

**CASE No. 20-30418**

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**UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

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**DENNIS PERRY,**  
*PLAINTIFF – APPELLANT*

v.

**H.J. HEINZ COMPANY BRANDS LLC AND  
KRAFT HEINZ FOODS COMPANY,**  
*DEFENDANTS – APPELLEES*

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**ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF LOUISIANA  
HON. GREG GERARD GUIDRY  
CASE NO. 2:19-CV-00280**

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**APPELLANT’S PETITION FOR REHEARING *EN BANC***

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## CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

A. Parties:

1. Dennis Perry
2. H.J. Heinz Company Brands LLC (“Heinz Brands”) is a wholly owned subsidiary of The Kraft Heinz Company, a publicly held Delaware corporation traded as KHC on the NASDAQ. Berkshire Hathaway, Inc. owns more than ten percent of the stock of The Kraft Heinz Company.
3. Kraft Heinz Foods Company is a wholly owned subsidiary of The Kraft Heinz Company, a publicly held Delaware corporation traded as KHC on the NASDAQ. Berkshire Hathaway, Inc. owns more than ten percent of the stock of The Kraft Heinz Company.

B. Counsel:

1. Brad E. Harrigan and Kenneth L. Tolar of TOLAR HARRIGAN & MORRIS LLC for the Plaintiff, Dennis Perry.

C. Tracy Zurzolo Quinn, L. Bradley Hancock, and Ashley Kristi Soppet of HOLLAND & KNIGHT LLP for the Defendants, H.J. Heinz Company Brands LLC and Kraft Heinz Foods Company.

*/s/Brad E. Harrigan*

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Brad E. Harrigan (Bar No. 29592)  
Attorney of Record for Dennis Perry

### **RULE 35(b)(1) STATEMENT**

The questions presented by this petition satisfy the criteria of Federal Rule of Appellate Procedure 35(b)(1) insofar as the Panel's decision conflicts with well-established Fifth Circuit precedent, as well as controlling law from the United States Supreme Court.

The instant petition requests rehearing *en banc* of the Panel's decision affirming summary judgment dismissing Appellant's trademark claims where the Panel acknowledged that Appellee was using *identical* and confusingly similar trademarks in connection with the sale of *identical* goods.

This Circuit has routinely held that whether likelihood of confusion exists between two trademarks is a question of fact. *See, e.g., Viacom Int'l v. IJR Capital Investments, L.L.C.*, 891 F.3d 178, 192 (5th Cir. 2018) ("Likelihood of confusion is a question of fact."); *Soc'y of Fin. Examiners v. Nat'l Ass'n of Certified Fraud Examiners Inc.*, 41 F.3d 223, 224 (5th Cir. 1995); *Great Am. Rest. Co. v. Domino's Pizza LLC*, 348 F. App'x 907, 909 (5th Cir. 2009). However, in contravention of well-established Fifth Circuit precedent that the inherently factual inquiry for likelihood of confusion is inappropriate for summary judgment, the Panel affirmed the

dismissal of all of Appellant's trademark claims against Appellee. In reaching this decision, the Panel determined that several of the "digits of confusion" used in the likelihood of confusion analysis weighed in Appellant's favor, yet nevertheless substituted its judgement for that of the jury in finding that Appellee's use of identical and confusingly similar marks in connection with identical products could not, as a matter of law, amount to trademark infringement or counterfeiting.

Further, the Panel was obliged to construe all the evidence and draw all reasonable inferences therefrom in the light most favorable to the nonmoving party. *See, e.g., Xtreme Lashes, LLC*, 576 F.3d 221, 226 (5th Cir. 2009). Nevertheless, the Panel weighed the evidence presented on each issue to make factual determinations on several of the factors. The Panel even made a factual determination as to Appellee's intent, despite Supreme Court precedent stating that it is inappropriate to weigh intent on summary judgment. *See, e.g., Hardin v. Pitney-Bowes Incorp.*, 451 U.S. 1008, 1008, 101 S. Ct. 2345, 2346, 68 L. Ed. 2d 861 (1981) ("It has long been established that it is inappropriate to resolve issues of credibility, motive, and intent on motions for summary judgment.")

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