Case No. 25-3555

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THE SCOTTS COMPANY LLC; OMS INVESTMENT, INC.
Plaintiffs-Appellants,

v.

THE PROCTER & GAMBLE COMPANY
Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of Ohio
Hon. Douglas R. Cole
U.S. District Court Case No. 2:24-cv-4199

BRIEF OF APPELLEE THE PROCTER & GAMBLE COMPANY

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 25-3555 Case Name: The Scotts Company LLC, et al v. The P

Name of counsel: Lauren S. Kuley

Pursuant to 6th Cir. R. 26.1, The Procter & Gamble Company
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on December 22, 2025 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/Lauren S. Kuley

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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STATEMENT REGARDING ORAL ARGUMENT

The district court's exceptionally thorough decision obviates any need for oral argument at this preliminary injunction stage. But Appellee The Procter and Gamble Company ("P&G") welcomes oral argument should the Court find it useful.

JURISDICTION

The district court had jurisdiction over Plaintiffs-Appellants The Scotts Company LLC and OMS Investments, Inc.'s (collectively, "Scotts") Lanham Act claims under 15 U.S.C. §1121. Following a two-day evidentiary hearing, the district court denied Scotts' motion for a preliminary injunction, and Scotts timely appealed. Opinion-Order, R.78 ("Op."); NOA, R.80. This Court has jurisdiction to review the denial of injunctive relief under 28 U.S.C. §1292(a).

ISSUE PRESENTED

Scotts requested a preliminary injunction for trade-dress infringement and dilution. The district court denied relief because it found Scotts unlikely to establish either infringement or dilution and because Scotts is unlikely to be irreparably harmed without immediate relief. This appeal thus presents one overarching question: whether the district court abused its discretion by denying Scotts a preliminary injunction for trade-dress infringement or dilution where Scotts failed to establish a likelihood of success on the merits or irreparable harm.

INTRODUCTION

When P&G introduced an innovative new weedkiller product called "Spruce" to consumers over a year ago, Scotts did not welcome it to the market. P&G is a leading producer of consumer product brands—e.g., Tide, Crest, Gillette—that are among the most well-known and successful brands in the world. Scotts is a longtime manufacturer in the lawn-and-garden market and sells two popular weedkillers—Roundup and Ortho—which were threatened by Spruce's arrival.

Rather than compete with Spruce in the marketplace, Scotts sought to impede Spruce's entry through litigation. Shortly after Spruce's launch, Scotts filed suit in the Southern District of Ohio, alleging that Spruce's packaging infringed the trade dress of a *separate* line of Scotts products known as Miracle-Gro. Scotts did so even though Spruce (a weed*killer*) does not compete directly with Miracle-Gro (a family of primarily plant food products and a few weed *preventers*). Nor did Scotts offer any evidence that a single consumer has ever mistaken Spruce for Miracle-Gro. Yet Scotts requested a preliminary injunction seeking to "restrain[]" P&G from selling Spruce in the packaging that had already been distributed to thousands of stores nationwide.

Following a two-day hearing, the district court denied Scotts' extraordinary attempt to remove Spruce from the marketplace for three primary reasons—all of which find ample support in the record below.

First, the district court held that Scotts failed to satisfy its burden of demonstrating a likelihood of success on the merits of its trade-dress infringement claims. After carefully analyzing each of the so-called "*Frisch* factors," the district court concluded that Scotts failed to demonstrate a likelihood of consumer confusion.

The court focused, in particular, on the "similarity" factor, explaining that the overall visual impressions created by the parties' respective products were substantially *dissimilar*. While Spruce and Miracle-Gro both use shades of green and yellow (in different proportions), their packaging is distinct. The district court also noted that packaging in green and yellow (the colors of plants and sunshine) is ubiquitous in the lawn-and-garden market—and is used by third-party products that compete directly with Miracle-Gro, diminishing the strength of Scotts' asserted trade dress. The court further concluded that Scotts failed to present any evidence of actual consumer confusion, a finding Scotts does not appeal. The district court's faithful application of

this Court's precedent is addressed further in the argument sections below.

Second, the district court held that Scotts failed to satisfy its burden of demonstrating a likelihood of success on the merits of its trade-dress dilution claim for the same reason: a lack of similarity. To establish dilution, Scotts must demonstrate that Spruce's "similarity" to Miracle-Gro's trade dress "impairs the distinctiveness" or "harms the reputation of" Miracle-Gro's "famous" trade dress. 15 U.S.C. §1125(c)(2)(B)-(C). Similarity is thus a "*necessary predicate*" for a dilution claim, as even Scotts' own authorities acknowledge. *See Levi Strauss & Co. v. Abercrombie & Fitch Trading Co.*, 633 F.3d 1158, 1173 n.12 (9th Cir. 2011) (emphasis added). And given its finding that the parties' respective trade dresses are "substantially dissimilar," the district court correctly concluded that Scotts could not establish a likelihood of success on its dilution claim.

Third, the district court held that Scotts failed to carry its burden of demonstrating irreparable harm in the absence of an injunction. Irreparable harm is a *prerequisite* to a preliminary injunction, yet Scotts does not appeal (or even mention) this adverse finding. As the district

court noted, Scotts presented no evidence that P&G's use of Spruce's distinctive trade dress caused lost sales or reputational harm. And even now, with Spruce in stores nationwide for over a year, the record is bereft of any suggestion that Scotts has suffered concrete harm—aside from healthy competition—from Spruce's entry to the market.

Scotts' own conduct after the court's order only reaffirms the absence of any irreparable harm. Rather than immediately seeking relief in this Court to enjoin continued sales of an allegedly-infringing product, Scotts waited four weeks to file its notice of appeal. Scotts then sought—and received—an extension, and finally filed its opening brief 117 days after the district court's order. And in its opening brief, Scotts does not even ask this Court to review the "bottom-line conclusion" whether a preliminary injunction should issue (Br.19), instead merely requesting a remand for further proceedings. A party in genuine fear of irreparable harm would act with far more urgency.

Indeed, as Scotts knew months before the district court's ruling, an imminent change in Spruce's packaging will likely moot Scotts' request for relief in this Court. P&G has already launched its second generation of Spruce packaging, with an updated design. *See* Tr.473:13-17, R.69,

PageID#5979. The new packaging is already shipping to stores for 2026, while this appeal—challenging the first-generation packaging—is pending. Scotts offers no explanation for its delay in protecting its rights on appeal, nor does it explain how this Court could order effective relief once the first-generation packaging leaves the market.

For all these reasons, the district court correctly concluded that Scotts failed to carry its burden for demonstrating its entitlement to the "extraordinary remedy" of a preliminary injunction. Scotts cannot demonstrate a likelihood of success on the merits, because Spruce's trade dress is not similar to Miracle-Gro's trade dress and consumers are exceedingly *unlikely* to confuse the source of the parties' respective products. And Scotts cannot demonstrate a risk of irreparable harm—a conclusion reaffirmed not only by the lack of evidence of lost sales or reputational harm, but also by Scotts' delay in seeking relief. Accordingly, the district court's order should be affirmed.

STATEMENT OF THE CASE

At bottom, this case asks whether consumers will mistake P&G's Spruce weedkiller as part of Scotts' Miracle-Gro product line.

A. P&G launches an innovative weedkiller product called "Spruce" in distinctive packaging.

The Procter and Gamble Company is a consumer goods conglomerate. From Tide to Crest to Gillette, its products are found in stores and homes around the world. Through its division known as P&G Ventures, the company launches new and "innovative consumer products, brands, and businesses." Croswell Decl., R.30-1, PageID#749.

In November 2024, P&G entered the lawncare market with a weed and grass herbicide called Spruce, which had been rigorously researched and developed by P&G Ventures. P&G-Proposals, R.71, PageID#6016. Spruce is a non-selective herbicide, meaning it kills weeds and grasses of all kinds. *Id.* Spruce products are designed specifically to eliminate unwanted weeds, flowers, and grasses—not to perform other lawncare functions like preventing spread or growth. P&G launched Spruce to fill a gap in the market with a product that was both safe and effective. *Id.*, PageID#6017. And P&G extensively marketed Spruce, including in a regional 2025 Super Bowl commercial. *Id.*, PageID#6023.

Spruce is widely available in stores and online. Home improvement stores like Home Depot and Lowe's carry the product, as do large retailers like Target and Walmart. *Id.*. Virtual marketplaces like Amazon, club

store websites, and P&G's own website all offer Spruce as well, and the product has performed well. *Id.* Spruce sells at a higher price point than other weed killers, with its products ranging from $12.99 to $39.99. *Id.*

When designing Spruce, it was of paramount importance to P&G that the product would not only perform well, but also stand out on store shelves. *Id.*, PageID#6019. Spruce's packaging features a unique transparent bottom section that allows consumers to see the product through the container. *Id.*, PageID#6020. No other herbicide on the market uses a transparent container. *Id.*, PageID#6021-22. P&G chose dark green for the top portion of the Spruce packaging in reference to its namesake, the spruce tree. *Id.*, PageID#6018. The package also features yellow labeling that highlights Spruce's speedy results and a large white brand name with distinct font. *Id.*, PageID#6020. Spruce's logo is a dandelion flower, with one half appearing photo-realistic and the other half a graphic design of wilting flower petals. *Id.*, PageID#6022. The logo most often appears centered toward the bottom of the package. The Spruce line-up looks like this:

Id., PageID#6021.

B. Scotts is a longstanding participant in a crowded lawn-and-garden market.

Scotts has a wide-ranging presence in the lawncare space, selling products from plant foods, mulch, soils, and potting mix to weed preventers and specialty products. *Id.*, PageID#6024. Many of these products fall under the "Miracle-Gro" brand. Notably, however, the Miracle-Gro line does not include any weed killers. Scotts does sell two of the "top-selling" weed-killers in the United States, but it does so under separate brands (Roundup and Ortho). Tr.166:3-24, R.68, PageID#5671. Roundup and Ortho use distinct trade dresses that are not the subject of Scotts' suit and do not resemble Miracle-Gro.

This appeal involves only the Miracle-Gro product line and trade dress. Miracle-Gro first hit the market 70 years ago with its signature plant food; that package is registered with the United States Patent and

Trademark Office, Reg. No. 2,139,929 (Mar. 3, 1998). Am.Compl.-Ex.A, R.60-1, PageID#3922. Since that time, Scotts added numerous products to the Miracle-Gro line. Occupying a prominent place in the market, Scotts has sold over one billion units of Miracle-Gro products over the past decade. Tr.176:3-6, R.68, PageID#5681.

In this case, Scotts defines its trade dress as a "unique composition" of five components:

1. a green and yellow color combination;

2. with each color presented as a separate horizontal band and the top color taking up a smaller ratio than the bottom color;

3. with the two bands sharing a common border that runs horizontally along the package;

4. with a straight line dividing the two colored bands; and

5. a circular horizontally centered graphic element.

Am.Compl., R.60, PageID#3899-900. Miracle-Gro's trade dress looks like this:

Id., PageID#3900. Although the product packaging varies somewhat, the trade dress for each product conforms to the same basic pattern: green bands over yellow on the product label, with a centered black circular logo that says "Miracle-Gro."

Scotts also sells other Miracle-Gro products that do not conform to the trade dress, as shown below:

Op., R.78, PageID#6539; *see* Sass-Decl., R.61-1, PageID#4456. As many as one-third of Miracle-Gro products are in non-conforming trade dress. Nearly all Miracle-Gro products feature the signature black circular logo, centered and with the name in white letters. As shown above, however, a few of the "performance" products use a different logo.

Yellows and greens—"the colors of sunshine and plants," Op., R.78, PageID#6575—are a popular choice in the lawn and garden marketplace. A sampling of third-party products demonstrates the point:

Op., R.78, PageID#6543; *see* PI Opp., R.30, PageID#701.

C. Scotts attempts to block Spruce's entry to the market by suing P&G for trade-dress infringement.

Shortly after Spruce entered the market and began competing directly with Roundup and Ortho, Scotts sued P&G for trade-dress infringement. Scotts asserted that Spruce's trade dress too closely resembled Miracle-Gro's. Scotts brought six claims: (1) trade-dress infringement, (2) unfair competition, (3) trade-dress dilution, (4) Ohio law deceptive trade practices, (5) common law unfair competition, and (6) false advertising. Am.Compl., R.60, PageID#3913-16.

Scotts sought an immediate injunction to force P&G to recall and repackage Spruce. PI-Mot'n, R.2, PageID#488. That motion focused on

two of Scotts' federal claims, trademark infringement and dilution, both arising under the Lanham Act. PI-Mem, R.2-1, PageID#506, 511.

P&G opposed injunctive relief, answered the complaint, and counterclaimed for cancellation of Scotts' registered trademark and declaratory relief. PI-Opp., R.30, PageID#691; Answer, R.38, PageID#1447, 1471-73. The district court allowed the parties to conduct limited discovery. P&G produced a report from marketing professor and survey expert, Dr. Itamar Simonson, who concluded that "there is no confusion whatsoever" between Spruce and Miracle-Gro. Simonson-Decl., R.30-21 PageID#1067. Scotts produced survey evidence for the first time in its reply, which the court permitted P&G to rebut in a sur-reply. PI-Sur-Reply, R.65, PageID#4902. The parties thus produced competing expert reports on the likelihood of consumer confusion. Wind-Report, R.61-16, PageID#4804; Simonson-Report, R.65-3, PagedID#4966. Scotts, however, did not produce any direct consumer evidence to support its claims.

The court held a two-day hearing on the motion. Scotts called two witnesses: John Sass, its Senior Vice President, Chief Creative Officer, and General Manager; and Dr. Yoram Wind, its survey expert. Scotts

put on no evidence of actual consumer confusion, lost sales, or reputational harm. P&G also called two witnesses: Maris Croswell, Senior Director of P&G Ventures; and Dr. Itamar Simonson. *See* Op., R.78, PageID#6546-60. Both parties submitted proposed findings of fact and conclusions of law. R.71; R.74.

D. The district court denies injunctive relief.

The district court ruled for P&G in a thorough 62-page opinion.

Infringement. Beginning with Scotts' trade-dress infringement claim, the court explained that Scotts bore the burden of demonstrating a likelihood of success on its claims that the Miracle-Gro trade dress is distinctive and nonfunctional, and that Spruce's trade dress is confusingly similar to the Miracle-Gro trade dress. Op., R.78, PageID#6566. The court dedicated the bulk of its analysis to the likelihood of consumer confusion, an analysis informed by eight factors. Following circuit precedent, the court identified two of those factors as weightiest—the "strength of the mark and similarity of trade dress." *Id.*, PageID#6571.

The court found that Miracle-Gro's trade dress, "at least" for its traditional color-and-shape design, "likely [has] *some* conceptual

strength." *Id.*, PageID#6574. But Miracle-Gro's "distinctiveness quickly vanishes," the court explained, when its trade dress deviates from its five marquee elements, as Scotts often does for specialty products. *Id.*, PageID#6575-76 ("One-third of Miracle-Gro products are sold in different packaging from the Trade Dress"). Moreover, the prevalence of green and yellow packaging "in the lawn and garden space" also "sap[s]" the trade dress's "conceptual strength." *Id.*, PageID#6575. Simply put, too many green-and-yellow products occupy the "same market." *Id.* The court also found that Scotts' considerable investment "over an extended period of time" helped Miracle-Gro earn "consumer awareness of" its trade dress and "substantial commercial strength." *Id.*, PageID#6573.

The predominant—and likely prerequisite—factor is the similarity of trade dress between Spruce and Miracle-Gro. The court dutifully rested its similarity analysis on "the overall impression of the mark[s]," not a side-by-side, spot-the-differences analysis. *Id.* n.38, R.78, PageID#6580-81 (quotation omitted). On that "holistic comparison," the court found "dissimilarity between Miracle-Gro and Spruce." *Id.*, PageID#6581.

The court observed that Spruce packaging has a transparent bottom section that makes the product inside visible, unlike Miracle-Gro. It highlighted differences in color shade, opacity, and ratio. *Id.*, PageID#6582. The court found that Miracle-Gro's standard trade dress presents in a "clearly defined" ratio of "one-third green on top, two-thirds yellow on bottom." *Id.* And while both packages feature a horizontally centered circular logo, the court found those logos starkly dissimilar. The "black circular element, which appears on *all* of the Miracle-Gro packages, independent of color, struck the Court as a uniquely important part of the Miracle-Gro Trade Dress." *Id.*, PageID#6577. At day's end, the court found that Spruce and Miracle-Gro create a "highly dissimilar overall visual impression," pushing the all-important similarity factor "heavily in P&G's favor." *Id.*, PageID#6584.

The court also analyzed the remaining *Frisch* factors, but found them insufficient to overcome the lack of similarity between the parties' respective trade dresses. As to the "actual confusion" factor, the court recognized that Scotts presented no evidence that any consumer had ever confused Spruce for a Miracle-Gro product (a fact admitted by Scotts). In lieu of any actual confusion, Scotts attempted to rely on a survey of

potential confusion conducted by Dr. Wind. Such a survey is intended to "replicat[e] actual retail conditions" by presenting photos of the products to consumers, who then respond to questions designed to gauge their likelihood of confusing the products. *Id.*, PageID#6585.

The court dismissed Wind's survey as entitled to "little to no weight" because it was "replete with … coding errors," marking consumer responses positive for confusion "that clearly should not have been coded in that manner." *Id.*, PageID#6586. The court also found the survey mistakenly presented the wrong photos to certain test groups, and at least one survey prompt was "highly suggestive." *Id.* In addition, Dr. Wind used the wrong kind of survey for brands that typically appear in separate store aisles (like Miracle-Gro and Spruce).

The court found that the marketing-channels factor favored Scotts because the parties sell their products in the same stores. *Id.*, PageID#6587. The court found the degree of purchaser care a "non-factor," owing to the products' visual dissimilarity. *Id.*, PageID#6588. And because Miracle-Gro and Spruce "are only somewhat related," the court determined, their semi-relatedness "makes confusion neither more nor less likely." *Id.*, PageID#6589.

The court also gave no weight to the "intent" and "product-expansion" factors. *Id.*, PageID#6590-91. Dismissing Scotts' argument that P&G intended to copy, the court found that P&G offered "compelling, in-depth testimony for why Spruce's color scheme was selected amongst the alternatives, and specifically detailed the market research and consumer testing backing the decision." *Id.*, PageID#6589.

Weighing the factors together, the court found that although a few factors broke Scotts' way, the packages' distinct visual impressions posed an "effectively insurmountable" obstacle to demonstrating likely consumer confusion. *Id.*, PageID#6591 (quotation omitted). The court thus concluded that Scotts failed to carry its burden of demonstrating a likelihood of success on the merits of its trade-dress infringement claims.

Dilution. The products' dissimilarity also played a central role in the district court's analysis of Scotts' dilution claim. Similarity is a necessary predicate for a dilution claim, which requires the plaintiff to demonstrate that "association arising from the *similarity*" between the marks "impairs the distinctiveness" or "harms the reputation" of the senior mark. *See* 15 U.S.C. §1125(c)(2)(B)-(C) (emphasis added). As the district court concluded, the "high level of dissimilarity between the

Miracle-Gro Trade Dress and Spruce packaging" precluded Scotts from establishing likely success on its dilution claim, because Scotts failed to demonstrate an "association arising from … similarity" in the first instance. Op., R.78, PageID#6592.

Irreparable harm. The court next dispelled any irreparable harm facing Scotts. The classic trademark harm would be confused consumers, which Scotts "fell short on demonstrating." *Id.*, PageID#6593. Intangible harms to reputation or brand loyalty also were "speculative" and unsubstantiated, as Scotts identified "no lost sales to date." *Id.*

Remaining equities. The court placed no weight on the harm preliminary relief posed to P&G—in part due to potential packaging changes already in progress. *Id.*, PageID#6594. Finally, the court recognized that the public interest favored allowing P&G to continue marketing its "safe and efficacious non-selective herbicide." *Id.* Thus, the court denied relief.

Scotts appeals. NOA, R.80; 28 U.S.C. §1292(a).

SUMMARY OF ARGUMENT

Scotts seeks to immediately expel P&G's "Spruce" line of products from the market, before the merits of the case are resolved. Scotts

pursues relief that is reserved for extraordinary instances of immediate, irreparable harm, despite showing no injury here. The district court thoroughly considered Scotts' motion, allowing discovery, extensive briefing, and two days of hearings before denying the motion in a careful opinion. This Court should affirm.

All the injunction considerations disfavor immediate relief. Scotts is unlikely to succeed on the merits of its infringement claim because it is unlikely to prove consumers will confuse Spruce for the Miracle-Gro product line. Scotts has no evidence of actual confusion, and the products look substantially dissimilar to consumers. Scotts fares no better on proving dilution, because an "association arising from *similarity*" is a necessary predicate for a dilution claim. Aside from the merits, Scotts showed no immediate, irreparable harm that would come from prosecuting its case in the normal course—indeed, Scotts forfeited the issue in its opening brief.

No Irreparable Harm. A preliminary injunction should issue only if the plaintiff shows that imminent and irreparable harm is likely. Even though this factor is "mandatory" and "indispensable," *D.T. v. Sumner Cnty. Sch.*, 942 F.3d 324, 327 (6th Cir. 2019), Scotts does not appeal the

district court's finding that Scotts failed to establish irreparable harm, which alone warrants affirmance. Scotts offered "no evidence of actual confusion" or "lost sales to date," and only "speculative" references to reputational injury. Op., R.78, PageID#6570, 6593. Rather than acting with the urgency of one facing imminent harm, Scotts took its time pursuing an appeal—this case has been pending for over a year. Scotts also fails to address how a preliminary injunction pertaining to the first-generation packaging would provide effective relief, given the ongoing rollout of updated 2026 packaging.

No Likelihood of Confusion. The district court also correctly concluded that Scotts failed to demonstrate a likelihood of success on the merits of its trade-dress infringement claims. Balancing several factors, the district court found Scotts failed to meet its burden. It is undisputed that Scotts could not identify any consumer who actually mistook Spruce for part of the Miracle-Gro line of products.

Scotts contests the court's handling of three discrete factors—similarity, strength, and relatedness. Notably, Scotts stops short of asking the Court to reach the ultimate question of whether a preliminary injunction should issue. Scotts does not ask this Court to find likely

infringement or dilution and *reverse*; rather, it urges only remand for the district court to redo its analysis of discrete subfactors.

The district court correctly found that the Spruce and Miracle-Gro trade dresses are dissimilar, based on its assessment of the overall visual impressions of the packaging. Scotts faults the court's analytical method of visual comparison—"side-by-side" analysis, Scotts calls it. But determining similarity under this Court's trade-dress infringement cases naturally involves *some* comparison of the products. Precedent warns that scrutinizing technical details—or "attempting to nit-pick minor visual differences," as the district court summarized—does not capture overall consumer impression. Op. n.38, R.78, PageID#6581. So the district court instead properly relied on high-level comparison, ascertained the general impression that the trade dresses create, and noted significant differences.

While Scotts claims that the district court ignored "marketplace conditions," Scotts ignores the district court's extensive consideration of how consumers encounter these products. The court analyzed the ubiquity of third-party lawn-and-garden products with comparable green-and-yellow color schemes. And it determined that the abundance

of greens and yellows in the marketplace weakens the likelihood that consumers would confuse Spruce for Miracle-Gro.

Scotts also raises a fact-finding objection regarding the exact proportion of green and yellow in Miracle-Gro's trade dress across the product line. But the court accurately observed that Miracle-Gro products feature a smaller green band on top, and more yellow on bottom, with *yellow* predominating. *Id.*, PageID#6542, 6582. The court correctly contrasted the Spruce packaging as more *green* than yellow. *Id.* Spruce packaging also features a large clear bottom portion that does not appear anywhere on Miracle-Gro. *Id.* Moreover, Scotts' *own witness* introduced the specific one-third/two-thirds color ratio, which Scotts now protests.

The district court also properly measured strength. Strength is a composite of two inputs: conceptual strength and commercial strength. The court rated Mircle-Gro's conceptual strength mediocre and its commercial strength significant. Putting the two together, the court found Miracle-Gro's trade dress "somewhat" strong. *Id.*, PageID#6577. Scotts rejects the court's consideration of relatively lower conceptual strength in the overall measure of strength. But a wall of precedent holds

that strength results from the "interplay" between conceptual and commercial strength, and the district court followed that lead.

Finally, Scotts contests the relatedness factor, which evaluates whether two products compete in the market. Scotts agrees with the district court that the products are "somewhat related but not competitive," but argues that the relatedness factor nonetheless could still support consumer confusion. But ample authority holds that if products are somewhat related but not competitive, the likelihood of confusion turns on the other *Frisch* factors. Thus, the district court correctly weighed relatedness neutrally.

No Dilution. Because of the "high level of dissimilarity" between the Spruce and Miracle-Gro packaging, the district court found Scotts unlikely to succeed on its dilution claim. Scotts argues the court needed to analyze a set of additional factors before reaching that conclusion. But "association arising from the *similarity*" between the trade dresses is an essential element of a dilution claim. 15 U.S.C. §1125(c)(2)(B)-(C) (emphasis added). A threshold similarity *requirement*—apart from the *degree* of similarity factor, §1125(c)(2)(B)(i)—thus emerges straight from the statutory text. Given its finding of "dissimilarity," the district court

correctly found that Scotts could not establish likelihood of success on dilution. Op., R.78, PageID#6592.

All the injunction factors decisively compel affirmance. None of Scotts' arguments counsels remand.

STANDARD OF REVIEW

This is an appeal from the denial of a preliminary injunction, so review is deferential. Federal courts "never award[]" a "preliminary injunction" " s of right." *Winter v. Nat'l Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). "Such relief is the exception, rather than the rule." *EOG Res., Inc. v. Lucky Land Mgmt., LLC*, 134 F.4th 868, 884 (6th Cir. 2025).

Because a preliminary injunction "involv[es] the exercise of a very far-reaching power," the plaintiff's evidentiary burden is "stringent." *Leary v. Daeschner*, 228 F.3d 729, 739 (6th Cir. 2000). The moving party "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter*, 555 U.S. at 20. This requires "a clear showing" on the factors. *James B. Oswald Co. v. Neate*, 98 F.4th 666, 672 (6th Cir. 2024).

Reviewing courts, in turn, apply a "highly deferential" abuse-of-discretion standard to review of a preliminary injunction. *Hunter v. Hamilton Cnty. Bd. of Elections*, 635 F.3d 219, 233 (6th Cir. 2011). Legal conclusions are reviewed de novo, and factual findings for clear error. *Id.* "The district court's determination will be disturbed only if the district court relied upon clearly erroneous findings of fact, improperly applied the governing law, or used an erroneous legal standard." *Id.*; *Sunless, Inc. v. Palm Beach Tan, Inc.*, 33 F.4th 866, 869 (6th Cir. 2022).

A trademark-infringement claim turns on the court's assessment and balancing of several factors to appraise consumer confusion. The "relative importance" of the factors is case specific, not formulaic. *Sterling Jewelers, Inc. v. Artistry Ltd.*, 896 F.3d 752, 756 (6th Cir. 2018); *see also Progressive Distribution Servs., Inc. v. United Parcel Serv., Inc.*, 856 F.3d 416, 427 (6th Cir. 2017). Scotts' "burden is to identify a disputed factor or set of factors" that would affect the outcome. *Mktg. Displays, Inc. v. TrafFix Devices, Inc.*, 200 F.3d 929, 934 (6th Cir. 1999). A "great deal of deference on appellate review" extends to the district court's conclusion. *PACCAR Inc. v. TeleScan Techs., LLC*, 319 F.3d 243, 251 (6th Cir. 2003).

ARGUMENT

The district court acted well within its discretion in denying the exceptional relief of a preliminary injunction. Scotts failed to satisfy its burden of establishing that Spruce likely infringes or dilutes the Miracle-Gro trade dress. And Scotts showed no likely harm requiring immediate injunctive relief before final judgment.

I. Scotts failed to establish (or even address) irreparable harm, an "indispensable" preliminary injunction factor.

Irreparable harm is the indispensable "core of the preliminary injunction." *EOG Res.*, 134 F.4th at 883. "If the plaintiff isn't facing imminent and irreparable injury, there's no need to grant relief *now* as opposed to at the end of the lawsuit." *D.T.*, 942 F.3d at 327. Yet Scotts ignores irreparable harm on appeal. Rather than addressing this "mandatory" and "indispensable" factor, *EOG Res.*, 134 F.4th at 883-85, Scotts rests its entire appeal on the district court's assessment of its likelihood of success on the merits. By failing to address irreparable harm in its opening brief, Scotts forfeited the issue on appeal, rendering futile the other issues that it does raise. The record confirms that Scotts failed to meet its burden.

A. The district court correctly determined that Scotts failed to establish a likelihood of immediate, irreparable harm.

Scotts' failure to address the mandatory irreparable harm factor alone warrants affirmance. Scotts bore the burden of demonstrating an injury that was "both *certain* and immediate, *not speculative* or theoretical." *D.T.*, 942 F.3d at 327 (emphasis added). But as the district court found, "Scotts has not shown that irreparable injury is *likely*" because "there are no lost sales to date," and "any potential harm to the Miracle-Gro brand or reputational harm is *too speculative* at this juncture." Op., R.78, PageID#6593 (second emphasis added). Scotts' opening brief does not challenge those findings. By failing to contest the district court's conclusion in its opening brief, Scotts has forfeited any argument on irreparable harm. *See D.T.*, 942 F.3d at 327; *Indeck Energy Servs., Inc. v. Consumers Energy Co.*, 250 F.3d 972, 979 (6th Cir. 2000). This Court can affirm on that ground alone. *See D.T.*, 942 F.3d at 327 (holding that establishing "the *existence* of an irreparable injury" is "mandatory" for granting a preliminary injunction).

The record developed by the parties likewise supports the district court's conclusion that Scotts failed to establish a likelihood of

irreparable harm. This Court's precedent requires Scotts "to demonstrate that irreparable injury is *likely* in the absence of an injunction,'" *EOG Res.,* 134 F.4th at 885 (quoting *Winter,* 555 U.S. at 22). But as the district court recognized, Scotts presented no evidence that Spruce's market presence likely caused it *any* harm—much less irreparable harm. Scotts conceded it was not aware of a single instance of consumer confusion, and presented no evidence of "lost sales to date." Op., R.78, PageID#6570, 6585, 6593. Scotts' bare assertions of "potential harm to the Miracle-Gro brand or reputational harm" were entirely "speculative," and unsupported by any evidence. *Id.*, PageID#6593. The district court thus correctly concluded that Scotts failed to carry its burden. *Id.* Again, Scotts failed to contest this conclusion on appeal.

To the extent Scotts intends to rely on a *presumption* of irreparable harm, it failed to preserve any such argument in its opening brief, thereby forfeiting the issue. *See Scott v. First S. Nat'l Bank*, 936 F.3d 509, 522 (6th Cir. 2019). In some cases, the Lanham Act provides "a rebuttable presumption of irreparable harm … upon a finding of likelihood of success on the merits." 15 U.S.C. §1116(a). But that provision does not apply here, because (1) Scotts failed to establish a

likelihood of success on the merits, *see* Section II below, and (2) Scotts forfeited this argument in its opening brief.

Even if §1116(a) were applicable and preserved, the presumption of irreparable harm is "*rebuttable*," 15 U.S.C. §1116 (emphasis added), by only a "slight evidentiary showing," *see Nichino Am., Inc. v. Valent U.S.A. LLC*, 44 F.4th 180, 186 (3d Cir. 2022) (burden of persuasion remains with plaintiff). P&G squarely rebutted any presumption of irreparable harm in this case. As P&G pointed out, Spruce and Miracle-Gro are not competing products, so the risk of "reputational harm" or loss of goodwill is "quite small." PI-Opp, R.31, PageID#1295. Moreover, Scotts failed to present any evidence that its trade dress "will in any way be harmed by Spruce," despite Spruce's presence on the market for several months, or that any such harm could not be redressed with monetary damages. *Id.*

Scotts' own litigation conduct further rebuts any risk of "likely," "certain," or "immediate" harm. Scotts filed its complaint thirteen months ago and has acted with no urgency in this appeal. Scotts waited twenty-eight days to file its notice of appeal and then took a thirty-day extension to file its opening brief, culminating in a 117-day delay between the district court's order and Scotts' opening brief. Even now, Scotts still

does not ask this Court to rule that a preliminary injunction should issue, but instead seeks merely remand for further proceedings. This kind of delay undercuts any assertion that Scotts faces "immediate" irreparable harm. *See Citibank, N.A. v. Citytrust*, 756 F.2d 273, 276 (2d Cir. 1985); 4 McCarthy on Trademarks and Unfair Competition §31:32 (5th ed. 2025 update) ("McCarthy") ("Delay negates the irreparable harm required for a preliminary injunction").

Meanwhile, P&G continued to develop the Spruce product and packaging, diminishing any chance of irreparable harm and potentially mooting Scotts' appeal. *See Hoop Culture, Inc. v. GAP Inc.*, 648 F. App'x 981, 986 (11th Cir. 2016) (presumption of harm rebutted where allegedly-infringing design sold out before appeal was fully briefed). P&G has already begun shipping its second-generation Spruce packaging for 2026, with an updated design. *See* Tr.473:13-17, R.69, PageID#5979. While Scotts slow-plays its challenge to the first-generation packaging before this Court, the updated packaging will soon be sold nationwide. A preliminary injunction addressed to the outdated, first-generation packaging is unnecessary in these circumstances.

B. The equities disfavor preliminary relief.

The remaining equities also disfavor market intrusion before final judgment. The Lanham Act's remedies will adequately restore Scotts in the unlikely event it ultimately proves liability on the merits. Scotts can pursue a permanent injunction against infringing uses, among other potential remedies. 15 U.S.C. §§1116(a), 1118. Scotts also seeks damages for lost profits and disgorgement (though, as the district court noted, it presented no lost profits evidence). §1117(a); *see* Am.Compl., R.60, PageID#3917-19. But "harm is not irreparable if it is fully compensable by money damages." *Basicomputer Corp. v. Scott*, 973 F.2d 507, 511 (6th Cir. 1992). Scotts has not substantiated its conclusory assertions of intangible reputational harm. PI-Reply, R.61, PageID#4433; Op., R.78, PageID#6593. And the reality is Spruce has been widely circulated for over a year—so any marginal intangible harm from permitting the case to proceed on the merits is by now negligible.

Conversely, P&G faces significant, irreparable harm from an injunction. P&G first announced its Spruce line in February 2023; by November 2024 the product went to market. Over the last year, Spruce has integrated into the lawncare market. Enjoining Spruce would

impose a massive and costly intrusion and impair P&G's relationships with retailers. PI-Opp., R.30, PageID#741-44. Unlike Scotts, P&G as defendant stands to recoup no damages from the case. So the cost of P&G's compliance with a preliminary injunction is irretrievable.

The public would be worse off, too. Spruce fills a market gap as the rare weedkiller that is both "safe" and "effective." Op., R.78, PageID#6540. Consumers have given Spruce a warm reception. P&G's market research showed that Spruce would actually *grow* the herbicide market as a whole—something that P&G's retail partners welcomed. Tr.398:25-402:16, R.67, PageID5398-5402; P&G-Proposals, R.71, PageID#6017, 6103. Ordering Spruce off store shelves before finding a trademark violation would be an undue and unsupported market intrusion. Unless and until a court conclusively finds that Spruce infringes Miracle-Gro's trade dress and irreparable harm is likely, no such premature intervention is warranted.

II. The district court correctly determined that Scotts is unlikely to succeed on its claim that Spruce infringes Miracle-Gro's trade dress.

The only explanation for Scotts' failure to address irreparable harm is that it is relying on a *presumption* of irreparable harm—without

actually stating or preserving that argument. But even if properly preserved, that presumption is contingent on Scotts demonstrating a likelihood of confusion. And in its thorough assessment of the governing factors, the district court correctly found that Scotts failed to demonstrate a likelihood of confusion.

"A trademark distinguishes one producer's goods or services from another's" so that consumers may "distinguish among competing producers." *U.S. Pat. & Trademark Off. v. Booking.com B. V.*, 591 U.S. 549, 552 (2020). Producers hold a right to exclusive use in commerce of distinctive trademarks, enforceable under the Lanham Act to prevent "unfair competition." 15 U.S.C. §1127.

The Lanham Act's infringement protections extend to trade dress, *see Wal-Mart Stores, Inc. v. Samara Bros.*, 529 U.S. 205, 209 (2000); §1125(a)(3), which is "the overall appearance of a product and its packaging," *Jack Daniel's Properties, Inc. v. VIP Products LLC*, 599 U.S. 140, 145 (2023). To prevail on its trade-dress infringement claim, Scotts must prove that the Miracle-Gro trade dress is (i) distinctive in the marketplace, (ii) nonfunctional, and (iii) confusingly similar to the infringing good. *Abercrombie & Fitch Stores, Inc. v. Am. Eagle Outfitters,*

Inc., 280 F.3d 619, 629 (6th Cir. 2002) (elements); *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111, 118 (2004) (burden). This appeal implicates only the confusion element—whether "consumers are likely to believe that" Miracle-Gro and Spruce "are affiliated" by their source. *Homeowners Grp., Inc. v. Home Marketing Specialists, Inc.*, 931 F.2d 1100, 1107 (6th Cir. 1991).

Eight non-exhaustive factors, called the "*Frisch*" factors, inform the confusion inquiry:

> (1) strength of the plaintiff's mark; (2) relatedness of the goods; (3) similarity of the marks; (4) evidence of actual confusion; (5) marketing channels used; (6) likely degree of purchaser care; (7) defendant's intent in selecting the mark; and (8) likelihood of expansion of the product lines.

Frisch's Rests., Inc. v. Elby's Big Boy of Steubenville, Inc., 670 F.2d 642, 648 (6th Cir. 1982).

The district court made findings as to each factor. *See* above 14-18; Op., R.78, PageID#6572-91. While those findings cut both ways, the court determined that Scotts ultimately failed to establish likely confusion because of its resounding failure on the similarity factor: "the overall visual impressions," the court held, "are simply too distinct" for the packaging to confuse consumers. *Id.*, PageID#6591.

In challenging the district court's thorough analysis, Scotts begins on the backfoot. "Evidence of actual confusion is 'undoubtedly the best evidence of likelihood of confusion.'" *DayCab Co., Inc. v. Prairie Tech., LLC*, 67 F.4th 837, 852 (6th Cir. 2023) (quotation omitted). Yet Scotts concededly offers none. Op., R.78, PageID#6585; Tr.145:3-17, R.68, PageID#5650 (Sass testimony); *see* Br.9.

Scotts also does not ask this Court to resolve the ultimate question of whether it is entitled to a preliminary injunction. Rather, Scotts urges a remand for the district court to redo three discrete *Frisch* factors—similarity, strength, and relatedness. Br.15, 19, 38, 42, 45. Despite Scotts' lengthy discussion of "open-textured standards" over formulaic rules (Br.16-17), Scotts itself repeatedly advocates formulaic rules for individual factors that have no grounding in caselaw. The district court, taking a holistic view, faithfully and correctly assessed each factor and properly weighed the factors to conclude consumer confusion is unlikely.

A. Spruce and Miracle-Gro use dissimilar packaging.

The similarity factor considers the overall visual impression created by the marks. As is common, this factor played a central role in the district court's bottom-line conclusion that consumer confusion is

unlikely. *Accord Abercrombie*, 280 F.3d at 629. Spruce and Miracle-Gro look so dissimilar, the court explained, that Scotts' burden to show likely confusion is "effectively insurmountable." Op., R.78, PageID#6591.

Scotts' lead argument is that the court erred by examining the two packages side-by-side, element-by-element. Br.9-10, 23-24, 28. But it was, in fact, *Scotts* that analyzed similarity on an element-by-element basis. Scotts-Proposals, R.73, PageID#6269. The district court, by contrast, deliberately broadened the analysis to view the parties' respective trade dresses holistically. Op., R.78, PageID#6581.

Scotts fails to explain, moreover, how a court could assess whether two products look similar *without* comparing the products. Indeed, this Court *routinely* compares product appearances to assess trade-dress infringement claims—precisely as Scotts itself asked the court to do. *See* Scotts-Proposals, R.73, PageID#6268-69. Comparative analysis is inherent to assessing whether one trade dress resembles another. *Abercrombie*, 280 F.3d at 629. The district court properly reviewed prominent features to aid its analysis of the overall "visual impression" created by the products. *Id.* at 647; *see* Op., R.78, PageID#6584.

Scotts also inaccurately asserts that the district court disregarded "marketplace conditions." But the district court *did consider* marketplace conditions—specifically, the market context in which the typical consumer operates. That context revealed that greens and yellows "abound in the lawn and garden space, perhaps because they are the colors of sunshine and plants." Op., R.78, PageID#6543, 6575. The ubiquitous use of greens and yellows in the marketplace "diminishes the [Miracle-Gro] Trade Dress's capacity to act as an identifier of a single source." *Id.*, PageID#6576.

1. Spruce and Miracle-Gro look different to consumers.

At bottom, the district court correctly found that the products' dissimilarity dispels the likelihood of consumer confusion. On this factor, courts consider "whether a given mark would confuse the public when viewed alone," understanding that consumers will not always view "both marks" at once but may retain a "general … impression or recollection of the other party's mark." *Daddy's Junky Music Stores, Inc. v. Big Daddy's Family Music Ctr.*, 109 F.3d 275, 283 (6th Cir. 1997). Known as the "anti-dissection rule," the "overall impressions" are more telling than "individual features." *Id.*; 1 McCarthy §11:27. Unsurprisingly, analyzing

similarity requires "actually comparing [one] packaging with the [other] packaging." *Gray v. Meijer*, 295 F.3d 641, 648 (6th Cir. 2022); *Groeneveld Transp. Efficiency v. Lubecore Int'l*, 730 F.3d 494, 509-10 (6th Cir. 2013).

Judged by those standards, the court correctly concluded Spruce and Miracle-Gro do not look alike. Consider the Miracle-Gro line:

See Op., R.78, PageID#6533-34. While Miracle-Gro products feature a green-and-yellow color combination, the green portion of the label is smaller than the yellow portion. *Id.*, PageID#6581-82. On the label, the

green color-band is on top, and yellow on bottom. Miracle-Gro products also use *bright* shades of green and yellow. *Id.* The black Miracle-Gro logo sits prominently across the green-and-yellow color bands, toward the label's top. *Id.*, PageID#6582-83.

Spruce's packaging, in contrast, looks like this:

Spruce's packaging is predominantly green, with narrower yellow bands highlighting marketing claims. The yellow portion is "relatively small" compared to the darker green portion, which predominates. *Id.*, PageID#6582. The packaging also features a transparent bottom section that reveals the contents inside. *Id.* The Spruce trademark appears as a bold, stylized, white text over a green background. The packaging also contains a round yellow dandelion image, with one half depicting a dehydrated, dying dandelion. This feature sits toward the bottom of the label, with a dark green background. *Id.*, PageID#6583.

The objective consumer is not "obtuse." *Abercrombie*, 280 F.3d at 648. That consumer would readily recognize that Spruce is predominantly green while Miracle-Gro is predominantly yellow. And that consumer would also realize that green-and-yellow combinations are ubiquitous in lawncare packaging, as pictured above (at 12). That color scheme does not set Miracle-Gro apart. *Cf. Wal-Mart*, 529 U.S. at 211. The objective consumer would further distinguish Spruce as the herbicide with a transparent bottom panel (a feature entirely absent from any Miracle-Gro packaging). That consumer would notice that Spruce often uses an on-top carry handle whereas Miracle-Gro's is often on the side, among other distinctions.

What may set Miracle-Gro's trade dress apart is its house mark—the prominent black circular logo that says "Miracle-Gro" in white across the middle. Op., R.78, PageID#6577 (noting "unique[] import[]"). That name-logo combination appears on every Miracle-Gro product in the record (save for select specialty products with a gold circle). *See* Tr.189:2-5, R.68, PageID#5694 (Sass testimony that "circular center Miracle-Gro black logo" identifies source). Equally so, Spruce packaging uniformly says "Spruce" across the middle above its distinct half photo-realistic,

half graphic-design dandelion logo. Consistent display "of a house mark can decrease the likelihood of confusion." *Maker's Mark Distillery, Inc. v. Diageo N. America, Inc.*, 679 F.3d 410, 422 (6th Cir. 2012); 3 McCarthy §23:43. Both brands uniformly and "designedly" use their names and logos as "an indication of a product's origin"; that central "difference" allows consumers to "quickly realiz[e] that" Spruce and Miracle-Gro "emanate from different sources." *Abercrombie*, 280 F.3d at 647-48; *see also Antioch Co. v. W. Trimming Corp.*, 347 F.3d 150, 160 (6th Cir. 2003); *Progressive*, 856 F.3d at 433.

Scotts counters that "Scotts" and "P&G," not "Miracle-Gro" and "Spruce," are the respective house marks. Br.37-38 n.3. But that misses the point. The products, "as they appear in the marketplace," always display their respective name–logo combinations. *Progressive*, 856 F.3d at 433. Miracle-Gro has accrued "consumer awareness" through its logo. *See* Op., R.78, PageID#6573. Because the black Miracle-Gro logo "is so easily recognizable and associated with a … popular brand," the logo's absence from Spruce packaging means no "reasonable consumer, when looking at the two [trade dresses] as they appear in commercial context,

would confuse the two." *Progressive*, 856 F.3d at 433; *see* Op., R.78, PageID#6583.

Miracle-Gro cannot "claim a monopoly on" green-and-yellow lawncare packaging. *See Abercrombie*, 280 F.3d at 632. But that basic color scheme (in differing shades and proportions) is all that is similar between Spruce and Miracle-Gro. No objective consumer is likely to be confused.

2. The district court's similarity analysis was sound.

The district court properly analyzed similarity based on these overall impressions. The court rightly framed the question as whether the products would "confuse the public when viewed alone." Op., R.78, PageID#6580 (quotation omitted). The court acknowledged that "side-by-side, element-by-element comparison" is incorrect, and treated *Gray* as "instructive" precedent. *Id.* Scotts largely relied on the collection of five specific elements that allegedly make up the Miracle-Gro trade dress, *see id.*, PageID#6581,[1] while the district court undertook a "more holistic comparison of the overall visual impression" of the products. *Id.*

[1] A plaintiff seeking trade-dress protection should "separate[] out and identif[y] in a list" the "discrete elements which make up" the dress in

As part of its "more holistic" analysis, the court observed prominent visual differences between Spruce and Miracle-Gro, from differing logos to partially transparent versus opaque packaging, to color ratio and ordering, to "very distinct shades of green." The court finally noted "other dissimilarities" in shape, size, and graphic design elements that further distinguish the "overall visual impression." *Id.*, PageID#6583. All these dissimilarities, the court held, "add up to a highly dissimilar overall visual impression," so this bellwether factor "weighs heavily in P&G's favor." *Id.*, PageID#6584.

Scotts accuses the court of conducting an improper side-by-side, element-by-element analysis. Br.23. But having documented its similarity analysis at some length, it is evident the district court followed precedent to a tee. A court must inspect "visual difference in branding" to discern whether a "reasonable consumer would think that the two [products] belong to the same company." *Groeneveld*, 730 F.3d at 510. "[N]aturally," therefore, "the commonalities of the respective marks must be the point of emphasis." *AutoZone, Inc. v. Tandy Corp.*, 373 F.3d 786,

"combination." *Abercrombie*, 280 F.3d at 634. Scotts identified the five elements described above at 9.

795 (6th Cir. 2004). Because trade dress is a product's "total image," including visual "features such as size, shape, color or color combinations, texture, graphics," and more, *Abercrombie*, 280 F.3d at 629, similarity review entails "actually comparing the [two products'] packaging," *Gray*, 295 F.3d at 648. A district court, as factfinder in a preliminary injunction posture, must be "able to use its eyes, look at the various products before it, and decide [if] a likelihood of confusion" obtains. *See Innovation Ventures, LLC v. N2G Distrib., Inc.*, 763 F.3d 524, 537 (6th Cir. 2014).

As a practical matter, courts therefore cannot avoid the comparison that Scotts castigates—as Scotts itself told the district court. *See, e.g.*, R.73, PageID#6268-69 ("[T]here is little to be said except to compare the impression created by the two [trade dresses]."); *id.* ("[C]ourts often discuss the most salient features that give rise to a mark's overall impression in their analyses." (quotations omitted)). Such visual comparison is this Court's customary mode of analysis for similarity. In *Abercrombie*, for example, this Court concluded there was no likelihood of confusion based on lack of similarity alone. 280 F.3d at 646-47. Central to the court's analysis was its detailed contrasting of the

Abercrombie and American Eagle clothing magazines, highlighting "visual differences" of all manner "on practically every page." *Id.*

In *Gray*, this Court considered and rejected the same "side-by-side" argument presented by Scotts. Like Scotts, the plaintiff accused the district court of conducting an improper "'side-by-side' test" when it found dissimilarity based on differences in the "design layout" of popcorn bags. 295 F.3d at 648. But this Court approved the district court's analysis, ruling that proper comparison focuses on the overall "differences in the two packages and the general impression each creates," rather than "technical differences." *Id.*; *see also Groeneveld*, 730 F.3d at 510.

This Court thus routinely compares trade dress appearances to evaluate "general impressions," not to scrutinize "technical differences." *Gray*, 295 F.3d at 648; *Abercrombie*, 280 F.3d at 648 (finding "overall appearances created by the configuration of the two catalogs" dissimilar). Here too, the district court properly rested its findings on the "overall visual impression" of the products and avoided scrutinizing finer distinctions.[2] Op., R.78, PageID#6580, 6583-84.

[2] Scotts criticizes the court's observation that, "if one looks closely," there is a gold dividing line between the color panels on Miracle-Gro, and no dividing line on Spruce. But the court put that in a *footnote*, underscoring

3. The district court properly considered how consumers would encounter the trade dress.

Scotts similarly misses the mark in accusing the district court of overlooking "marketplace conditions" or "the commercial context." Br.25, 28. Scotts does not explain what it means by those terms, nor does it identify any authority requiring a federal judge to walk the aisles at Lowes to assess whether two products are dressed "similarly." Insofar as Scotts means the district court had to evaluate the products "from the standpoint of consumers encountering the marks in the marketplace," Br.2, 9-10, the court plainly did so.

In asserting the district court ignored "commercial context," Scotts overlooks a critical aspect of the court's analysis. Far from omitting any discussion of "marketplace conditions," the court's order in fact extensively discussed the abundance of green-and-yellow packaging an ordinary consumer would encounter in the lawn and garden market. Op., R.78, PageID#6543, 6548-49, 6575-76. The court expressly analyzed whether consumers would confuse Spruce with Miracle-Gro when they "come across the Spruce products *against the backdrop of other*

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it was not part of its assessment of "overall visual impression." *See* Op., R.78, PageID#6583.

commercially available lawn-care products[.]" *Id.*, PageID#6534-35 (emphasis added). Scotts' brief fails to address the court's reliance on the slew of third-party products employing a comparable color scheme, which diminish the strength of Miracle-Gro's trade dress and undermine any claim that consumers were likely to confuse Spruce for Miracle-Gro.[3]

As the district court noted, some of the most telling testimony on similarity came from Scotts' own corporate representative, John Sass. Sass testified that many third-party lawncare products use green and yellow color combinations. These products include Preen weed preventer, which Scotts "admitted … is 'widely sold in the lawn-and-garden marketplace,'" and sometimes "'shelved right next to'" Miracle-Gro. *Id.*, PageID#6543. The same is true for Spectracide, another "leading weed killer product.'" *Id.*

In attempting to distinguish Miracle-Gro from Preen, Sass pointed to "visual differences" including: (1) Miracle-Gro's trade dress is "'typically one-third green on top, two-thirds yellow on the bottom,' while the Preen product uses those colors in different proportions"; and (2)

[3] Scotts may have overlooked this discussion by focusing only on the "similarity" section of the opinion, but the *Frisch* factors are "interrelated." *See Daddy's Junky*, 109 F.3d at 280.

"while Miracle-Gro's logo is a 'dark circle that is centered in the middle of the packaging,' there is no corresponding circular element on the Preen product." *Id.*, PageID#6548. Preen's packaging more closely resembles Miracle-Gro than any Spruce product. If these "visual differences" were sufficient to distinguish Preen from Miracle-Gro in the marketplace, they were also plainly sufficient to distinguish Spruce.

More broadly, the district court assiduously compared the Spruce and Miracle-Gro trade dresses from the ordinary-consumer perspective. In describing Spruce's packaging, the district court relied on a blown-up photograph of Spruce products *on a store shelf*, and repeatedly referred to what "consumers" would see. *Id.*, PageID#6541-42. The court "remain[ed] mindful throughout that the ultimate question is whether a reasonable consumer is likely to be confused." *Id.*; *see also id.*, PageID#6572 ("[T]he more the allegedly infringing mark resembles the superior mark, the more likely a consumer would be to assume it is the same manufacturer."); *id.*, PageID#6588 ("[T]he Court does not expect customers to be confused, even if exerting a low degree of care because of the distinct overall visual impressions between the products."). As in

Abercrombie, the trade dresses' resemblance, "or rather lack thereof," was determinative. *Id.*, PageID#6572; *Abercrombie*, 280 F.3d at 646.

To the extent Scotts now asserts the district court should have placed even greater emphasis on "marketplace conditions," Scotts bore the burden of demonstrating consumer confusion in the marketplace. *Permanent Make-Up*, 543 U.S. at 118. The only marketplace evidence Scotts produced, besides product images and store placement, was an expert survey that was "teeming with problems." Op., R.78, PageID#6585. Despite Scotts' newfound emphasis on "marketplace conditions," Scotts does not appeal the court's rejection of its consumer survey for "failing to replicate market conditions accurately." *Id.* n.21, R.78, PageID#6553. For all its objections to the district court's analysis, Scotts identifies no evidence the court should have depended on instead. *See* Br.25.

4. Miracle-Gro's green-to-yellow ratio is generally uniform and, regardless, inconsequential.

Scotts also faults the district court for stating that "all products sold in the" Miracle-Gro trade dress use the same "ratio of green and yellow." Br.34-35. In context, however, the court evaluated the two colors' rough proportion, not an exact ratio, as well as Miracle-Gro's consistent green-

over-yellow configuration. The court's consideration of those notable differences was proper.

True enough, the court said Miracle-Gro's trade dress has a "clearly defined" color ratio. Op., R.78, PageID#6582. But the court credited the testimony of Scotts' own witness, Sass, that its "Miracle-Gro trade dress says typically one-third green on top, two-thirds yellow on the bottom." Tr.187:16-19, 188:18-20, R.68, PageID#5692-93. Indeed, Sass discussed decades of Miracle-Gro advertisements containing that ratio, and even cited that ratio to distinguish Miracle-Gro from third-party brands like Preen. Tr.52:17-24, R.68, PageID#5557. Scotts itself—not the court—thus emphasized the importance of a one-third green, two-thirds yellow ratio, thereby inviting any error. *See also* PI-Reply-Ex.M, R.61-13, PageID#4790.[4]

Regardless, the court never indicated that its analysis hinged on the existence of that specific ratio across all Miracle-Gro products. The

[4] Scotts' new "ratio" argument reflects what the district court described as "constantly shifting sands." Tr.484:4-5, R.69, PageID#5990. Sometimes, "Scotts tries to lump its Registered mark and common law trade dress into a single concept" to distinguish third-party packages. Op. n.3, R.78, PageID#6536; Tr.187:16-24, R.68, PageID#5692. Other times, however, Scotts relaxes its trade-dress specificity (e.g., color ratio) to make Spruce seem more similar. Br.36.

fairer takeaway is that Miracle-Gro's trade dress is consistently more yellow than green. Op., R.78, PageID#6574, 6582. What mattered to the district court was the greater proportion of yellow, in conjunction with a green-over-yellow format and black logo. *Id.* Those characteristics distinguished Spruce's packaging, on which "dark green predominates" with a "clear, bottom portion" and a "relatively small" yellow stripe on top "used to highlight a message." *Id.*, PageID#6582.

A uniform 1/3-2/3 color ratio performed no discernible work in the court's similarity analysis. The court relied on many other "visual differences" that "add up to a highly dissimilar overall visual impression." *Id.*, PageID#6584. Accordingly, even if the court's reliance on Sass's testimony regarding the specific ratio was erroneous (it was not), any such error would be harmless. *See United States v. Hatcher*, 947 F.3d 383, 394 (6th Cir. 2020) (holding a clearly "mistaken statement" of fact that does not "affect[] the district court's [judgment]" is "harmless"); Fed. R. Civ. P. 61 (harmless error analysis applies "at every stage").

B. The district court correctly concluded that Miracle-Gro's trade dress has limited strength.

Scotts next contests the court's assessment of Miracle-Gro's strength. Strength measures a trade dress's "distinctiveness and degree of recognition in the marketplace." *Homeowners*, 931 F.2d at 1107. The stronger the trade dress, the more likely consumer confusion will arise. Trade dress can amass strength across two dimensions, "conceptual" and "commercial." *Maker's Mark*, 679 F.3d at 419; *see* 1 McCarthy §11.80. *Conceptual* strength addresses the trade dress's "inherent distinctiveness," while *commercial* strength gauges "customer recognition value." *Id.* "A mark cannot be strong unless it is both conceptually and commercially strong." *Kibler v. Hall*, 843 F.3d 1068, 1073 (6th Cir. 2016). That is, "a mark can be conceptually strong without being commercially strong," and vice versa, "and thus weak under *Frisch*." *Id.* at 1074.

Scotts won this factor. The district court held that Miracle-Gro likely holds "some conceptual strength" and "substantial commercial strength." Op., R.78, PageID#6577. Considering their "interplay," the court weighed the strength factor "somewhat in Scotts' favor." *Id.* Scotts nonetheless argues strength should have weighed more heavily in its

favor. Br.2, 40-41. But the district court correctly considered both the conceptual and commercial components of strength, and Scotts' arguments for reweighing fail.[5]

1. Conceptual and commercial strength are complementary considerations.

Strength "analysis depends on the interplay between conceptual and commercial strength." *Maker's Mark*, 679 F.3d at 419. A trade dress's "true strength … can only be determined by weighing both aspects of strength." 1 McCarthy §11.80. Thus, a court that relegates one aspect has conducted "an improperly truncated analysis." *Id.* & n.5 (noting circuit uniformity). Strength could be graphed on an x- and y- axis, with the upper-right quadrant representing the plaintiff's target zone.

X-axis: conceptual strength. Conceptual strength is a function of the dress's "distinctiveness," which courts plot on a "spectrum." *Bliss Collection, LLC v. Latham Companies, LLC*, 82 F.4th 499, 509-10 (6th Cir. 2023). That spectrum includes, from least to most distinct, "generic, descriptive, suggestive, fanciful, and arbitrary." *Id.* at 510; *see*

[5] The district court also gave no indication that a slight increase in strength could overcome the marks' substantial dissimilarity, making remand pointless. *See* Fed. R. Civ. P. 61; *Mktg. Displays*, 200 F.3d at 934.

Abercrombie & Fitch Co. v. Hunting World, Inc., 537 F.2d 4, 9 (2d Cir. 1976) (Friendly, J.). Generic or descriptive marks "evoke some quality of the product … or describe directly," while an arbitrary mark "is unrelated to the product." *Bliss*, 82 F.4th at 510. Courts also consider external factors, including "the existence of similar third-party" marks. *Id.*

Miracle-Gro's trade dress is conceptually so-so. Recall its defining qualities: a green-and-yellow color combination in horizontal bands, the top color (green) occupying a smaller portion than the bottom color (yellow), with a "wholly unremarkable" straight dividing line, and a "uniquely important" black circular graphic logo that says "Miracle-Gro." *See* above 9; Op., R.78, PageID#6577, 6582-83. Rather than fanciful or arbitrary components (which would be more distinctive), the trade dress features generic components—solid colors and basic shapes. It is somewhat suggestive insofar as green and yellow signify outdoor products. But nothing is "particularly distinct about using green and yellow for packaging in the lawn care industry." *Id.*, PageID#6575. Indeed, the most distinctive aspect of the trade dress is the black Miracle-Gro logo—a component absent from Spruce and all non-Miracle-Gro products.

Two additional considerations diminish the trade dress's conceptual strength. First, many third parties adorn their lawncare packaging with green and yellow. *See* above 12. Preen, for example (among others, *see* PI-Opp., R.30, PageID#701), sells its weed preventer in a bright yellow container with green labeling and a green cap. These third-party uses "weaken[]" Miracle-Gro's strength as "an identifier for a single source." *Progressive*, 856 F.3d at 429; *see Kibler*, 843 F.3d at 1074; 1 McCarthy §11:88. Scotts does not have "a monopoly on" green-and-yellow in the lawncare market. *See Abercrombie*, 280 F.3d at 638.

Second, Scotts markets many Miracle-Gro products in a different dress. *See* above 11. Those products use blacks, blues, purples, and other colors, not the traditional green-and-yellow dress. Those nonconforming uses diminish the trade dress's capacity to identify Miracle-Gro as its source. *See Frisch's Rest., Inc. v. Shoney's Inc.*, 759 F.2d 1261, 1265 (6th Cir. 1985); Op., R.78, PageID#6577.

Y-axis: commercial strength. Commercial strength "depends on public recognition." *Kibler*, 843 F.3d at 1074. Courts use evidence of marketing and publicity as well as survey data to evaluate commercial strength. *Id.* Miracle-Gro performs stronger commercially than

conceptually, owing to its longstanding presence in the market, advertising investment, and sheer sales. *See* Op., R.78, PageID#6568. The district court therefore found that Scotts has amassed "consumer awareness of [the Miracle-Gro] packaging." *Id.*, PageID#6573.

2. Scotts' unsupported argument eliminates conceptual strength.

The "interplay" of mediocre conceptual strength and substantial commercial strength, the district court found, amounted to a "somewhat strong" trade dress. *Id.*, PageID#6577. Without challenging the degree of conceptual strength, Scotts protests that the court "improperly used" conceptual strength "to reduce the overall strength." Br.39-40. It is well-settled, however, that overall strength is a composite of two inputs—the "interplay" of commercial and conceptual strength. So, while low conceptual strength "cannot detract from" *commercial* strength, Br.39, it can and does impair *overall* strength.

Notably absent from Scotts' brief is a single case holding that lack of conceptual strength cannot reduce the overall strength of a mark. Instead, Scotts rests its position on the grammatical structure of one sentence in a 35-year-old case. *Homeowners* says: A mark can be strong "because it is unique, because it has been the subject of wide and

intensive advertisement, or because of a combination of both." 931 F.2d at 1107 (quotation omitted). "By using the disjunctive 'or,'" Scotts argues, *Homeowners* establishes that conceptual strength or commercial strength alone independently establish overall strength, and a court lacks discretion to weigh the two together. Br.40.

Homeowners itself refutes Scotts' argument. Conceptual strength, *Homeowners* explains, "is only a first step in determining the strength of a mark in the marketplace." 931 F.2d at 1107. An "inherently distinctive," and so conceptually strong, mark may "have little customer recognition or 'strength' in the market, or perhaps have high recognition which is limited to a particular product or market segment." *Id.* Thus, *Homeowners* does not preclude courts from considering both conceptual and commercial strength in measuring overall strength, as Scotts contends. Nor have later cases understood *Homeowners* that way. *See Therma-Scan, Inc. v. Thermoscan, Inc.*, 295 F.3d 623, 631 (6th Cir. 2002) (characterizing *Homeowners*).

Moreover, one "single word in a single case," *United States v. Getachew*, 157 F.4th 883, 890 (6th Cir. 2025)—here, "or,"—does not displace the settled precedent that the "combination of these two factors

determines the relative strength or weakness of the trade dress," *Gray*, 295 F.3d at 647; *AWGI, LLC v. Atlas Trucking Company, LLC*, 998 F.3d 258 (6th Cir. 2021); *Kibler*, 843 F.3d at 1073 (a "mark cannot be strong unless it is both conceptually and commercially strong"); *Maker's Mark*, 679 F.3d at 419; *Therma-Scan*, 295 F.3d at 631; *cf.* 1 McCarthy §11.80.

Scotts' true gripe is that the court found its trade dress only "somewhat" strong. But the combination of both conceptual and commercial strength yields greater overall strength than one without the other. An arbitrary mark with strong commercial presence (think Apple smartphones) no doubt has greater strength than a descriptive mark with strong commercial presence (think Home Depot). Here, Miracle-Gro has a strong commercial presence without a *distinct* conceptual presence, given the many third-party products in comparable green-and-yellow packaging.

To escape this conclusion, Scotts commits the analytical mistake it bemoans. Strength analysis, and likelihood-of-confusion analysis more broadly, is a holistic endeavor designed to gauge consumer impression. The *Frisch* factors are not rigid frameworks but rather channels to investigate whether consumers are likely to mistake the junior mark's

source. Scotts, not the district court, would reduce that "open-textured" inquiry to a coding exercise: If conceptually or commercially strong, or if both, then strong. Br.40. So long as the product is commercially strong, Scotts' argument would nullify conceptual strength.

As this Court has made clear, the strength factor "is a matter of degree," not a binary "either/or proposition." *Kibler*, 843 F.3d at 1083; *Gray*, 295 F.3d at 647. Accordingly, the court correctly considered both commercial and conceptual strength in its assessment.

C. The relatedness of Spruce and Miracle-Gro is neutral.

Scotts argues that the relatedness-of-goods factor shows likely confusion. Br.42. Precedent squarely forecloses that argument. The district court was correct that the factor weighs neutral.

The "relatedness" factor evaluates the degree to which goods occupy the same market. The Court classifies goods under "three benchmarks"—(i) direct competitors, (ii) "somewhat related, but not competitive," or (iii) "unrelated." *Kellogg Co. v. Toucan Golf, Inc.*, 337 F.3d 616, 624 (6th Cir. 2003). For competing goods, "confusion is likely if the marks are sufficiently similar"; for somewhat related goods, "the likelihood of confusion will turn on other factors"; and for unrelated

goods, "confusion is highly unlikely." *Id.* Courts consistently use this "tripartite system." *AutoZone*, 373 F.3d at 798.[6]

The district court applied settled law. It properly analyzed the degree to which Miracle-Gro and Spruce compete and determined the products are "somewhat related." Op., R.78, PageID#6579. Even the *most* related Miracle-Gro product, the "weed preventer," does not directly compete with P&G's non-selective herbicidal weed*killer*. The Miracle-Gro product prevents weeds before they sprout; Spruce kills unwanted, already-grown weeds. They serve different needs and "are not interchangeable." *Id.* Indeed, Scotts *does* have products that directly compete against Spruce—Roundup and Ortho—but they do not feature the Miracle-Gro trade dress. Under this Court's precedent, Spruce and Miracle-Gro thus occupy the same category as tequila and whiskey (*Maker's Mark*), a rap artist and disc jockey (*Kibler*), and shipping and order fulfillment services (*Progressive*). Weedkiller and weed preventer fit that list.

[6] *See, e.g.*, *Homeowners*, 931 F.2d at 1108; *Daddy's Junky*, 109 F.3d at 282-83; *Therma-Scan*, 295 F.3d at 632; *Kellogg*, 337 F.3d at 624; *Progressive*, 856 F.3d at 431; *AWGI*, 998 F.3d at 266.

Because Miracle-Gro and Spruce are noncompeting but "somewhat related" products in the "broad industry" of lawn-and-garden care, *Progressive*, 856 F.3d at 432, the law is settled that the "other factors" from *Frisch* determine whether consumer confusion is likely. It therefore follows, as the district court found, that the relatedness factor cuts neither way. Op., R.78, PageID#6579. The other *Frisch* factors are determinative.

Scotts does not argue that Miracle-Gro and Spruce are direct competitors. Rather, Scotts accepts that conclusion but contends that "somewhat related" goods can still weigh in favor of confusion. Br.43. This position dismisses a torrent of contrary precedent and invokes a chain of out-of-circuit cases dealing with complementary products. Br.44-45. But the *Frisch* factors already account for complementary products: They are likely confusing if other factors, particularly similarity, so indicate. Accordingly, this Court has plainly held that whether complementary products are likely to confuse consumers "will turn on other factors." *Progressive*, 856 F.3d at 431.

Scotts presses a fact-based argument that consumers might purchase both Spruce (weedkiller) and Miracle-Gro (weed preventer) for

one day's yardwork. Br.45. Even if that were true, it does not make confusion more likely. Whiskey and tequila are sold in the same stores and frequently bought together, but that made the products in *Maker's Mark* only "somewhat related" as "part of the same broad category of" goods. *Maker's Mark*, 679 F.3d at 423. That degree of loose relation did not help the plaintiff show confusion. Same here. Scotts would use relatedness to double count other factors, like marketing channels and strength.

Finally, applying this Court's decision in *Abercrombie*, the district court concluded that the high-level of visual dissimilarity makes Scotts' burden "effectively insurmountable...even if some of the other factors weigh in its favor." Op., R.78, PageID#6579, 6591. The court's finding that the products "are simply too distinct" to establish likely confusion deflates the stakes of Scotts' relatedness argument. Even if Scotts were right about relatedness (and this Court's precedents were wrong), the district court's analysis confirms that a marginal tweak on this factor could not overcome the substantial dissimilarity of the packaging. *Id.*, PageID#6591; *see Leelanau Wine Cellars, Ltd. v. Black & Red, Inc.*, 502 F.3d 504, 516 (6th Cir. 2007) (assuming products are in "direct

competition," confusion of *dissimilar* marks is unlikely). Thus, Scotts' imagined error would be harmless. *See* Fed. R. Civ. P. 61.

* * *

The district court committed no legal error on similarity, strength, or relatedness. Scotts concededly adduced no evidence of actual consumer confusion. Op., R.78, PageID#6585; Tr.145:3-17, R.68, PageID#5650. And the district court acted within its discretion to conclude that Scotts could not overcome the dissimilarity between Spruce and Miracle-Gro to show likely confusion.

III. The district court correctly determined that Scotts is unlikely to succeed on its claim that Spruce dilutes Miracle-Gro's trade dress.

The district court also correctly concluded that Scotts failed to demonstrate a likelihood of success on its dilution claims. The Lanham Act protects against "dilution of famous marks," *Jack Daniel's*, 599 U.S. at 147, including a famous trade dress, 3 McCarthy §24:102. A junior mark dilutes a famous mark, however, only if there is an "association arising from the *similarity*" between the two marks that either (1) "impairs the distinctiveness of the famous mark" (called "blurring"); or (2) "harms the reputation of the famous mark" (called "tarnishment"). 15

U.S.C. §1125(c)(2)(B)-(C) (emphasis added). The district court found that Spruce and Miracle-Gro are "highly dissimilar." Op., R.78, PageID#6583, 6592. As the court properly recognized, Scotts' dilution claims therefore fail at the threshold.

A. Dilution requires association arising from similarity, which Scotts has not shown.

Blurring. Scotts has failed to show a likelihood of success on its dilution-by-blurring claim because "similarity" is a necessary predicate, and the district court found that the Spruce and Miracle-Gro trade dresses are wholly dissimilar.

The Lanham Act defines "dilution by blurring" as an "association arising from the similarity between a mark … and a famous mark that impairs" the latter's "distinctiveness." 15 U.S.C. §1125(c)(2)(B). "Similarity" is thus "the *necessary predicate* for dilution analysis" under the statute, because the use of a *dissimilar* mark could not possibly impair the distinctiveness of a senior mark. *Abercrombie*, 633 F.3d at 1173 n.12 (emphasis added). Given its finding that the Spruce and Miracle-Gro trade dresses were *not* similar, the district court correctly concluded that Scotts failed to demonstrate likelihood of success on its dilution-by-blurring claim.

Scotts ignores the statute's definitional requirements of "dilution by blurring," focusing instead on the list of factors (e.g., "the *degree* of similarity") that a court may consider in determining whether the use of a similar mark "is likely to cause dilution by blurring." *See* §1125(c)(2)(B)(i)-(vi). Scotts asserts that the district court erred by failing to consider these additional factors. *See* Br.46-47.

That argument, however, overlooks the fact that "similarity" is "the necessary predicate for dilution analysis"—as Scotts' own authorities acknowledge. *See Levi Strauss*, 633 F.3d at 1173 n.12 ("necessary predicate"); *Starbucks Corp. v. Wolfe's Borough Coffee, Inc.*, 588 F.3d 97, 108 (2d Cir. 2009) (acknowledging "similarity" is "an integral element in the definition of 'blurring'"). While the "*degree* of similarity" may inform whether a similar mark is "likely to cause dilution by blurring," the court does not reach that step unless the plaintiff first establishes an "association arising from the similarity between [the marks]" in the first instance. §1125(c)(2)(B). Without that showing, courts need not consider the other elements or factors that determine whether a similar mark is likely to cause dilution.

The structure of §1125(c)(2)(B) confirms that similarity is a necessary predicate. "Fame" is the classic "threshold" element of a dilution claim, as the dilution provision (§1125(c)) applies only to "famous marks." *See Kibler*, 843 F.3d at 1083. Yet once fame is established, the statute permits courts to measure the "*degree* of recognition of the famous mark" as a factor informing whether dilution is likely. *See* §1125(c)(2)(B)(iv) (emphasis added). Similarly, a mark must be "distinctive" to be protectable, *Kellogg*, 337 F.3d at 628, even as courts may measure the "*degree* of inherent or acquired distinctiveness" as a factor in determining whether dilution is likely. *See* §1125(c)(2)(B)(ii) (emphasis added).

Similarity is no different. The statute permits courts to consider "the degree of similarity" as informing whether use of the similar mark is likely to cause dilution. *See* §1125(c)(2)(B)(i). But that provision does not mean (as Scotts assumes) that a plaintiff can prevail on a dilution claim without establishing "an association arising from the similarity" in the first instance. §1125(c)(2)(B). Rather, each of these elements (fame, distinctiveness, and similarity) is a necessary predicate for a dilution claim, as the district court correctly recognized.

There is similarly no merit to Scotts' assertion that the district court "mistakenly" required it to satisfy some heightened standard for similarity. *See* Br.48-50. Scotts is correct that, following recent amendments to the Lanham Act's dilution provisions, the Second and Ninth Circuits have retreated from precedent which had required dilution plaintiffs to demonstrate the marks were "identical" or "substantially similar." *See Starbucks*, 588 F.3d at 107-08; *Levi Strauss*, 633 F.3d at 1172.[7] But Scotts is wrong to imply that this issue tainted the district court's analysis. As noted, Scotts' own authorities confirm that, even *after* the statutory amendments, similarity remains "the necessary predicate" for a dilution claim. *See* above 66. The district court held that Scotts failed to demonstrate a likelihood of success on its dilution claims based on its earlier finding (in its infringement analysis) of "a high level of *dissimilarity* between the Miracle-Gro Trade Dress and the Spruce packaging." Op., R.78, PageID#6592 (emphasis added). The court's conclusion thus hinged on the same "similarity" analysis

[7] This Court has not addressed the effect of the statutory amendments on its own test for trademark dilution by blurring. The district court's opinion thus accurately reflects Sixth Circuit law, and Scotts does not argue otherwise.

described in section II.A above, rather than any heightened standard for dilution claims.

Tarnishment. The district court correctly concluded that Scotts failed to demonstrate likely success on its tarnishment claim for the same reason. Like blurring, tarnishment requires Scotts to demonstrate that an "association arising from the *similarity*" between the trade dresses "harms the reputation" of its famous mark. 15 U.S.C. §1125(c)(2)(C) (emphasis added); *see Hormel Foods Corp. v. Jim Henson Productions, Inc.*, 73 F.3d 497, 507 (2d Cir. 1996); *V Secret Catalogue, Inc. v. Moseley,* 605 F.3d 382, 388 (6th Cir. 2010). For all the reasons described above, Scotts is unlikely to succeed on a tarnishment claim because the parties' trade dresses are not similar.

Scotts also failed to demonstrate likely success on its tarnishment claim because it failed to show that Spruce "harms the reputation of" Miracle-Gro. §1125(c)(2)(C). In two days of hearings, Scotts presented no evidence of reputational injury at all. Scotts attempts to paper over that deficiency, alluding (in a single sentence) to its proposed fact findings on customer dissatisfaction. Br.51. But the district court, as factfinder, did not credit those proposed findings, and dismissed Scotts'

vague allusions to reputational harm as "too speculative." Op., R.78, PageID#6593; *see* 3 McCarthy §24:89.

Scotts also wrongly accuses the district court of "ignor[ing] direct evidence of dilution," by which it apparently means Dr. Wind's dilution survey. Br.50-51. But the district court dismissed Dr. Wind's confusion survey as entitled to "little to no weight," and "teeming with problems." Op., R.78, PageID#6585-86. The record demonstrates that Dr. Wind's dilution survey was even more flawed, as it employed an untested methodology he had never used before, and that had never been approved by any court. *See* PI-Sur-Reply, R.65, PageID#4923-26. The court found it "unnecessary" to address Dr. Wind's dilution survey, in any event, because Scotts failed to establish the baseline "similarity" required to support any dilution claim. *See* Op. n.19, R.78, PageID#6551.

B. The dilution claim is unlikely to succeed for a host of additional reasons.

Although Scotts faults the district court for its succinct dispensation of Scotts' dilution claims (*see* Br.46), the court's analysis in fact reflected Scotts' own cursory treatment of the issues. Scotts dedicated a single paragraph of its preliminary injunction motion to dilution—and that paragraph incorporated Scotts' infringement

analysis. R.2-1, PageID#511; *see* PI-Reply, R.61, PageID#4432. Scotts took the same shortcut in its proposed conclusions of law, stating merely that the dilution "factors have each been addressed in the discussion of the likelihood of confusion." R.74, PageID#6420. Scotts cannot now criticize the district court for adopting that approach. A court is not "'required to analyze … factors despite [the party's own] failure to brief them" or "to consider arguments not presented to it." *Sunless*, 33 F.4th at 869; *see* R.30, PageID#740.

Scotts also failed to present any evidence that the Miracle-Gro trade dress is "famous," a necessary prerequisite for any dilution claim. A "famous" trade dress is one "widely recognized by the general consuming public of the United States as a designation of source," §1125(c)(2)(A), which is "difficult to prove." *Coach Servs., Inc. v. Triumph Learning LLC,* 668 F.3d 1356, 1373 (Fed. Cir. 2012). Only a "select class of marks" have "such powerful consumer associations" that dilution protections attach. *Avery Dennison Corp. v. Sumpton*, 189 F.3d 868, 875 (9th Cir. 1999).

Scotts presented no consumer-recognition evidence. *See* PI-Mot'n, R.2-1, PageID#511 (zero record cites). And its expert, Dr. Wind, did not

test for fame. Tr.296:5-12, R.69, PageID#5802. The Sass declarations describe Scotts' investment in, and sales of, Miracle-Gro, but evidence of commercial strength is different than fame. *See Black & Decker Corp. v. Positec USA Inc.*, No. 11-cv-5426, 2015 WL 1543262, at *34-35 (N.D. Ill. Mar. 31, 2015) (holding commercial strength and distinctiveness of Black and Decker's yellow-and-black color combination was "insufficient evidence that their trade dress is 'famous'").

In short, Scott failed to demonstrate a likelihood of success on its dilution claims. Both dilution-by-blurring and tarnishment require an "association arising from similarity," but Scotts failed to demonstrate that the parties' respective trade dresses are similar. And Scotts failed to present evidence on other necessary elements (e.g., fame).

* * *

Traditional equitable principles disfavor the extraordinary remedy of a preliminary injunction. The Court should affirm that Scotts has failed to meet its high burden for such exceptional relief at this early stage.

CONCLUSION

For these reasons, the Court should affirm.

December 22, 2025

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CERTIFICATE OF COMPLIANCE

1. This submission complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,988 words, excluding the parts exempted by Fed. R. App. P. 32(f), as determined by the word-count function of Microsoft Word.
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document on December 22, 2025 with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit using the Appellate Electronic Filing system. Counsel for Appellants will be served by the ECF system.

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DESIGNATION OF DISTRICT COURT DOCUMENTS

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R.30-1	748-770	Declaration of Maris Crosswell
R.30-20	1030-1031	Declaration of Dr. Itamar Simonson
R.30-21	1032-1067	Expert Report of Dr. Itamar Simonson
R.31	1245-1301	P&G's Opposition to Preliminary Injunction (sealed)
R.38	1447-1475	P&G's Answer and Counterclaims
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		Preliminary Injunction (sealed)
R.46-1	1793-1964	Declaration of John Sass (sealed)
R.60	3897-3920	Amended Complaint
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