions.com, Inc.*, 2:14-CV-02604-CBM-JC, 2015 WL 12656280 (C.D. Cal. June 5, 2015); *Home Decor, Inc.*

v. Google, CV-12-5706-GW(SHX), 2013 WL 10858861 (C.D. Cal. May 9, 2013); *Jurin v. Google*, 2:09-CV-03065-MCE, 2012 WL 5011007 (E.D. Cal. Oct. 17, 2012); *Karl Storz Imaging, Inc. v. Pointe Conception Med.*, CV-09-8070-GAF, 2011 WL 13195980 (C.D. Cal. Aug. 1, 2011).

A. No Reasonable Jury Could Find for Plaintiff on Its Claims for Trademark Infringement and Unfair Competition.

Claims for unfair competition and trademark infringement under federal and state law are "substantially congruent," and courts regularly combine an evaluation of such claims under the same likelihood-of-confusion analysis. *Health Indus. Bus. Council v. Animal Health Inst.*, 481 F.Supp.3d 941, 956 (D. Ariz. 2020). To prevail on these claims, Lerner & Rowe must prove (1) it has a valid, protectable trademark, and (2) ALG's use of the accused mark is likely to cause confusion. *Brookfield Commc'ns, Inc. v. West Coast Entm't Corp.*, 174 F.3d 1036, 1046 (9th Cir. 1999).

Lerner & Rowe focused its argument below on its claim that Accident Law Group's keyword advertising *diverted* customers. (3-ER-732; 1-ER-221). But infringement requires confusion, not mere diversion. In *Network Automation v. Advanced System Concepts*, the Court held that the analysis for keyword advertising necessarily focuses on confusion, not diversion—it is not enough that a user searches for a particular brand and ultimately clicks on a link for a different brand. 638 F.3d 1137, 1148-49 (9th Cir. 2011). The Court analogized a Macy's shopper *en route* to the Calvin Klein section, who is diverted by a prominently displayed sign for Charter Club (Macy's own brand) and never reaches the Calvin Klein section. *Id*. at 1148. The shopper was not legitimately confused even though he was diverted. *Id*. In that case, there is no confusion, so there is no infringement. *Id*. ("[I]t would be wrong to expand the initial interest confusion theory of infringement beyond the realm of the misleading and deceptive to the context of legitimate comparative and contextual advertising.").

To prove likelihood of confusion, a mark owner must show that use of the accused mark was "likely to confuse *an appreciable number* of people as to the source of the product." *M2 Software, Inc. v. Madacy Entm't*, 421 F.3d 1073, 1085 (9th Cir. 2005) (emphasis in original). Likelihood of confusion means confusion is *probable*, not just *possible*. *Multi Time Mach.*, 804 F.3d at 938.

The Ninth Circuit typically evaluates likelihood of confusion by evaluating the eight *Sleekcraft* factors. *Id.* at 936 (citing *AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348-49 (9th Cir. 1979)). The subject marks must be evaluated as they appear in the marketplace. *Network Automation*, 638 F.3d at 1150; *Brookfield*, 174 F.3d at 1054.

In the keyword-advertising context, the Ninth Circuit has found most of the *Sleekcraft* factors unhelpful. The *Network Automation* Court held that, in those instances, "likelihood of confusion will ultimately turn on what the consumer saw on the screen and reasonably believed, given the context." 638 F.3d at 1153. The Court recounted its prior decision in *Playboy*, noting the significance of banner ads that were "confusingly labeled or not labeled at all," and remarking that "clear labeling 'might eliminate the likelihood of initial interest confusion that exists in this case.'" *Id*. at 1153-54 (citing *Playboy Enters., Inc. v. Netscape Commc'ns Corp*., 354 F.3d 1020, 1023, 1030 n.43 (9th Cir. 2004)). The Court then commented that "even if Network has not clearly identified itself in the text of its ads, Google and Bing have partitioned their search results pages so that the advertisements appear in separately labeled sections for 'sponsored' links." *Id*. at 1154. "The labeling and appearance of the advertisements as they appear on the results page includes more than the text of the advertisement, and must be considered as a whole." *Id*.

Ultimately, the *Network Automation* Court determined that the most relevant factors for analyzing likelihood of confusion in keyword advertising were "(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." *Id*. at 1154.

B. <u>This Case Can Be Resolved Simply by Evaluating the Webpage at Issue and the Relevant Consumer.</u>

In *Multi Time Machine, Inc. v. Amazon.com, Inc*., the Ninth Circuit affirmed summary judgment in favor of Amazon, where Amazon was accused of trademark infringement after having programmed a watchmaker's trademark into its platform's search function so search results would display competitors' products. 804 F.3d 930, 932-33, 935 (9th Cir. 2015). Amazon did not sell the plaintiff watchmaker's products, and the search-results page displayed the trademark in three places. *Id*. The Court noted that none of the actual search results displayed the watchmaker's trademark, and the listings were all clearly labeled with their own brands. *Id*. at 935-36.

In its analysis, the Court stated that the case could "be resolved simply by an evaluation of the web page at issue and the relevant consumer." *Id*. at 936. The Court commented that the *Sleekcraft* test was not particularly apt and agreed with *Network Automation* that, in the keyword advertising context, "likelihood of confusion will ultimately turn on what the consumer saw on the screen and reasonably believed, given the context." *Id*. at 936-37 (citing *Network Automation*, 638 F.3d at 1153). The Court broke this factor into two component parts: "(1) Who is the relevant reasonable consumer?; and (2) What would he reasonably believe based on what he saw on the screen?" *Id*. at 937.

As for the first question, the Court analyzed the "relevant reasonable consumer" by applying the factor concerning "the nature of the goods and the type of consumer." *Id*. The analysis requires consideration of "the typical buyer exercising ordinary caution." *Id*. (citing *Au-Tomotive Gold, Inc. v. Volkswagen of Am., Inc*., 457 F.3d 1062, 1076 (9th Cir. 2006)). Confusion is less likely when buyers exercise care in their purchasing decision, as they would when shopping for expensive offerings or when the consumer is sophisticated in some respect. *Id.* The Court noted "the default degree of consumer care is becoming more heightened as the novelty of the Internet evaporates and online commerce becomes commonplace." *Id.* (quoting *Network Automation*, 638 F.3d at 1152). The Court determined the goods at issue were expensive (the watches sell for "several hundred dollars") and concluded the relevant consumer "is a reasonably prudent consumer accustomed to shopping online." *Id.* (quoting *Toyota Motor Sales, U.S.A., Inc. v. Tabari*, 610 F.3d 1171, 1176 (9th Cir. 2010)).

The Court then turned to the second question (the labeling and appearance of the products on the webpage), which it deemed "the most important factor in this case" because "clear labeling can eliminate the likelihood of initial interest confusion in cases involving internet search terms." *Id.* The Court analyzed the subject webpage and noted that, although the trademarked term appeared three times in the page, the other listings clearly labeled the product names and model numbers, making confusion "highly unlikely." *Id.* at 938. "[N]o reasonably prudent consumer accustomed to shopping online would view Amazon's search results page and conclude that the products offered are MTM watches." *Id.*

The Court concluded summary judgment was appropriate without considering any other factors because any remaining disputes were immaterial (though, the court did summarily address additional factors thereafter). *Id*. at 938-39. The Court remarked that while "[i]t is possible that someone, somewhere might be confused by the search results page, . . . [u]nreasonable, imprudent and inexperienced web-shoppers are not relevant." *Id*.

C. An Analysis of the Relevant Factors Demonstrates No Reasonable Jury Could Find Likelihood of Confusion.

1. The "nature of the goods and the type of consumer" suggests confusion is unlikely.

Here, Lerner & Rowe argues the relevant consumer exercises a low degree of care because its services are inexpensive (offered on a contingency-fee basis) and are unsophisticated in legal matters. (Dkt. 9 at 37-38). However, this argument misconstrues the nature of the parties' legal services. The value proposition to each client is substantial. There is a great deal at stake. Selecting a lawyer is quite important to parties seeking to recover for their personal injuries. (1-ER-273). Compare the damages at stake for even minor personal injuries to the "expensive" watches selling for "several hundred dollars" in *Multi Time Machine*.

And, in any event, being unsophisticated in legal matters does not obviate the heightened degree of care exercised among those who are accustomed to navigating a basic search engine. *Network Automation*, 638

F.3d at 1148-49 ("Consumers who use the internet for shopping are generally quite sophisticated about such matters."); *Multi Time Machine*, 804 F.3d at 937 ("the default degree of consumer care is becoming more heightened as the novelty of the internet evaporates and online commerce becomes commonplace."). The very fact that the prospective clients used the internet to search for an attorney in the first place—rather than simply calling the phone number they encounter in the parties' voluminous TV ads, radio ads, and billboards—suggests some degree of experience using search engines.

As in *Multi Time Machine*, the relevant consumer here is "a reasonably prudent consumer accustomed to shopping online." 804 F.3d at 937. But even applying a lower degree of care, the clear labeling of the ads would have been obvious to anyone who can read that the ads concerned a competitor.

Accordingly, this factor suggests confusion is unlikely.

. . .

. . .

. . .

2. The presentation, labeling, and context of the subject advertisements demonstrate confusion is unlikely.

a. Lerner & Rowe's evidence of the accused ads should be deemed inadmissible.

Lerner & Rowe's evidence of the accused ads (1) was not adequately disclosed in discovery; (2) does not show the ads are the result of ALG paying for its name as a keyword, as opposed to Google unilaterally placing the ad with its broad-match algorithm; and (3) does not show the ads in full context, as they must be examined.

In its Motion for Summary Judgment, Lerner & Rowe attached 28 screenshots of Google search results where ALG's ads appear. (2-ER-566-593). ALG objected to the screenshots for lack of foundation on grounds it was unclear when the screenshots were taken and by whom, as well as for being only partial screenshots. (1-ER-257). Foundation was particularly important because ALG stopped paying for the name as a keyword in May 2021, and any screenshots taken thereafter would depict ads placed exclusively by Google, whose broad-match algorithm would have made the connection (based on ALG paying for other terms, like "personal injury lawyer") and indexed the ad accordingly. (2-ER-565; 2-ER-305, 311-12; 2-ER-323, 328-29).

Lerner & Rowe's Combined Reply/Response to Countermotion attached a declaration from its attorney, identifying the dates the attorney captured each of the subject screenshots. (1-ER-217-20). ALG objected to the late-disclosed declaration on grounds its counsel had inquired in discovery of when the screenshots were taken and by whom and were repeatedly told it was unknown. (1-ER-121-22). Since Google's broad-match algorithm placed ALG's ads both before and after ALG stopped paying for Lerner & Rowe's name as a keyword, the late-disclosed declaration precluded ALG's ability to timely investigate and submit evidence of whether the subject ads were the result of ALG paying for Lerner & Rowe's name as a keyword or of Google placing the ads unilaterally based on its broad-match algorithm. (2-ER-565; 2-ER-305, 311-12; 2-ER-323, 328-29). Accordingly, Accident Law Group was prejudiced by the late disclosure, and the evidence of the accused ads should be deemed inadmissible.

Moreover, only three of the screenshots were purportedly captured before May 2021, while Accident Law Group was paying to serve ads with Lerner & Rowe's name. (1-ER-217-18; 2-ER-566, 568-69). And, since Google's broad-match algorithm placed ALG's ads both before and after

May 2021, Lerner & Rowe cannot establish causation resulting from ALG's conduct.

Finally, the evidence of the accused ads are cut-off images, most of which show only the first or second result (with a few showing a third result). (2-ER-566-93; 1-ER-121-22). They do not show the subject ads in context in the marketplace, as they must be examined. The context of the subject ads is the "most important" consideration for evaluating likelihood of confusion. *See Multi Time Machine*, 804 F.3d at 937-38 (granting summary judgment to defendant, in part because the *sixth* and *tenth* search results were books rather than competing-brand watches). By presenting only the first or second search results, Lerner & Rowe portrays the subject ads as overwhelming all other results, which is simply not the reality consumers encountered in the marketplace. As the jury would be unable to evaluate the context of the ads as they would have appeared in the marketplace, the jury cannot fairly determine whether a likelihood of confusion results from ALG's advertising.

For each of these reasons, Lerner & Rowe's evidence of the accused ads should be deemed inadmissible, and summary judgment should be affirmed on this separate ground.

b. Nevertheless, the ads' presentation, labeling, and context dispel any claim of likely confusion.

A common-sense review of the subject ads demonstrates the presentation, labeling, and context would not reasonably confuse consumers. Most importantly, none of ALG's ads include the term "Lerner & Rowe"—or anything remotely close to it. (2-ER-566-93). And they all include ALG's registered trademark. (*Id.*) Many of the screenshots also include an ad or organic result for Lerner & Rowe adjacent to the ALG ad. (2-ER-569-73, 579-80, 583-85, 587-93).[2] That appearance only serves to further clarify that ALG's ad is not an ad for Lerner & Rowe. And numerous of the screenshots also show other attorney advertisements, further alerting searchers that the results include options other than just Lerner & Rowe. (2-ER-580, 582-83, 585, 587, 593).[3]

As for partitions between search results, the screenshots take on two different formats—one for desktop/tablets, another for cell phones. (*Compare* 2-ER-569, *with* 2-ER-570). The desktop/tablet format includes pronounced white space between the entries; the "**Ad**" notation delineates

[2] There are likely more; the screenshots are cut off and do not show the rest of the page.

[3] Again, there are likely more, but the screenshots are cut off.

the start of a new ad; and even where an ad is next to an organic result, the white space followed by a new banner clearly creates a partition that would inform an ordinary consumer that these are distinct results. (2-ER-569). The partitions between entries in the cell-phone format are even more pronounced. These results also include the "**Ad**" notation at the top left of each entry, but they also display each entry in a white box with a gray barrier between results. (2-ER-570).

These screenshots make clear that ALG's ads do not promote or suggest any affiliation with Lerner & Rowe.

Lerner & Rowe argues ALG's ads are not clearly labeled because they have none of the distinguishing features present in the *Multi Time Machine* case. (Dkt 9 at 31-32). Of course, by virtue of being on different platforms (Amazon vs. Google), there are inevitable distinctions. But those distinctions are minimal and immaterial.

Lerner & Rowe purports to list the labeling features present in *Multi Time Machine* that are not present here. *Id*. But most of these purportedly "missing" features were not actually present in *Multi Time Machine*. For example, Lerner & Rowe claims "Accident Law Group's ads are not segregated from the organic search results for Lerner & Rowe by any borders, bars, or shading." (Dkt. 9 at 32). But there are no "ads" and "organic results" in Amazon's search results—they are all product listings. 804 F.3d at 934. And, of course, ALG's ads *are* partitioned from organic results (and other ads), as indicated above.

Lerner & Rowe also claims ALG's ads are missing a distinguishing feature because "Accident Law Group's ads appear *above* the organic search results for Lerner & Rowe's name, as opposed to below the 'bread crumb' (the only other place where the searched-for mark is displayed) and the 'Related Searches' bar." (Dkt. 9 at 32). This argument misunderstands the meaning of "bread crumb" and "Related Searches" from *Multi Time Machine*. These items are recounted, not to demonstrate labeling but merely to describe the search-results page. The "bread crumb" is simply the text of the searched-for term under the search bar, identifying that the listings relate to the term. 804 F.3d at 933. And the "Related Searches" field (directly below the bread crumb) is a recommendation for an alternative search query "in case the consumer is dissatisfied with the results of the original search." *Id*. The Related Searches field in that case recommended an alternative search that also included the plaintiff's trademark. *Id*. Notably, the *Multi Time Machine* plaintiff argued that Amazon's display of the marks in this manner was *more likely* to lead to confusion. *Id*. at 938. By contrast, Accident Law Group's ads do not display "Lerner & Rowe" at all.

Next, it claims a distinction with *Multi Time Machine* because "[t]here is no clear text identifying Accident Law Group's ads as 'Related *Results*.'" (Dkt. 9 at 32) (emphasis added). But neither is there clear text identifying "Related Results" in *Multi Time Machine*—the term "Related Results" appears nowhere in the decision. This argument appears to further stretch the meaning of "Related Searches" (which, again, is only a suggested alternative *search*). And, in fact, the *Multi Time Machine* Court rejected the plaintiff's argument that Amazon should have more clearly labeled search results to state it did not offer the subject watches before offering alternatives. 804 F.3d at 938.

Then, Lerner & Rowe argues a distinction with *Multi Time Machine* because ALG's ads are "displayed in the same size, color, and style" as organic results. (Dkt. 9 at 32). But all *Multi Time Machine* listings were in similar sizes, colors, and styles—and, again, there were no separate ads and organic results. 804 F.3d at 933. The Court did note that the listings all prominently featured the names of the competing product and manufacturer. *Id*. at 938. But this is also true of the subject ads here (though there are no "product names" because the subject offerings are services).

Finally, Lerner & Rowe argues that only some of ALG's ads contain photographs and that, in any event, the photographs are unhelpful because ALG does not focus its marketing efforts on the appearance of its principal. (Dkt. 9 at 32). The *Multi Time Machine* Court did note that the listings contained photographs of the competing watches. *Id*. at 933. However, the Court did not—as suggested by Lerner & Rowe—require that the manufacturers be known by the image of their products. The photos were simply additional features that might reasonably inform the searcher that the results contained alternatives to the searched-for brand. By contrast, the ads at issue in *Network Automation* did not include photographs either. *See* 638 F.3d at 1155.

The *Multi Time Machine* Court raised another distinguishing feature not mentioned by Lerner & Rowe—namely, that the *sixth* and *tenth* results were books and not watches, the context of which made clear the distinct listings were not affiliated with the plaintiff. 804 F.3d at 938. Here, the sixth and tenth results are concealed by Lerner & Rowe's incomplete screenshots, which generally show only one or two results, making it impossible to evaluate the full context of the subject search results. (2-ER-566-93).

Moreover, most screenshots show Lerner & Rowe's own listings adjacent to ALG's ad, which provide an additional distinguishing feature beyond those present in *Multi Time Machine*.[4]

Lerner & Rowe seeks to overcome this common-sense conclusion by presenting a report from a search-engine expert[5] and arguing ALG's mark ACCIDENT LAW GROUP "is generic, or at most descriptive and . . . therefore more easily confuses a searcher into believing they are affiliated with another firm." (Dkt. 9 at 37). A generic term identifies a class of goods or services and can never be protected or registered because the market must be able to identify specific goods and services. *KP Permanent Make-Up, Inc. v. Lasting Impr., Inc.*, 408 F.3d 596, 602 (9th Cir. 2005). ALG's mark ACCIDENT LAW GROUP is not a generic term used to identify the

---

[4] These results also show that Lerner & Rowe focuses its marketing using the term "wreck" (*i.e.*, "Hurt in a wreck?" and "In a wreck, need a check?") rather than the term "accident." (2-ER-568-73, 577, 580, 583-85, 589-90).

[5] The expert opines "ALG's chameleon-like trade name 'Accident Law Group' enabled the Ads and ALG's website to divert business from Lerner & Rowe." (3-ER-618 ¶ 45). Of course, diversion is not confusion. The screenshots demonstrate that "Accident Law Group" in the ads does not actually blend into the results and suddenly look like "Lerner & Rowe." And Lerner & Rowe presents no evidence of the website.

services offered by personal-injury lawyers. Of course, Accident Law Group's mark was registered by the USPTO, which would not have been possible if the mark were generic.

A descriptive term, on the other hand, describes characteristics of the goods or services and is capable of protection where the mark has acquired distinctiveness (or secondary meaning)—*i.e.*, consumers have come to recognize the mark as referencing the source of the goods or services rather than a description of the goods or services. *Id*. Acquired distinctiveness is typically proven through years of substantially exclusive use, consumer survey evidence, marketing efforts, and evidence of extensive sales. McCarthy § 15:30. While the mark, here, is admittedly inherently descriptive, it has acquired distinctiveness through substantially exclusive use for eight+ years. (2-ER-524); *see also* 15 U.S.C.A. § 1052(f) (proof of exclusive use for five years is *prima facia* evidence of acquired distinctiveness). Moreover, since 2017, ALG has spent more than $1 million each year on advertising—focusing such efforts exclusively on two Arizona counties. (1-ER-262; 2-ER-525, 527, 3-ER-854). That advertising budget progressively increased to $4.7 million in 2021, with more than $17.5 million spent over the past several years. (*Id*.) And it has worked: The consumer-survey evidence demonstrates 69% of consumers in Maricopa and Pinal Counties were already aware of ALG. (2-ER-370). Other than Lerner & Rowe's conclusory claims that the mark is generic or descriptive, it presented neither evidence nor argument to challenge that Accident Law Group's mark had acquired distinctiveness.

The thrust of Lerner & Rowe's claim is that Accident Law Group's descriptive name causes its ads to "blend its identity" with that of Lerner & Rowe. But its cited authority does not support its claim. Lerner & Rowe cites the Fifth Circuit's decision in *Jim S. Adler, P.C. v. McNeil Consultants, LLC*, 10 F.4th 422 (5th Cir. 2021), and claims the facts are "strikingly similar to the present matter." (Dkt. 9 at 34-35). The *Adler* case, however, was an appeal from the grant of a Rule 12(b)(6) motion to dismiss, where the plaintiff had alleged that the defendant presented internet searchers with generic text and unlabeled ads in addition to answering the phone with a generic script, so consumers did not know who they were calling. 10 F.4th at 429. The decision was based entirely on allegations deemed true in the complaint. *Id*. at 430. The court did not consider how the ad actually appeared in the context of the search results. And, contrary to Lerner & Rowe's representation, it did not indicate that a descriptive name increased the likelihood of confusion, but rather that the alleged "generic nature of the advertisements" (*i.e.*, unlabeled ads) did. *Id*. at 429.

In fact, defendants with descriptive names have overcome similar arguments. *See, e.g.*, *1-800 Contacts, Inc. v. Lens.com, Inc.*, 722 F.3d 1229, 1242 (10th Cir. 2013) (summary judgment for defendant against arguments that consumers might believe <Lens.com> is 1-800-Contacts' domain name); *Infogroup, Inc. v. DatabaseLLC*, 95 F. Supp. 3d 1170, 1191 (D. Neb. 2015) (rejecting similar argument in context of preliminary injunction); *JIVE Commerce, LLC v. Wine Racks Am., Inc.*, 1:18-CV-49-TS-BCW, 2018 WL 3873675, at *6 (D. Utah Aug. 15, 2018) (same).

Taken to its logical conclusion, Lerner & Rowe's argument would allow any company to levy accusations of infringement against a competitor with a descriptive name, no matter the level of acquired distinctiveness—Delta Airlines could sue American Airlines; Trader Joe's could sue Whole Foods; Chase Bank could sue Bank of America. But such an anti-competitive cudgel would pose a substantial burden on the courts and on marketplace competition.

Lerner & Rowe also argues that ALG should have included some other distinguishing feature to minimize likelihood of confusion (a disclaimer or the TM, SM, or ® symbols). (Dkt. 9 at 34). The plaintiff in *Multi Time Machine* similarly argued that Amazon should have modified search results to more-clearly indicate it did not offer its watches before suggesting alternative options. 804 F.3d at 938. The Court disagreed: "The search results page makes clear to anyone who can read English that Amazon carries only the brands that are clearly and explicitly listed on the web page." *Id*. Likewise, a common-sense reading of ALG's ads demonstrates no likelihood of confusion.

The *Multi Time Machine* Court stopped here, granting summary judgment on grounds the type of consumer and the labeling/context of the ads demonstrated confusion was unlikely—that any remaining dispute as to the other factors was immaterial. 804 F.3d at 938. This is the case here as well. The type of consumer and the labeling/context of ALG's ads demonstrate confusion is unlikely. Lerner & Rowe has not, and cannot, demonstrate that confusion is probable, as opposed to merely possible. Accordingly, the Court should affirm summary judgment for Defendants.

. . .

. . .

. . .

3. Any evidence of actual confusion is *de minimis*.

Although the *Multi Time Machine* Court noted there was no evidence of actual confusion, this is not a major distinction because the purported evidence of actual confusion here proves any such confusion is *de minimis*.

a. The alleged actual-confusion evidence should be deemed inadmissible.

In reaching its decision, the District Court ruled—over ALG's hearsay objections—that Lerner & Rowe's evidence of actual confusion was admissible. This Court should reverse that ruling.

Lerner & Rowe relies exclusively on Accident Law Group's ambiguous call logs as its purported evidence of actual confusion despite consisting of hearsay-within-hearsay.

The logs are ambiguous in most instances where Lerner & Rowe claims an entry is proof of confusion. And, despite having names and contact information, Lerner & Rowe did not obtain a declaration or depose a single caller it now claims were confused. It also declined to depose the intake employees, who kept the logs. Instead, Lerner & Rowe seeks to capitalize on this ambiguity by claiming every note referencing "Lerner & Rowe" is evidence of actual confusion. In reality, as set forth below, most of the references in the call log indicate the caller was legitimately diverted, rather than confused.

The call logs were created by ALG intake employees who identified the firm as Accident Law Group and then asked a series of intake questions, including, in relevant part, "how did you find us?" (2-ER-555, 558-60). The call logs consist of brief notes taken by intake employees, out-of-court, based on what a caller said to them, also out-of-court. The evidence necessarily relies on the truth of the statements at both levels of hearsay. The District Court found that the first level of hearsay (employee notes) is overcome by the business-records exception. Fed. R. Evid. 803(6). But this exception should not apply because the circumstances indicate a lack of trustworthiness. *See* FRE 803(6)(E)). Intake employees are not tasked with recording verbatim statements of callers or tracking purported instances of confusion. Rather, they are tasked with recording referral source—for mere tracking purposes. The employees ask set questions and make notes summarizing the response, requiring some level of interpretation (particularly when the information provided is not a typical, expected response). Based on the questioning, the employees would have expected to identify a single referral source—a referring individual or law firm, a TV or radio ad, a Google search, a billboard. The notes are extremely brief because of the nature of the questioning and the information the employees are tasked with collecting. The referral-source question is, operationally, the least pertinent of the information. This makes for untrustworthy data, at least as it relates to the information in question.

But, even if the business-records exception applies to the employee's notes (the first level of hearsay), it would not apply to the out-of-court statements of callers (the second level of hearsay).

The District Court concluded that this second level of hearsay is overcome by the residual hearsay exception in Fed. R. Evid. 807, which deems a statement admissible if (1) "supported by sufficient guarantees of trustworthiness," considering the totality of the circumstances, and (2) "it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts." FRE 807(a). The court's analysis on the first point focused exclusively on the employees' maintaining call logs for a business purpose, thus, suggesting "that the callers' stated reasons for calling were recorded accurately and with care." (1-ER-104). However, that analysis merely reiterates the business-records exception focused on the first level of hearsay (the employees). It did not address the out-of-court statements of the callers (the second level). There are no apparent guarantees of trustworthiness emanating from a random caller of a widely publicized business phone number. Neither Lerner & Rowe nor the District Court suggests otherwise.

As to the second point, the Court concluded the statements made by callers are the most probative evidence on the central issue of whether they were confused. (*Id*.) But, against the backdrop of the ambiguous notes, the more probative evidence of caller confusion would have been to either obtain declarations or take depositions. Even just a single one would have shed light on Lerner & Rowe's claim that callers were confused. Lerner & Rowe declined to present such evidence. It is not clear if Lerner & Rowe sought this evidence and simply did not disclose it because the testimony did not line up with its theory of the case. In any event, the ambiguous call logs are not the most probative evidence on caller confusion, and the exception should not apply to this second level of hearsay.

Accordingly, the call logs should be deemed inadmissible.

. . .

b. The District Court properly dismissed any evidence of actual confusion as *de minimis*.

Human nature is such that a certain degree of error is inevitable. People browse the internet inattentively. People mistakenly click links (the "fat finger" phenomenon). It does not mean they were confused. And, of course, there will always be some who are easily confused—outliers who are not ordinary consumers exercising ordinary caution. This is why the test for infringement requires probable (rather than possible) confusion of an *appreciable* number of consumers. *See* McCarthy § 23:3 ("The test of infringement cannot be a mere 'possibility' of confusion, because '[m]any consumers are ignorant or inattentive, so some are bound to misunderstand no matter how careful a producer is.' . . . 'Some confusion is always possible: but there must be some threshold quantum that crosses from mere possibility into a probability.'"). This reality is also baked into the case law holding that limited instances of confusion may be discounted as *de minimis* when context demonstrates there are significant opportunities for confusion. *See, e.g.*, *Nutri/Sys., Inc. v. Con-Stan Indus., Inc.*, 809 F.2d 601, 606 (9th Cir. 1987). It is further reflected in survey-design principles, where a control group (without the allegedly offending ad) is assessed to determine a baseline level of confusion, which is then subtracted from the test group to obtain a net rate of confusion—*i.e.*, the level of confusion that may be reasonably attributable to the allegedly offending ad. *See* McCarthy § 32:187 ("The use of a control in a trademark survey serves a purpose similar to the use of a placebo in testing for drug efficacy and a lineup of people including the suspect for eyewitness identification in criminal cases. . . . The net rate of confusion is the raw confusion rate minus the rate produced by the control question.").

Evidence of actual confusion can take the form of (1) instances of confusion among customers (*i.e.*, anecdotal evidence), or (2) a consumer survey. *BBK Tobacco & Foods LLP v. Cent. Coast Agric. Inc.*, 615 F.Supp.3d 982, 1020 (D. Ariz. 2022). Unsurprisingly, Lerner & Rowe makes much of the raw number of alleged instances of confusion. And it emphasizes that ALG engaged in the subject advertising for nearly five years. However, spread over five years and placed in the appropriate context of the total opportunities for confusion, this raw number indicates confusion is unlikely.

Instances of actual confusion must be viewed against the context of the number of opportunities for such confusion. *Kendall-Jackson Winery, Ltd.*

v. E. & J. Gallo Winery, 150 F.3d 1042, 1052 (9th Cir. 1998); *Nutri/Sys., Inc. v. Con-Stan Indus., Inc.*, 809 F.2d 601, 606 (9th Cir. 1987); *George & Co. LLC v. Imagination Entm't Ltd.*, 575 F.3d 383, 398 (4th Cir. 2009) ("[e]vidence of the number of instances of actual confusion must be placed against the background of the number of opportunities for confusion before one can make an informed decision as to the weight to be given the evidence.") (citing McCarthy § 23:14); *Petro Stopping Centers, L.P. v. James River Petroleum, Inc.*, 130 F.3d 88, 95 (4th Cir. 1997) ("In light of its huge volume of commerce, Petro Stopping's meager evidence of actual confusion is at best *de minimis*."); *D&J Master Clean, Inc. v. Servicemaster Co.*, 181 F. Supp. 2d 821, 828 (S.D. Ohio 2002) (holding two misdirected phone calls per week out of average of 550 calls was only 0.36% and did not support a finding of actual confusion); *Alchemy II, Inc. v. Yes! Entm't Corp.*, 844 F. Supp. 560, 569 n.12 (C.D. Cal. 1994) (ruling phone-call evidence of actual confusion was inadmissible hearsay; but noting the evidence was *de minimis* in light of the high volume of calls during the holidays); *GOLO, LLC v. Goli Nutrition Inc.*, CV-20-667-RGA, 2020 WL 5203601, at *9 (D. Del. Sept. 1, 2020) ("While Plaintiff offers the numerator in its determination of actual confusion events, its argument leads to the question: what is the denominator?"

Rejecting 210 purported instances of actual confusion as "isolated and idiosyncratic" in light of significant number of opportunities for confusion); *see also* McCarthy § 23:14. While Lerner & Rowe will likely attempt to distinguish these cases factually, they all stand for the proposition that proportionally few instances of actual confusion may be dismissed as *de minimis*.

Examining the case law on consumer surveys, McCarthy notes that "[w]hen the percentage results of a confusion survey dip below 10%, they can become evidence which will indicate that confusion is not likely." McCarthy § 32:189; *see also Water Pik, Inc. v. Med-Systems, Inc.*, 726 F.3d 1136, 1149 (10th Cir. 2013) (affirming summary judgment for defendant; net confusion rate of less than 6.5% was "insignificant"); *CareFirst of Maryland, Inc. v. First Care, P.C.*, 434 F.3d 263, 268 (4th Cir. 2006) (net confusion rate of 2% is *de minimis* and "hardly a sufficient showing of actual confusion"); *Henri's Food Prods. Co. v. Kraft, Inc.*, 717 F.2d 352, 358-59 (7th Cir. 1983) (net confusion rate of 7.6% weighed against a finding of infringement); *Brockmeyer v. Hearst Corp.*, 248 F. Supp. 2d 281, 298 (S.D.N.Y. 2003) (net confusion rate of 3% is a "factor [that] weighs in favor of the defendants"); *IDV North Am., Inc. v. S & M Brands, Inc.*, 26 F. Supp. 2d 815, 831-832 (E.D.

Va. 1998) (net confusion rate of 2.4% proves "the absence, rather than the presence, of likely confusion of source or sponsorship between Bailey's cigarettes and BAILEY's liqueurs"); *BBK Tobacco*, 615 F.Supp.3d at 1021 (granting summary judgment to defendant despite plaintiff's consumer survey evidence showing net confusion rates of 11-12%); *Newport Pac. Corp. v. Moe's Southwest Grill, LLC*, 05-cv-00995, 2006 WL 2811905 *14 (D. Or. 2006) (granting summary judgment to defendant; finding net confusion rate of 14% was "barely above McCarthy's threshold that confusion results below 10% are evidence that confusion is not likely").

Lerner & Rowe presents an inaccurate and unreasonable interpretation of the call logs to argue actual confusion was pervasive. However, even crediting every claimed instance of actual confusion, the actual-confusion evidence is *de minimis*.

Lerner & Rowe counts 236 instances where it is referenced in the call logs in some way. It claims this is evidence of 236 instances of actual confusion. (Dkt. 9 at 20). But this is not a reasonable interpretation of the data. First, Lerner & Rowe's principal Kevin Rowe testified that the parties used to refer business to each other. (2-ER-485). Of the call log entries that reference Plaintiff, 29 entries specifically indicated the client was *referred by*

Lerner & Rowe. (1-ER-259; 2-ER-355-56; 3-ER-638-42; 5-ER-1117-1362). Moreover, many of the entries indicate that the caller was searching for Lerner & Rowe and found ALG. (*Id.*) For example, a 3/23/18 entry shows the referral source as "Internet - searching L&R" (5-ER-1161); a 5/5/18 entry notes "Internet (L&R)" (5-ER-1155); a 7/22/18 entry notes "Google-L&R" (5-ER-1142). Most of the entries follow a similar format. (5-ER-1117-1362). Notably, these responses were given after ALG had identified itself. (2-ER-555, 558-60).

Lerner & Rowe claims this is all actual-confusion evidence because it shows the client was searching for Lerner & Rowe and was diverted to ALG. (3-ER-737). But Lerner & Rowe must show that consumers were confused, not merely diverted. Having not obtained any declarations or taken any depositions, its claim that these callers were confused is mere speculation. *Cf. Cafasso v. Gen. Dynamics, Inc.*, 637 F.3d 1047, 1061 (9th Cir. 2011) (speculative evidence does not create a fact issue).

Based on Lerner & Rowe's count, the call logs include 84 callers who stated they were either looking for, were calling for, or otherwise wanted Lerner & Rowe. (2-ER-464-65). While these may arguably suggest confusion, the fact that someone reported finding ALG because they were "looking for" Lerner & Rowe could also mean they simply found ALG while looking for Lerner & Rowe—a reasonable likelihood given the fact that ALG's ads appear among search results for Lerner & Rowe. The evidence is ambiguous. For most of the entries, a factfinder can only speculate whether such callers were actually confused.

Ultimately, however, even crediting Lerner & Rowe's unreasonable assertion that every reference to Lerner & Rowe was an instance of actual confusion, this evidence is properly dismissed as *de minimis*.

This is a unique case wherein the total number of opportunities for confusion is explicitly quantified (via Google Ad data), giving the Court an unusual level of insight and certainty in evaluating the facts of the case. The Google Ad data demonstrate 109,322 total ad impressions (*i.e.*, the number of times ALG's ads were displayed to someone who searched for Lerner & Rowe). (2-ER-326). Comparing these impressions to the 236 call-log entries, the alleged instances of confusion amount to only 0.214% (two-tenths of one percent) of the total opportunities for confusion.

In a recent Tenth Circuit keyword-search case, the court considered the ads' "click-thru rate" (*i.e.*, the percentage of people who encountered the ads and clicked on them) as the "upper limit" for *possible* confusion. *1-*

800 Contacts, Inc. v. Lens.com, Inc., 722 F.3d 1229, 1244 (10th Cir. 2013). The click-thru rate was essentially the total number of customers *diverted*, and the plaintiff had to demonstrate which, if any, were diverted due to confusion. The court eventually affirmed summary judgment in favor of the defendant notwithstanding the plaintiff's consumer survey showing a net confusion rate of 7.4%, since it was below the 10% threshold as ascribed by McCarthy. *Id*. at 1249.

Here, ALG's click-thru rate was 6.82%—well below the 10% threshold for legally significant actual-confusion evidence. (1-ER-326).

Notably, these are real numbers. They can be sliced and presented in various ways. But they are not reasonably subject to cross-examination or criticism like an expert or consumer survey. The data are real. And they are undisputed.

Lerner & Rowe cites various cases to support its claim that only a few instances of actual confusion are enough to compel a trial. However, the cited cases are quite distinct from the present case (mostly in the traditional infringement setting) and do not contradict the requisite contextual consideration. *See Ironhawk Techs., Inc. v. Dropbox, Inc.*, 2 F.4th 1150, 1160 (9th Cir. 2021) (defendant presented customers with identical marks on related goods, and the Court expressed doubt that the jury would find the actual confusion factor in plaintiff's favor); *Stone Creek, Inc. v. Omnia Italian Design, Inc.*, 875 F.3d 426, 433 (9th Cir. 2017) (marks and goods were "indistinguishable," defendant admitted to "blatant copying," "These occasions 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"); *S. Cal. Darts Ass'n v. Zaffina*, 762 F.3d 921, 930 (9th Cir. 2014) (identical marks and services, intentional copying); *Playboy*, 354 F.3d at 1027 (pre-*Network Automation*, unlabeled ads, 54% confusion rate); *Rosetta Stone Ltd. v. Google, Inc.*, 676 F.3d 144, 152 (4th Cir. 2012) (plaintiff's mark was displayed in ad for counterfeit goods, survey showed 94% confusion rate).

The other cases cited from other jurisdictions (also in the traditional infringement setting) merely indicate that, where the marks and offerings are identical or nearly identical, even a small amount of actual confusion may be an additional factor to be considered. (Dkt. 9 at 24-27). One court remarked that isolated instances of actual confusion after a significant period of concurrent sales or extensive advertising do not necessarily indicate an increased likelihood of confusion and may even suggest the opposite. *Daddy's Junky Music Stores, Inc. v. Big Daddy's Fam. Music Ctr.*, 109 F.3d 275, 284 (6th Cir. 1997).

And Lerner & Rowe inaccurately recounts several of the cited opinions. *See JL Beverage Co., LLC v. Jim Beam Brands Co.*, 828 F.3d 1098, 1111 (9th Cir. 2016) (several incidents of actual consumer confusion did *not* weigh in plaintiff's favor); *Rearden LLC v. Rearden Com., Inc.*, 683 F.3d 1190, 1207, 1217 (9th Cir. 2012) (highly similar marks and related services, evidence of "dozens" of instances of confusion, not just two); *State 48 Recycling Inc. v. Janes*, CV-22-00767-PHX-GMS, 2022 WL 1689414 *1 (D. Ariz. May 26, 2022) (employees left company and stole customers by pretending to be representatives of former employer); *AAA Alarm & Sec. Inc. v. A3 Smart Home LP*, CV-21-00321-PHX-GMS, 2021 WL 3857417 *1 (D. Ariz. Aug. 30, 2021) (identical marks and services, plaintiff submitted substantial evidence in a preliminary-injunction hearing, including customer testimony, of ongoing and pervasive actual confusion); *Trident Inv. Partners Inc. v. Evans,* CV-20-01848-PHX-DWL, 2021 WL 75826 *5 (D. Ariz. Jan. 8, 2021) (default judgment, identical marks and services, plaintiff had alleged "significant confusion among consumers").

Additionally, ALG commissioned a consumer survey that further bolsters the conclusions from the real data. ALG engaged Professor David Franklyn of the McCarthy Institute to conduct a consumer survey evaluating confusion based on the subject ads. (2-ER-358-417). The survey determined that the net rate of confusion was near zero and *de minimis* at best. (2-ER-367-70, 373; 2-ER-421-22). This conforms to the actual data addressed above. And this *de minimis* rate of confusion makes sense: The consumer survey also found that 88% of consumers in Maricopa and Pinal Counties had heard of Lerner & Rowe, while 69% had heard of Accident Law Group. (2-ER-370). Thus, most consumers encountering the parties' trademarks were already familiar with them—and were, thus, unlikely to be confused by competing ads.

Even if the survey were ultimately given little or no weight, Lerner & Rowe has no other evidence to support its claim of confusion. Lerner & Rowe did not commission its own consumer survey—or at least it has not disclosed one. And the real data demonstrates the purported confusion evidence is *de minimis*.

Accordingly, Lerner & Rowe cannot show more than *de minimis* evidence of actual confusion.

4. Proximity of goods, similarity of marks, marketing channels, and likelihood of expansion are all irrelevant.

The *Network Automation* Court concluded that "proximity of the goods," "similarity of the marks," "marketing channels," and "likelihood of expansion" were unimportant in a case involving keyword advertising. 638 F.3d at 1150-53. Although the parties, here, are direct competitors and use similar marketing channels,[6] the confluence of these facts does not speak to likely confusion under the circumstances. The labeling/context of the subject ads suggest consumers are unlikely to be confused.

The "similarity of the marks," here, actually reduces the likelihood of confusion because ACCIDENT LAW GROUP and LERNER & ROWE are not at all similar. Lerner & Rowe suggests the Court should consider the marks identical because ALG used its name as a keyword. (3-ER-739). However, Lerner & Rowe's name was only used (by Google) to index ads with search results. Its name was never displayed to consumers. Comparing the marks as consumers would encounter them in the

[6] "Today, it would be the rare commercial retailer that did not advertise online, and the shared use of a ubiquitous marketing channel does not shed much light on the likelihood of consumer confusion." *Id.* at 1151.

marketplace (as the test requires) contemplates the two, clearly distinct marks. The distinct marks diminish any likelihood of confusion.

5. Accident Law Group's intent was legitimate competition.

Lerner & Rowe suggests "defendant's intent" favors a finding of likelihood of confusion because ALG was familiar with Lerner & Rowe and chose to use its name as a keyword anyway. (Dkt. 9 at 43-44). Lerner & Rowe cites cases where a defendant adopted a plaintiff's mark with knowledge of the plaintiff's rights in the mark, thereby creating the implication of an intent to deceive. (*Id*). These cases are inapposite. ALG paid to serve its own ads in search results for Lerner & Rowe. This is a common and legitimate marketing strategy. ALG did not display Lerner & Rowe's name in the ad. It did not do anything to suggest any affiliation with Lerner & Rowe. Lerner & Rowe has not and cannot show that ALG intended to cause confusion.

6. Trademark strength is irrelevant.

Lerner & Rowe repeatedly refers to the "Lerner & Rowe Marks," presumably to bolster its argument that the claimed marks are strong. (Dkt. 9 at 7; 3-ER-734). But Lerner & Rowe's own evidence demonstrates it only owns one of the identified marks, LERNER & ROWE. (2-ER-512-17). The other two marks are owned individually by shareholders of Lerner & Rowe, P.C., neither of whom are parties to this lawsuit. (*Id*.) But it does not particularly matter because the strength of the mark in this instance is largely irrelevant.

Trademark strength is relevant to likelihood of confusion because a stronger mark enjoys a wider range of protection "both as to products and format variations." McCarthy § 11:73. In other words, trademark strength concerns the mark's "reach" (*i.e.*, enforceability) against dissimilar marks and offerings. A stronger mark can stave off marks with fewer similarities (*e.g.*, distinct wording) as well as those used in connection with less-related goods and services (*i.e.*, across various product classes). By contrast, the owner of a weaker mark will only be able to enforce rights against highly similar marks on closely related goods and services. The rationale is that consumers are more likely to believe there is an affiliation where a mark approximates an inherently distinctive and commercially well-known mark. *Id*.

Although the *Network Automation* Court included "strength of the mark" among its list of relevant factors for evaluating keyword advertising, it did so under the faulty assumption, addressed below, that consumers searching for a brand name must be looking exclusively for that brand—and are, thus, more likely to be confused when encountering competing ads. 638 F.3d at 1149, 1154. Consumers may be more likely to be looking for a particular brand when typing in a more-distinctive mark. However, the effect of such focused intent is simply that the searcher generates a universe of search results containing a greater proportion of less-interesting results. Search engines produce millions, if not billions, of results, regardless of whether the search term is a household name or a generic product category. A Google search for Nike returns 2.26 billion results, while a search for "athletic shoes" yields 252 million. Even assuming all searchers of brand names have uniform intent, no ordinary consumer would be surprised to encounter other related results. Thus, trademark strength is not legitimately probative of likelihood of confusion in the context of keyword advertising unless the accused mark is displayed in the subject ads.

The *Multi Time Machine* Court determined that trademark strength is irrelevant in the context of keyword advertising if the ad is clearly labeled. 804 F.3d at 940. The Court recognized that "[e]ven assuming MTM's mark is one of the strongest in the world—on the same level as Apple, Coke, Disney, or McDonald's—there is still no likelihood of confusion because Amazon clearly labels the source of the products it offers for sale." *Id*. In such instances, the marks are typically distinct and the products typically compete. This would not be the case where the accused mark is confusingly similar to the plaintiff's mark, which would present a more-typical infringement claim. But, in instances where the only dispute concerns competitive keyword advertising, such advertising is legitimate competition so long as the advertiser does not create the false impression of affiliation.

Like in *Multi Time Machine*, ALG's ads, here, are clearly labeled with its own federally registered trademark. The ads do not display Lerner & Rowe's mark or anything remotely similar. The ads simply do not suggest any affiliation, other than appearing adjacent to (but partitioned from) Lerner & Rowe ads and organic results. Even if Lerner & Rowe's mark was the strongest trademark in the world, it says nothing about likelihood of confusion in this instance.

Based on the foregoing, the District Court properly found no reasonable jury could find likelihood of confusion in this case. Summary judgment for Defendants should, therefore, be affirmed.

II. ALTERNATIVELY, THE COURT MAY AFFIRM ON GROUNDS ACCIDENT LAW GROUP NEVER USED THE MARK IN COMMERCE.

On appeal, this Court can affirm for any reason supported by the record. *Griffin v. Arpaio*, 557 F.3d 1117, 1121 (9th Cir. 2009). Accident Law Group submits that this Court can affirm on separate grounds it never used Lerner & Rowe's trademark in commerce.[7] More than a decade ago, this Court held that "use of a trademark as a search engine keyword that triggers the display of a competitor's advertisement is a 'use in commerce' under the Lanham Act." *Network Automation*, 638 F.3d at 1144. In other words, the Court held that paying Google to serve an ad along with search results for a competitor, even where the competitor's mark is not displayed to consumers, constitutes use of that mark in commerce. The District Court

[7] Lerner & Rowe claims there is "no dispute Accident Law Group has used Lerner & Rowe's protected, federally registered marks." (Dkt. 9 at 17). This is incorrect, and the supporting citation only establishes that the trademarks are registered, not that ALG used the trademarks.

in this case was, of course, bound to follow that precedent. This Court, however, can and should overturn that determination.

A. Trademark "Use" Is Essential to Trademark Infringement.

The Lanham Act prohibits only trademark use, *i.e.*, use of a trademark in connection with the sale of goods or services in commerce. 15 U.S.C. § 1114; *Prestonettes, Inc. v. Coty*, 264 U.S. 359, 368 (1924) (A trademark "does not confer a right to prohibit the use of the word or words. It is not a copyright. A trademark only gives the right to prohibit the use of it insofar as to protect the owner's good will against the sale of another's product as his."). The Lanham Act and relevant case law focus on the acts of sellers who use a competitor's trademark as their own. *See* Margreth Barrett, *Internet Trademark Suits and the Demise of "Trademark Use,"* 39 U.C. Davis L. Rev. 371, 376-87 (2006) (detailing statutory basis for "use" requirement).

Here, ALG never displayed the Lerner & Rowe trademark or anything remotely similar. Nor did ALG use Lerner & Rowe's mark in metadata or codes, or in any manner whatsoever. ALG merely accepted Google's invitation to pay Google to display its own advertisement among the search results when a consumer typed Lerner & Rowe's name into the search box.

B. Evolving Case Law Concerning Trademarks and the Internet

In the internet's adolescent years, courts struggled with an appropriate standard for evaluating infringement online. Consumers were not as adept at navigating the internet and there was a haze of distrust surrounding online activity. The courts were already recognizing the need to adapt to changes in technology and to evolving consumer experience and expectations. *Brookfield*, 174 F.3d at 1054 ("We must be acutely aware of excessive rigidity when applying the law in the Internet context; emerging technologies require a flexible approach.").

The earliest of the keyword-advertising cases were decided about fifteen years ago, only shortly after Google began allowing marketers to advertise in search results. Early cases focused solely on whether web traffic was "diverted"—they did not look at whether consumers were actually confused or misled. *See Network Automation, Inc.*, 638 F.3d at 1145-49 (recounting some of the history). The reasoning was that a company used its competitor's trademark and ended up with its competitor's business as a result. But this reasoning misconstrued the way search engines work and how people interact with and use the internet. And it ignored similar marketing phenomenon, like comparative advertising, where non-confusing use of a competitor's trademark in competition is considered beneficial for consumers—providing consumers options and improving marketplace efficiency.[8]

As internet usage proliferated and online shopping became more prevalent, courts began modifying their approach to keyword advertising, acknowledging the reality of the online-shopping experience and refocusing the analysis on the requirement of "confusion" rather than mere "diversion." In 2011, the *Network Automation* Court departed from prior decisions and clarified that the analysis for keyword advertising must necessarily focus on confusion, not mere diversion. 638 F.3d at 1148-49. Even then (more than a decade ago), the court noted the increasing ubiquity of the internet, commenting that "[c]onsumers who use the internet for shopping are generally quite sophisticated about such matters." *Id*. at 1152.

Early keyword-advertising cases were split on when an accused mark is used in commerce. Some cases determined that because the defendants

---

[8] In fact, the Federal Trade Commission *encourages* comparative advertising on grounds it is "a source of important information to consumers and assists them in making rational purchase decisions." 16 C.F.R. § 14.15(b)-(c) ("Commission policy in the area of comparative advertising encourages the name of or reference to competitors….").

did not display the competitor's trademarks in their ads, they did not use the trademarks in commerce. *See, e.g.*, *Merck & Co. v. Mediplan Health Consulting, Inc.*, 425 F.Supp.2d 402, 415 (S.D.N.Y. 2006). Others determined that participation in Google's AdWords program constituted trademark use under the Lanham Act simply because it amounted to commercial use of the mark. *See, e.g.*, *Fin. Exp. LLC v. Nowcom Corp*., 564 F. Supp. 2d 1160, 1173 (C.D. Cal. 2008). The early cases finding that keyword advertising constituted use of a trademark in commerce often relied on *Brookfield*, 174 F.3d at 1064, which held that metatags—contained in the code of the website but not displayed in the page's content—are a use in commerce.

Eventually the use issue in the context of keyword advertising made its way to the circuit courts, and, once again, a split emerged. In 2009, the Second Circuit distinguished its prior determination on "use in commerce" and held that Google used the plaintiff Rescuecom's marks in commerce because it "displays, offers, and sold Rescuecom's mark to Google's advertising customers *when selling its advertising services*." *Rescuecom Corp. v. Google Inc.*, 562 F.3d 123, 129 (2d Cir. 2009) (emphasis added). The *Rescuecom* Court noted "highly relevant" dicta from the distinguished case that using a trademark to trigger an ad "might, depending on other elements, have been actionable." *Id*. at 128 (citing *1-800 Contacts, Inc. v. WhenU.Com, Inc.*, 414 F.3d 400, 409 & n.11 (2d Cir. 2005)). Then, as it had in its prior decision, the Second Circuit applied the definition of "use in commerce" found in the second sentence of 15 U.S.C. § 1127 to determine whether Google had actually used the mark in commerce. *Id*. at 128 (quoting 15 U.S.C. § 1127) ("a mark shall be deemed to be in use in commerce . . . (2) on services when it is used or displayed in the sale or advertising of services and the services are rendered in commerce."). The court noted that Google's use fit perfectly within that definition because it had actually presented the mark to customers for purchase through its Keyword Suggestion Tool. *Id*. The court explained that this presentation of the mark to customers made Google's use a "non-internal" use, which distinguished it from prior cases where metadata and keywords triggering ads had not qualified as trademark use. *Id*. The *Rescuecom* decision focused on *Google's* use of the mark and the fact that it actually presented the subject marks to its prospective customers.

ALG, thus, submits that to find it used Lerner & Rowe's trademark in commerce, Lerner & Rowe must show that its trademark was "used or displayed in the sale or advertising of services." *See* 15 U.S.C. § 1127.

The drafters of the Lanham Act surely understood that a trademark-infringement action requires presentation of the subject mark to the relevant consumers—either displayed when the advertisement is visual or spoken when auditory (*e.g.*, a radio commercial). Otherwise, it is not the accused mark causing confusion. There is no support for a determination that Congress intended the term "used" in Section 1127 to include an advertisement that neither displays nor verbally uses the trademark. The decisions that conclude otherwise are remnants of the general distrust of online commerce that permeated during the early years of the internet.

The 2011 *Network Automation* Case was the first circuit case to decide that a competitor serving its ads in search results of another was "use in commerce" by the competitor (rather than by the search engine). 638 F.3d at 1144-45. Importantly, the Ninth Circuit lacked the benefit of briefing on the issue because neither party contested that keyword advertising constituted use of the mark under the Lanham Act. With only three sentences, the Court determined that the defendant had used the plaintiff's trademark. The Court noted it had previously assumed, without expressly deciding, that the use of a trademark as a search-engine keyword that triggers the display of a competitor's advertisement is a "use in commerce" under the Lanham Act. For this proposition, it cited *Playboy*, 354 F.3d at 1024, and *Brookfield*, 174 F.3d at 1054, with an additional citation to *Finance Express LLC v. Nowcom Corp.*, 564 F. Supp. 2d 1160, 1172-73 (C.D. Cal. 2008). The Court then stated it agreed with the Second Circuit in *Rescuecom* "that Google's sale of trademarks as search engine keywords is a use in commerce." And, finally, the Court cited McCarthy §§ 23:11.50, 25:70:25 (4th ed. 2010).

The *Brookfield* case was decided in 1999 while "the Web [was] becoming an important mechanism for commerce" and companies were "racing to stake out their place in cyberspace." 174 F.3d at 1044. The *Brookfield* Court likened the defendant's use of the plaintiff's mark in metatags to posting a sign with another's trademark in front of one's store. *Id.* at 1064. This analogy, however, is one of actually displaying the trademark to consumers on a sign. The Court assumed, without analyzing the statutory definition of "use in commerce," that including a trademark in hidden metatags was use of a trademark in commerce.

None of the circuit cases relied on by *Network Automation* were cases against a competitor who had only paid for advertising and had neither programmed nor displayed its competitor's trademarks in some way. In

Playboy, Netscape had listed Playboy's trademarks among terms related to adult-oriented entertainment, and adult-oriented companies were actually *required* to link their ads to this set of terms. 354 F.3d at 1023.

The cited district court case, *Finance Express*, was, on the other hand, against a competitor. 564 F. Supp. 2d at 1173. The Central District of California also relied on *Brookfield* and *Playboy*, as well as decisions in other district courts. The *Finance Express* Court merely focused on the commercial nature of the transaction, never addressed the lack of display of the trademark, never distinguished between the competitor and the search engine, and never explained how the competitor actually "used" the trademark. *Id*. As Lerner & Rowe does here, the California District Court used the phrase "purchased keywords from Google" as if the keywords were goods rather than services and as if the defendant had purchased a physical trademark. In reality, this is not at all the way the transaction occurs. ALG, like the defendant in *Finance Express*, paid Google to provide a service, namely to display its advertisements to consumers based on consumers' search criteria.

Even the *McCarthy* section cited by the Ninth Circuit in *Network Automation* has changed. The current Fifth Edition states that while "search engines in the early days of the internet relied heavily on metatags to find web sites . . . modern search engines no longer use metatags" and that, in 2009, Google officially announced that its search algorithm did not rely on metatags. McCarthy § 25A:3. The current version of the treatise also recognizes that "applying the Freeway Sign metaphor to metatags [a reference to *Brookfield*] has been criticized as improperly creating infringement out of mere diversion without confusion." *Id*.

In 2012, the Fourth Circuit decided a pay-per-click case and stated in a footnote, "since it is not an issue in this appeal, we express no opinion today as to whether Google 'used' these marks as contemplated by the Lanham Act." *Rosetta Stone*, 676 F.3d at 153.

In 2013, the Wisconsin Court of Appeals declined to extend the *Rescuecom* decision to a right of privacy statute. *Habush v. Cannon*, 346 Wis. 2d 709, 728, 828 N.W.2d 876, 885 (Wis. Ct. App. 2013) ("Based on the arguments before us and on our own attempt to find helpful authority, we conclude that the more reasonable interpretation of the word 'use' in Wis. Stat. § 995.50(2)(b) is that it does not cover bidding on someone's name as a keyword search term.").

C. “Use in Commerce” Should Require Presentation of the Mark to the Allegedly Confused Consumers.

As consumers have increasingly embraced the internet and online commerce has become the norm, ALG contends it is time for the case law to further evolve to match the consumer experience. The Court should reconsider its precedent deeming keyword advertising “use in commerce” when the mark is not actually presented to consumers. Treating keyword advertising as “use in commerce” when the mark is not actually presented to consumers is problematic because (1) it is based on a faulty assumption regarding search-engine user’s objectives; (2) it does not reflect common experience of search-engine use; and (3) the traditional likelihood-of-confusion analysis is ill suited for such circumstances.

1. Prior cases concerning keyword ads were based on a faulty assumption.

The *Network Automation* Case, along with other keyword-ad cases, has operated under the assumption that a person who types a trademark into a search engine is searching exclusively for goods and services from the owner of the mark. 638 F.3d at 1150. Based on this assumption, courts have justified holding that the mere context of a competitor’s ad nearby may give rise to confusion even if the trademark is never actually displayed to consumers.

However, subsequent studies have found that this assumption is unwarranted. In fact, searchers' objectives vary widely. *Cf*. Eric Goldman, *Deregulating Relevancy in Internet Trademark Law*, 54 Emory L.J. 507, 513-28, 566 (2005) (analyzing the internet search process, addressing the faulty logic underlying the assumption that an internet searcher must be looking solely for the trademark owner; "[I]t is improper to assume that using a trademarked keyword means that the searcher wanted to find the trademark owner").

A 2013 study published in the Harvard Journal of Law & Technology recounted several survey results (using automotive brands) finding that anywhere between 47% and 65% (depending on the context) of consumers searching for a specific brand online are only seeking information about that specific brand. David J. Franklyn, David A. Hyman, *Trademarks As Search Engine Keywords: Much Ado About Something?*, 26 Harv. J.L. & Tech. 481, 517-18 (2013). About one-third of consumers who search for a specific brand online are seeking information about the brand *and* similar products from other brands. *Id*. In any event, most of the searchers expected to encounter and sort through more than just the brand owner in search results. *Id*. Indeed, anyone who has ever used a search engine is familiar with the voluminous results that are returned. Thus, the study concluded that courts "should not simply assume that consumers have homogenous goals and expectations and are all equally susceptible to diversion or confusion." *Id*. at 501.

Accordingly, the assumption underlying the prior keyword advertising cases is inaccurate. By discarding this erroneous assumption, it becomes apparent that consumers are not susceptible to confusion based on mere context of a competitor's ad among search engine results.

2. Consumers understand how search engines work and are not likely to be confused by a nearby ad.

In the decade since the above-referenced studies were analyzed, search-engine use and online commerce has only further expanded. The ubiquity of the digital economy was further accelerated by the Covid-19 pandemic, which forced most every transaction online.

In 2024, consumers understand that search engines generate an incredible number of results that may only be marginally related to the searched-for term. A Google search for "Starbucks" yields 447 million results; "Toyota" yields 1.21 billion results. It would be unreasonable to suggest that every one of these results—or even *most* of these results—direct search-engine users to the respective brand owner. The very function of a search engine is to find and return related results. Whether the results are ads or organic results, they are generally related to the searched-for term to varying degrees. Consumers understand and wield search engines accordingly. Anyone who has used a search engine understands they may have to review multiple entries before finding what they are looking for—or before finding a result that piques their interest.

3. The traditional likelihood-of-confusion analysis is ill suited for competitive keyword advertising.

Based on the determination that liability for trademark infringement can arise without ever displaying the mark to consumers, the *Network Automation* Court wrestled with the appropriate framework to analyze an infringement claim in the context of keyword advertising, suggesting that the typical *Sleekcraft* factors (for evaluating likelihood of confusion) and the "internet troika" (which had recently arisen to tackle online infringement) were not particularly fitting. 638 F.3d at 1148-49. While ultimately framing its analysis with the *Sleekcraft* factors, the Court was forced to create a mutant test for such circumstances, justified by its emphasis that the *Sleekcraft* factors were "(1) non-exhaustive, and (2) should be applied flexibly, particularly in the context of internet commerce." *Id*. at 1149. After running through the *Sleekcraft* factors, the court determined that in the keyword-advertising context, likelihood of confusion will turn on "what the consumer saw on the screen and reasonably believed, given the context'"—which factor is notably *not* among the typical *Sleekcraft* factors. *Id*. at 1153.

The traditional likelihood-of-confusion analysis compares the marketplace use of allegedly conflicting indicia-of-origin to determine whether confusion is likely to result. *See, e.g.*, *M2 Software*, 421 F.3d at 1082 ("The similarity of marks 'has always been considered a critical question in the likelihood-of-confusion analysis.'"); *Hewlett-Packard v. Packard Press*, 281 F.3d 1261, 1265 (Fed. Cir. 2002) ("[T]he 'similarity or dissimilarity of the marks in their entireties' is a predominant inquiry."); *Chesebrough-Pond's, Inc. v. Faberge, Inc.*, 666 F.2d 393, 397 (9th Cir. 1982) (affirming summary judgment, primarily for lack of similarity of the marks MACHO and MATCH); *see also Brookfield*, 174 F.3d at 1054 ("[t]he marks must be considered in their entirety and as they appear in the marketplace."). But where a marketer never displays a competitor's mark or anything remotely similar, courts are forced to evaluate whether consumers are likely to be confused based on the mere spatial positioning of the products or ads. This is reflected in *Network Automation*'s wholesale upending of the traditional *Sleekcraft* analysis in favor of a standard that focuses almost entirely on the context of the accused ads.

The Lanham Act does not contemplate protection from confusion based on spatially positioning competing ads or products. A claim for trademark infringement requires likely confusion resulting from "use in commerce" of "any reproduction, counterfeit, copy, or colorable imitation of a registered mark." 15 U.S.C. § 1114(1)(a). Similarly, a claim for false designation of origin or unfair competition requires likely confusion resulting from "use in commerce" of a "word, term, name, symbol, or device, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact." *Id.* § 1125(a). But if this mark, word, term, name, symbol, or device is never presented to the consumer, it is not logically the cause of the confusion. Rather, under such reasoning, it is merely the spatial positioning that must necessarily cause the confusion.

A hypothetical scenario—based on the concept that Google has replaced traditional retailers in the marketplace setting—illustrates the unsatisfactory reasoning underlying the idea that spatial positioning, by itself, might cause confusion:

Consider a grocer who routinely shelves competing bags of flour next to each other. The fact that the competing brands sit on the shelf adjacent to one another could never be deemed trademark infringement—even if consumers were to mindlessly reach for the adjacent brand without noticing the changeover from one brand to the next.

Similarly, if a competitor specifically pays the grocer to shelf its product directly next to its top-selling competitor (in attempt to boost sales), this is not trademark infringement.

Even if that competitor uses a descriptive brand name, like WORLD'S BEST FLOUR, next to the competitor's inherently distinctive brand, *e.g.*, BEDOUIN FLOUR, the use of a descriptive brand name and placement on a shelf directly next to a competitor is still not trademark infringement.

Consider, then, if a shopper asks where to find BEDOUIN FLOUR and the grocer directs them to the aisle with an entire wall of flour options (analogous to Google indexing and returning related search results). Even then, the use of a descriptive brand name and placement on a shelf directly next to a competitor is not trademark infringement. The competitor simply never used the BEDOUIN FLOUR trademark. The customer understands there may be other options—and may even change her mind when encountering them. This is diversion, not confusion.

The novelty of the internet and search-engine use has worn off, and consumers know what they are going to get. A company should not be liable for arranging for its products to be displayed on the "shelf" next to a competitor in search-engine results for the same reason such a claim seems particularly trivial in the context of a brick-and-mortar retail store.

The outcome of cases across the country, applying the likelihood-of-confusion test, reflect the reality that consumers are not likely to be confused where the claimed mark is not displayed to consumers. McCarthy § 25A:7 ("Courts almost always find no likelihood of confusion if all that defendant has done is use another's mark as a keyword to trigger an ad for defendant in which the other's trademark does not appear."). As this has been the general outcome for cases when the mark is not displayed to consumers, it makes little sense to allow the continued maintenance of such lawsuits—and resulting waste of public and private resources—based on an outdated view of consumer experience and an unnecessary modification of the *Sleekcraft* analysis focused on the "context" of the subject ads. The *Sleekcraft* factors will protect brand owners when keyword advertising might cause confusion as the result of displaying some indicia-of-origin to consumers.

Accordingly, the Court should affirm, here, based on reconsideration its decision deeming keyword advertising use in commerce where the accused mark is never presented to consumers.

CONCLUSION

Defendants/Appellees request the Court affirm the grant of summary judgment. No reasonable jury could conclude that consumers are likely to be confused by Accident Law Group's ads. The District Court properly granted summary judgment to Accident Law Group.

RESPECTFULLY SUBMITTED this 10th day of January, 2024.

Jaburg & Wilk, P.C.

/s/ Aaron K. Haar

Maria Crimi Speth (012574)
Aaron K. Haar (030814)
3200 N. Central Ave., Suite 2000
Phoenix, Arizona 85012

Attorneys for Defendants-Appellees

CERTIFICATE OF COMPLIANCE

I am the attorney or self-represented party.

This brief contains 13,728 words, excluding the items exempted by FRAP 32(f). The brief's type size and typeface comply with FRAP 32(a)(5) and (6). I certify that this brief complies with the word limit of Cir. R. 32-1.

RESPECTFULLY SUBMITTED this 10th day of January, 2024.

Jaburg & Wilk, P.C.

/s/ Aaron K. Haar
Maria Crimi Speth (012574)
Aaron K. Haar (030814)
3200 N. Central Ave., Suite 2000
Phoenix, Arizona 85012

Attorneys for Defendants-Appellees

CERTIFICATE OF RELATED CASES

Defendants-Appellees have no knowledge of any related case pending in this court.

RESPECTFULLY SUBMITTED this 10th day of January, 2024.

Jaburg & Wilk, P.C.

/s/ Aaron K. Haar
Maria Crimi Speth (012574)
Aaron K. Haar (030814)
3200 N. Central Ave., Suite 2000
Phoenix, Arizona 85012

Attorneys for Defendants-Appellees

CERTIFICATE OF SERVICE

I hereby certify that on January 10, 2024, I electronically transmitted the foregoing Defendants-Appellees' Answering Brief with the Clerk of the United States Ninth Circuit Court of Appeals by using the appellate CM/ECF system for filing, and for transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

Andrew M. Gaggin
Lerner & Rowe PC
2701 East Camelback Road, Suite 140
Phoenix, Arizona 85016
agaggin@lernerandrowe.com
Attorneys for Plaintiff-Appellant

/s/ Joy Brown