

NOT FOR PUBLICATION

In the
United States Court of Appeals
For the Eleventh Circuit

No. 24-14209

HAMMER BRAND, LLC,
d.b.a. Wolf Brand Scooters,

Plaintiff-Appellee,

versus

VORO, INC.,

Defendant-Third Party Plaintiff-Appellant,

NINGBO KAABO TECHNOLOGY CO., LTD.,

*Defendant-Third Party Defendant
Cross Defendant-Appellant,*

LEITMOTIF SERVICES LLC,
d.b.a. Fluidfreeride LLC,

Defendant-Cross Claimant-Appellant,

KAABO TECH INC.,
d.b.a. Kaabo USA, et al.,

Defendants- Cross Defendant.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 8:23-cv-01272-KKM-NHA

Before JILL PRYOR, LUCK, and BRASHER, Circuit Judges.

PER CURIAM:

This appeal involves a trademark dispute between Hammer Brand, LLC, a producer of “Wolf” brand gas-powered scooters, and Ningbo Kaabo Technology Co., Ltd., a producer of “Wolf Warrior” and “Wolf King” electric-powered scooters. Hammer sued Kaabo and its distributors—Voro, Inc. and Leitmotif Services, LLC (which does business as Fluidfreeride)—for trademark infringement under the Lanham Act. Hammer sought a permanent injunction and cancellation of Kaabo’s “Wolf Warrior” trademark registration. The district court granted the permanent injunction and cancelled Kaabo’s “Wolf Warrior” mark. Kaabo, Voro, and Fluidfreeride appeal the permanent injunction and cancellation. After careful review, and with the benefit of oral argument, we affirm.

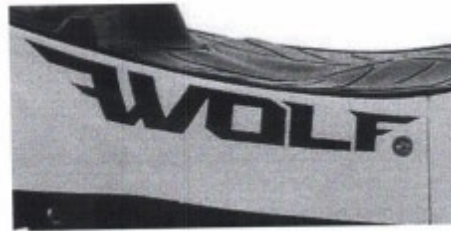
FACTUAL BACKGROUND

Hammer produces “Wolf” brand gas-powered scooters. Hammer has sold Wolf scooters since 2013 and it registered the “Wolf” mark with the United States Patent and Trademark Office in 2016. The “Wolf” mark, as used on Hammer’s Wolf RX-50 model scooter, looks like this:

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Kaabo is a Chinese manufacturer that makes electric kick scooters under the brands “Wolf Warrior” and “Wolf King.” Kaabo sells its scooters in the United States through distributors, including Voro and Fluidfreeride. Kaabo began selling its products in the United States in 2022, and registered the mark “Wolf Warrior,” shown below, with the Patent and Trademark Office in 2023:

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That same year, Hammer started receiving calls asking whether it sold electric “Wolf” brand scooters. Hammer’s logistics manager, Michael Buklis, received six calls asking about Hammer’s “electric scooter,” including one where the caller asked about a Wolf “King” model scooter. In May 2023, Hammer’s general manager, Justin Marmolejo, received a letter from an attorney sent to both Voro and Hammer to schedule an inspection of a defective Kaabo Wolf King scooter. In April 2024, Marmolejo also received a call from a Hammer dealer, Michael Cappuccetti, reporting that he had received six phone calls from people looking for Wolf electric scooters, including one potential customer who said he was looking for a “Wolf King GTR.” Later that month, Marmolejo also received an email from another Hammer dealer, Stephanie

Zeimet, forwarding a message from a customer looking for support for a Kaabo “Wolf King” scooter, which made the dealer “curious if [Hammer was] selling the little electric toys and [she] wasn’t aware of it.” Hammer investigated and learned of Kaabo’s “Wolf Warrior” and “Wolf King” scooters, sold through Voro, Fluidfreeride, and other distributors.

PROCEDURAL BACKGROUND

Hammer sued Kaabo, Voro, and Fluidfreeride under the Lanham Act. The complaint raised two claims: (1) a trademark-infringement claim seeking a permanent injunction preventing Kaabo and its distributors from using the word “Wolf” in connection with the sale of Kaabo electric scooters and cancellation of Kaabo’s “Wolf Warrior” mark; and (2) a fraudulent-registration claim seeking damages in connection with Kaabo’s fraudulent registration of the “Wolf Warrior” mark.

After discovery, Hammer moved for summary judgment on both claims. The district court first considered the trademark-infringement claim and the request for a permanent injunction. The only summary-judgment dispute between the parties was whether Hammer was irreparably harmed by Kaabo’s use of the “Wolf Warrior” mark. Hammer, the district court explained, could show a presumption of irreparable harm if, as a matter of law, Kaabo infringed Hammer’s “Wolf” mark. And Hammer could establish infringement if there was no genuine dispute that Kaabo’s “Wolf Warrior” mark created a likelihood of confusion with Hammer’s mark.

The district court analyzed the eight likelihood-of-confusion factors, and found that the summary-judgment evidence on six of them—similarity of the marks, similarity of the products, similarity of trade channels and customers, similarity of advertising, actual confusion, and customer sophistication—favored Hammer, while two—the strength of the mark and intent to infringe—favored Kaabo. Balancing the factors together, the district court concluded that Kaabo’s use of the “Wolf Warrior” mark created a likelihood of confusion, and that Kaabo infringed Hammer’s “Wolf” mark.

Having found infringement, Hammer was entitled to a permanent injunction because Kaabo’s infringement created a presumption of irreparable harm that Kaabo had not rebutted. And for the same reason, Hammer was entitled to cancellation of Kaabo’s “Wolf Warrior” mark.

But the district court denied summary judgment on Hammer’s fraudulent-registration claim. Although the evidence was undisputed that Kaabo was aware of Hammer’s “Wolf” mark before registering its “Wolf Warrior” mark, there was a genuine dispute about whether Kaabo initially lied on its application to the Patent and Trademark Office. The fraudulent-registration claim is still pending.

Kaabo appeals the permanent injunction and cancellation of its “Wolf Warrior” mark.¹

¹ This appeal is brought by Kaabo, Voro, and Fluidfreeride, but, for ease of reference, from here on out, we’ll refer to them together as Kaabo.

STANDARD OF REVIEW

We review de novo a district court’s summary judgment, using the same standard as the district court and drawing all reasonable inferences in favor of the non-moving party. *See FCOA LLC v. Foremost Title & Escrow Servs. LLC*, 57 F.4th 939, 946 (11th Cir. 2023). Summary judgment is proper where there is “no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a).

We “review for abuse of discretion a district court’s decision to grant a permanent injunction, but in conducting that review, we consider all underlying legal determinations, including the propriety of the entry of summary judgment, de novo.” *Barrett v. Walker Cnty. Sch. Dist.*, 872 F.3d 1209, 1221 (11th Cir. 2017). We review for abuse of discretion the cancellation of a trademark. *See PlayNation Play Sys., Inc. v. Vex Corp.*, 924 F.3d 1159, 1170 (11th Cir. 2019). We “may affirm on any ground supported by the record, regardless of whether that ground was relied upon or even considered below.” *Waldman v. Conway*, 871 F.3d 1283, 1289 (11th Cir. 2017).

DISCUSSION

Kaabo argues that the district court erred by granting a permanent injunction on Hammer’s trademark-infringement claim and cancelling its “Wolf Warrior” mark. We’ll begin by reviewing the permanent injunction, and then consider the cancellation.

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I. THE PERMANENT INJUNCTION

Kaabo argues that the district court erred in entering a permanent injunction because Hammer failed to show that Kaabo infringed Hammer's mark.² An injunction is a remedy for trademark infringement. *See* 15 U.S.C. § 1116(a); *see also Hard Candy, LLC v. Anastasia Beverly Hills, Inc.*, 921 F.3d 1343, 1353 (11th Cir. 2019) (“In ‘ordinary trademark infringement actions . . . complete injunctions against the infringing party are the order of the day.’” (quoting *SunAmerica Corp. v. Sun Life Assurance Co. of Can.*, 77 F.3d 1325, 1336 (11th Cir. 1996))). A trademark-infringement plaintiff is entitled to a permanent injunction if it shows that: “(1) it has suffered an irreparable injury; (2) remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) the public interest would not be disserved by a permanent injunction.” *Angel Flight of Ga., Inc. v. Angel Flight Am., Inc.*, 522 F.3d 1200, 1208 (11th Cir. 2008) (citing *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006)).

² Although this is an interlocutory appeal because the fraudulent-registration claim is still pending, *see* 28 U.S.C. § 1291, we have jurisdiction to review the district court's permanent injunction under 28 U.S.C. section 1292(a)(1), *see id.* § 1292(a)(1) (providing that “the courts of appeals shall have jurisdiction of appeals from . . . [i]nterlocutory orders of the district courts of the United States . . . granting, continuing, modifying, refusing or dissolving injunctions”).

As it did in the district court, Kaabo only challenges the first factor on appeal—irreparable harm. A showing of trademark infringement creates “a rebuttable presumption of irreparable harm.” 15 U.S.C. § 1116(a). To prevail on a trademark-infringement claim, the plaintiff must show “(1) that it owns a valid mark with priority, and (2) that the defendant’s mark is likely to cause consumer confusion with plaintiff’s mark.” *FCOA*, 57 F.4th at 946.

Kaabo does not dispute that Hammer owns a valid mark with priority. Instead, it contends that Hammer cannot meet the second element of its trademark-infringement claim because there was no likelihood of customer confusion. “[L]ikelihood of confusion occurs when a later user uses a trade-name in a manner which is likely to cause confusion among ordinarily prudent purchasers or prospective purchasers as to the source of the product.” *Wreal, LLC v. Amazon.com, Inc.*, 38 F.4th 114, 126–27 (11th Cir. 2022) (quoting *Cap. Films Corp. v. Charles Fries Prods., Inc.*, 628 F.2d 387, 393 (5th Cir. 1980)). “Although likelihood of confusion is a question of fact, it may be decided as a matter of law.” *Tana v. Dantanna’s*, 611 F.3d 767, 775 n.7 (11th Cir. 2010); see also *Savannah Coll. of Art & Design, Inc. v. Sportswear, Inc.*, 983 F.3d 1273, 1281 (11th Cir. 2020) (“[W]hile generally likelihood of confusion raises a question of fact, when appropriate, it may be determined as a matter of law.” (quoting *Alliance Metals, Inc., of Atlanta v. Hinely Indus., Inc.*, 222 F.3d 895, 907 (11th Cir. 2000))).

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We apply a two-step test to determine likelihood of confusion. First, we consider eight factors, “which can provide circumstantial evidence of likelihood of confusion”:

- (1) the strength of the allegedly infringed mark;
- (2) the similarity of the infringed and infringing marks;
- (3) the similarity of the goods and services the marks represent;
- (4) the similarity of the parties’ trade channels and customers;
- (5) the similarity of advertising media used by the parties;
- (6) the intent of the alleged infringer to misappropriate the proprietor’s good will; . . . (7) the existence and extent of actual confusion in the consuming public[;] . . . [and
- (8)] consumer sophistication.

FCOA, 57 F.4th at 947 (citation modified). Reviewing a summary judgment, we evaluate each of these factors, viewing the evidence and drawing reasonable inferences in favor of the non-moving party. *Id.* Second, we weigh “each of the relevant [factors]—independently and then together—to determine whether the ultimate fact, likelihood of confusion, can reasonably be inferred.” *Id.*

The factors, however, “should not be applied mechanically.” *Wreal*, 38 F.4th at 127. Rather, we “accord weight to the individual likelihood-of-confusion factors based on what the situation calls for and do not simply calculate the number of factors favoring such a conclusion and the number of factors militating against it.” *Savannah Coll.*, 983 F.3d at 1281 (citing *Jellibeans, Inc. v. Skating Clubs of Ga., Inc.*, 716 F.2d 833, 840 n.17 (11th Cir. 1983)).

With this framework in mind, we apply the likelihood-of-confusion factors to the summary-judgment evidence in this case.

A. Likelihood-of-Confusion Factors

i. Strength of the Mark

We start with the first factor—strength of the mark. Determining the strength of a mark is a two-step process. *FCOA*, 57 F.4th at 948. First, we determine the mark’s conceptual strength; then we consider its commercial strength. *Id.* at 949–50. When considering conceptual strength, we place the “mark on the sliding scale of trademark strength, from weakest to strongest: (1) generic, (2) descriptive, (3) suggestive, and (4) fanciful or arbitrary.” *Id.* at 949.

Here, Hammer’s mark was “fanciful or arbitrary,” the strongest kind of mark, because the term “Wolf” bore no conceptual relationship to scooters. See *Frehling Enters., Inc. v. Int’l Select Grp., Inc.*, 192 F.3d 1330, 1335 (11th Cir. 1999) (explaining that an “arbitrary mark is a word or phrase that bears no relationship to the product” (citing *Freedom Sav. & Loan Ass’n v. Way*, 757 F.2d 1176, 1182–83 n.5 (11th Cir. 1985))). But Hammer did not present evidence of commercial strength.

“We have held that determining the strength of any mark requires weighing either or both circumstantial evidence of advertising and promotion and direct evidence of consumer recognition, such as by a survey.” *FCOA*, 57 F.4th at 950 (citation modified). Hammer argues that there was undisputed evidence in the record that it advertised and promoted its scooters online. Yes, there was.

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But, “in isolation, evidence of promotion *efforts* is not sufficient to establish a mark’s commercial strength because it tells us precious little about the efficacy of those efforts in creating marketplace recognition.” *Fla. Int’l Univ. Bd. of Trs. v. Fla. Nat’l Univ., Inc. (FIU)*, 830 F.3d 1242, 1259 (11th Cir. 2016). Because there was no evidence of the effects of Hammer’s efforts, for example, through “direct evidence of consumer recognition, such as by a survey,” *FCOA*, 57 F.4th at 950, the strength-of-the-mark factor weighed in favor of Kaabo.

ii. Similarity of the Marks

Next is the similarity of the marks. To judge the similarity of two marks, we apply a “subjective eyeball test,” *FCOA*, 57 F.4th at 952 (citation modified), looking to the “appearance, sound[,] and meaning of the marks, as well as the manner in which the marks are used,” *FIU*, 830 F.3d at 1260 (citation modified). “The greater the similarity, the greater the likelihood of confusion.” *Id.*

Here, the appearance of the two marks was very similar, using nearly identical font and styling. The sound and meaning of the marks were also similar, with both marks employing the identical term “Wolf.” And the manner of use was virtually indistinguishable, with the marks placed and used in the same way on the respective scooters.



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Kaabo nevertheless argues that the addition of the words “Warrior” and “King” to the word “Wolf” created a “profound difference in meaning” that “impact[ed] consumer perceptions.” According to Kaabo, the terms “Warrior” and “King” brought their own “history,” and, in this context, “Wolf” was not referring to an animal, but instead to a type of warrior or king.

We are unpersuaded. While the addition of the terms “Warrior” and “King” to the term “Wolf” may have slightly altered the meaning of Kaabo’s marks compared to “Wolf” standing alone, we don’t think a reasonable jury could find that this introduced a “profound difference in meaning” that fundamentally transformed the nature of the mark. The use of additional words surrounding the term “Wolf” did not detract from the plain visual similarity of the marks. *See Frehling*, 192 F.3d at 1337 (concluding that “[t]he inclusion of” additional words alongside a mark “d[id] little to reduce the danger of that potential confusion in light of the overwhelming similarity of the marks”).

If anything, the use of the “Wolf” mark in conjunction with other words actually increased the likelihood of confusion in this context. “Wolf” is a brand name that is often accompanied by another descriptor for the particular model. For example, Hammer’s best-selling scooter is the “Wolf RX-50,” but it also sells the “Wolf Blaze,” and other similarly-named products. Given this context, it is likely that a consumer would think that “Wolf Warrior” was a reference to another type of Hammer “Wolf”-brand product, particularly given the strong visual identity between the two marks.

See id. (finding that adding words surrounding a clearly identifiable mark “suggest[s] that they represent but a single product line or signature collection” of the mark). Looking at the evidence in the light most favorable to Kaabo, this factor weighed in Hammer’s favor.

iii. Similarity of the Products

We also review the similarity of the products. Two products are similar when they “are [of] the kind that the public attributes to a single source.” *FIU*, 830 F.3d at 1261 (quoting *Frehling*, 192 F.3d at 1338). “The focus is on the reasonable belief of the average consumer as to what the likely source of the goods is.” *Id.* (citation modified). Put another way, the question is whether the products are similar enough that a reasonable customer could believe that the products are made by the same producer. The products needn’t be identical; they “need only be ‘related in some manner . . . such that they could give rise to the mistaken belief that [the products] emanate from the same source.’” *Wreal*, 38 F.4th at 132 (quoting *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1369 (Fed. Cir. 2012)).

Here, the products were related because they were both motorized scooters, and a reasonable customer could believe that they “emanate[d] from the same source.” *Id.* The fact that Hammer produced seated gas-powered scooters while Kaabo produced standing electric scooters did not make the products so different that a reasonable consumer would believe they were probably made by different producers. The question here is “not whether

or not the purchasing public [could] readily distinguish between the products,” but rather “whether the products [were] the kind that the public attribute[d] to a single source.” *Frehling*, 192 F.3d at 1338 (citing *E. Remy Martin & Co., S.A. v. Shaw–Ross Int’l Imports, Inc.*, 756 F.2d 1525, 1530 (11th Cir. 1985)). Here, the products, although distinct, were similar enough that a reasonable customer could believe that the products were made by the same producer.

Pushing back, Kaabo points to testimony by Hammer’s general manager that Hammer had no interest in selling electric scooters, and testimony by Hammer’s owner that he considered electric kick scooters to be “suicide machines.” Kaabo says this demonstrated that gasoline-powered scooters and electric kick scooters were sufficiently different that a reasonable jury could conclude the products “d[id] not necessarily come from the same source.” But whether or not Hammer would sell both kinds of scooter is beside the point.

The similarity-of-products question is focused on whether the public could think that the products came from the same source. *See FCOA*, 57 F.4th at 953 (explaining that “the similarity of the products[] concerns whether the products are of a kind the public could *think* originate from a single source”). Here, the products were similar enough that the public could think they “originate[d] from a single source,” regardless of whether Hammer had any interest in selling electric scooters. *See id.*

iv. Similarity of Trade Channels and Customers

Fourth, the similarity-of-trade-channels-and-customers factor “focuses on where, how, and with whom the parties transact with their actual and potential customers.” *Id.* at 954 (citation modified). “The primary focus in this inquiry is on the overlap of the customer bases, because the greater the overlap, the greater the likelihood that consumers will be exposed to both marks and become confused.” *Id.* “Dissimilarities between the retail outlets for and the predominant consumers of plaintiff’s and defendants’ goods lessen the possibility of confusion.” *Sovereign Mil. Ord. v. Knights Hospitallers*, 809 F.3d 1171, 1188 (11th Cir. 2015) (citation modified).

Here, the summary-judgment evidence showed that both Hammer and Kaabo sold their scooters through dealers and distributors who then sold to the public, and that Kaabo’s dealers—Voro and Fluidfreeride—sold to the public both online and through physical dealerships, in the same manner as Hammer’s dealerships. In response, Kaabo argues that one of Hammer’s dealers testified that some customers can spend \$2,000 or \$3,000 for an electric scooter but would not spend \$1,200 for a gasoline powered scooter. But it is not clear why this is relevant.

We’ve explained that the similarity-of-trade-channels-and-customers factor does not require “direct competition or identity of sales”; instead, this factor looks to evidence that “the companies cater[ed] to the same general kinds of individuals.” *FCOA*, 57 F.4th at 954 (citation modified). There’s no evidence in the record that

the price differential between certain models of gas-powered and electric scooters resulted in two entirely separate markets for Hammer's and Kaabo's products. If anything, the dealer's testimony showed that electric and gas-powered scooters were generally sold through the same trade channels. For that reason, this factor also weighed in Hammer's favor.

v. Similarity of Advertising

Turning to the similarity of advertising, this factor “requires that we compare the parties’ advertisements and the audiences they reach.” *FIU*, 830 F.3d at 1262 (citing *Sovereign Mil.*, 809 F.3d at 1188). “Our cases do not require identity of advertising methods; ‘the standard is whether there is likely to be significant enough overlap in the [audience of the advertisements] that a possibility of confusion could result.’” *FIU*, 830 F.3d at 1262 (quoting *Frehling*, 192 F.3d at 1340).

Here, the parties “advertise[d] through similar mediums,” *FCOA*, 57 F.4th at 955, including online advertising and social media. Hammer advertised its scooters “to a broad range of customers of all ages and income brackets,” primarily “online and through social media,” while Kaabo advertised through “Google ads” and “social media including Facebook, Twitter (X), and Instagram.” While the advertising evidence was not particularly strong, this factor weighed in Hammer's favor.

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vi. Intent

The sixth likelihood-of-confusion factor, intent, focuses on whether Kaabo “had a conscious intent to capitalize on the plaintiff’s business reputation, was intentionally blind, or otherwise manifested improper intent” when using the “Wolf Warrior” or “Wolf King” name. *FIU*, 830 F.3d at 1263 (quoting *Custom Mfg. & Eng’g, Inc. v. Midway Servs., Inc.*, 508 F.3d 641, 648 (11th Cir. 2007)). “If it can be shown that a defendant adopted a plaintiff’s mark with the intention of deriving a benefit from the plaintiff’s business reputation, this fact alone may be enough to justify the inference that there is confusing similarity.” *Id.* at 1263 (quoting *Frehling*, 192 F.3d at 1340).

Although Hammer pointed to evidence that Kaabo was aware of Hammer’s mark when it registered the “Wolf Warrior” mark, Kaabo’s president testified that the Chinese company registered the “Wolf Warrior” mark because it believed that the two marks were sufficiently different and that the Patent and Trademark Office would reject the application for registration if there was any infringement. This was evidence a jury could use to find that Kaabo did not intentionally infringe Hammer’s mark. Drawing all inferences in Kaabo’s favor, as we must on summary judgment, we agree with the district court that this factor weighed in Kaabo’s favor.

vii. Actual Confusion

The most important factor is actual confusion. *FIU*, 830 F.3d at 1264 (noting that actual confusion is “the best evidence of a likelihood of confusion”). “Actual confusion asks whether there is evidence in fact of confusion.” *FCOA*, 57 F.4th at 956 (citing *Frehling*, 192 F.3d at 1340). “[I]n assessing the quantum of actual confusion required for a finding in the plaintiff’s favor, even a ‘very little’ amount of actual confusion is highly probative.” *Wreal*, 38 F.4th at 137 (quoting *World Carpets, Inc. v. Dick Littrell’s New World Carpets*, 438 F.2d 482, 489 (5th Cir. 1971)); see also *Caliber Auto. Liquidators, Inc. v. Premier Chrysler, Jeep, Dodge, LLC*, 605 F.3d 931, 937 (11th Cir. 2010) (“[T]he quantum of evidence needed to show actual confusion is relatively small.” (quoting *Jellibeans*, 716 F.2d at 845)). Thus, “even two instances of actual confusion [are] ‘worthy of some consideration’ when the right people are confused in the right way.” *FIU*, 830 F.3d at 1264 (quoting *Safeway Stores, Inc. v. Safeway Disc. Drugs, Inc.*, 675 F.2d 1160, 1167 (11th Cir. 1982)). In assessing the weight of actual-confusion evidence, “we must consider who was confused and how they were confused.” *Id.* (citation modified). That means we give “substantial weight” to evidence of actual confusion among “the consumers of the relevant product or service, especially the mark holder’s customers,” *Wreal*, 38 F.4th at 137 (citation modified), but “[s]hort-lived confusion or confusion of individuals casually acquainted with a business is” generally “worthy of little weight,” *FIU*, 830 F.3d at 1264 (quoting *Safeway*, 675 F.2d at 1167).

Here, there was actual customer confusion. In early 2023, shortly after Kaabo registered the “Wolf Warrior” mark, Hammer’s logistics manager, Michael Buklis, received six phone calls asking about Hammer’s “electric scooters” despite the fact that Hammer doesn’t sell them. In one instance, the caller asked about a Wolf “King” model scooter. Similarly, in April 2024, Hammer dealer Michael Cappucetti reported receiving about six calls from potential customers asking about Wolf electric scooters. In one of these calls, the customer asked whether Cappucetti sold a Wolf King “GTR” model scooter. When Cappucetti told him he hadn’t heard of it and wasn’t sure if Wolf made such a model, the caller said, “well, you are a Wolf dealer, correct?” Later that month, another Hammer dealer, Stephanie Zeimet, forwarded a message from a customer looking for support for a “Wolf King” scooter.

Kaabo offers two arguments in response. First, it contends that the callers could have been asking about whether Hammer sells electric versions of its Wolf scooters. But in at least three instances, customers called Hammer or its dealers specifically asking about “Wolf King” models, and in one of these cases, the customer said that the reason for the call was because the dealer was a “Wolf dealer.” Further, in May 2023, Hammer also received a letter from a lawyer representing an insurance company investigating a fire caused by a “Kaabo Wolf King GT Pro Scooter” purchased from Voro. Although non-consumer confusion may be less relevant than consumer confusion, the fact that a sophisticated non-consumer believed that a “Wolf” brand scooter must have been pro-

duced by Hammer—notwithstanding the fact that the lawyer identified the scooter as a Kaabo product—also raised an inference of confusion.

Second, Kaabo asserts that we cannot consider the actual-confusion evidence because it was hearsay. But it wasn't. Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Fed. R. Evid. 801(c). The customer-confusion testimony was not hearsay because it didn't assert anything. The inquiries—whether or not Hammer or its dealers carried a particular model of scooter—were non-assertive statements that were incapable of being true or false. *See United States v. Rivera*, 780 F.3d 1084, 1092 (11th Cir. 2015) (finding that “non-assertive statements that are incapable of being true or false” are not hearsay). And to the extent these inquiries had any assertive content, they were not offered to prove the truth of whether Hammer or Kaabo sold a “Wolf King” model. They were offered to show that customers were confused because they called Hammer and its dealers about a model of scooter Hammer did not produce or sell.

In any event, the “district court may consider a hearsay statement in passing on a motion for summary judgment if the statement could be reduced to admissible evidence at trial or reduced to admissible form.” *Macuba v. Deboer*, 193 F.3d 1316, 1323 (11th Cir. 1999) (citation modified); *see also* Fed. R. Civ. P. 56(c)(2). The customer testimony could be reduced to admissible form at trial, for example, through direct testimony. So, there was no barrier to

considering the customer confusion evidence, which weighed heavily in Hammer's favor.

viii. Consumer Sophistication

The final factor is customer sophistication. “Typically, we analyze likelihood of confusion using only seven factors” *FCOA*, 57 F.4th at 957. But “we have recognized that consumer sophistication may also be relevant to assessing likelihood of confusion,” although we “do not require that the factor be considered in every, or even most, likelihood of confusion analyses.” *Id.* Sophisticated customers who “have special knowledge of the industry through education or experience, or have invested significant time into becoming well-informed due to the nature of the purchase, are more likely to distinguish between similar marks and thereby avoid becoming confused.” *Id.* (citation modified). The more sophisticated the customer base, the lower the likelihood of confusion. *Id.*

Here, the summary-judgment evidence showed that scooter purchasers do not understand the differences between scooters and generally “don’t know what they’re talking about.” Kaabo responds that scooter buyers are sophisticated because there is a general understanding “that consumers are likely to exercise more care when purchasing expensive products such as the scooters at issue, which costs thousands of dollars.” It also argues that Hammer’s consumers are likely older and more mature as their products require a license in some states. But Kaabo offered no summary-judgment evidence to support these assertions. Without contrary evidence, the sophistication factor weighed in Hammer’s favor.

B. Balance of the Factors

Balancing the factors, the district court did not err in inferring a likelihood of confusion between the two marks. Because the likelihood of confusion analysis “presupposes that various factors will point in opposing directions,” *Tana*, 611 F.3d at 775 n.7, “[c]ourts may grant summary judgment on likelihood of confusion even if some [factors] favor the non-movant,” *FCOA*, 57 F.4th at 948; *see also Tana*, 611 F.3d at 782 (affirming summary judgment where two factors supported nonmovant); *Welding Servs., Inc. v. Forman*, 509 F.3d 1351, 1361 (11th Cir. 2007) (affirming summary judgment where three factors supported nonmovant).

Here, although the strength and intent factors supported Kaabo, the balance of the factors showed a strong likelihood of confusion. Most importantly, there were several instances of actual confusion, which we’ve said is the “best evidence of a likelihood of confusion.” *FIU*, 830 F.3d at 1264. Hammer pointed to over a dozen instances of actual confusion, with both customers and non-customers attributing Kaabo’s “Wolf Warrior” and “Wolf King” products to Hammer’s “Wolf” mark. In several instances, customers contacted Hammer or its dealers looking for specific Kaabo products assuming that they must belong to Hammer’s “Wolf” brand. This confusion is perhaps unsurprising given the similarity of the marks and the similarity of the products the marks represent. The close visual resemblance between the marks and the fact that they were both used on motorized scooters made it easy to confuse the two.

Taken together, these factors created a strong inference of likelihood of confusion. And that’s not even considering the other factors, with evidence showing that the products were sold through similar trade channels, used similar advertising, and were sold to a generally unsophisticated customer base. And even the factors in Kaabo’s column didn’t weigh strongly in its favor. Hammer’s mark was conceptually strong because it was fanciful and arbitrary. And on intent, although a reasonable jury could credit the testimony by Kaabo’s president that he believed the marks were sufficiently different, there was also evidence that Kaabo sought to register a “Wolf King” mark while the litigation was pending, a fact Kaabo’s president initially denied in a deposition, but later admitted. As the district court observed, Kaabo’s prior awareness of the “Wolf Warrior” mark combined with the “obvious visual similarity of the marks” and the contradictory statements by Kaabo’s president could support an inference that Kaabo intentionally copied Hammer’s mark.

We therefore conclude that the district court correctly determined on summary judgment that Kaabo infringed Hammer’s mark. This showing of trademark infringement created “a rebuttable presumption of irreparable harm,” 15 U.S.C. § 1116(a), that Kaabo failed to rebut. And because there was irreparable harm—the only disputed element for a permanent injunction—the district court did not abuse its discretion in entering the injunction for Hammer on its infringement claim. *See Angel Flight*, 522 F.3d at 1208.

II. CANCELLATION

Kaabo also challenges the cancellation of its “Wolf Warrior” trademark. But Hammer responds that we don’t have jurisdiction to review the cancellation because the district court did not enter a final judgment. The district court denied summary judgment on Hammer’s fraudulent registration claim, so that claim is still pending and the summary judgment was not final. *See Scott v. Advanced Pharm. Consultants, Inc.*, 84 F.4th 952, 959 (11th Cir. 2023) (“[T]ypically we may not review an order of a district court adjudicating fewer than all the claims in a suit, or adjudicating the rights and liabilities of fewer than all the parties because such an order is not a final judgment from which an appeal may be taken.” (citation modified)).

Hammer is right that we normally only have jurisdiction over “final decisions of the district courts,” 28 U.S.C. § 1291, and that the order cancelling Kaabo’s mark is not a final decision because the fraudulent-registration claim is still pending in the district court, *see Scott*, 84 F.4th at 959. But, as we explained earlier, we do have jurisdiction to review the permanent injunction. *See* 28 U.S.C. § 1292(a)(1). And because we have jurisdiction over the injunction, Kaabo argues that we have pendent jurisdiction over the cancellation. We agree.

“Pendent appellate jurisdiction is present when a nonappealable decision is inextricably intertwined with the appealable decision or when review of the former decision is necessary to ensure meaningful review of the latter.” *Hamrick v. Partsfleet, LLC*, 1 F.4th

1337, 1352 (11th Cir. 2021) (citation modified). “[P]endent appellate jurisdiction should be present only under rare circumstances, and does not exist where resolution of the nonappealable issue is not necessary to resolve the appealable one.” *Id.* (citation modified). “Issues are not inextricably intertwined with the question on appeal when the appealable issue can be resolved without reaching the merits of the nonappealable issues.” *Id.* (citation modified).

This case presents one of the rare circumstances where we have pendent jurisdiction because our review of the permanent injunction and the cancellation order are inextricably intertwined. They have overlapping elements. To review the injunction, which we have jurisdiction to do, *see* 28 U.S.C. § 1292(a)(1), necessarily means that we decide the cancellation.

To cancel a mark, the plaintiff must show “(1) that it had standing to petition for cancellation because it was likely to be damaged by the infringer’s continued use of the infringing mark, and (2) that there were valid grounds for discontinuing registration.” *PlayNation*, 924 F.3d at 1171. A finding that a federal trademark is registered satisfies the first element and establishing trademark infringement satisfies the second. *Id.*

Trademark infringement is also a necessary element for a permanent injunction. As we explained above, the injunction required a showing of irreparable harm. And irreparable harm required a showing of infringement. By reviewing the injunction, we necessarily decide the infringement issue for cancellation. Our sis-

ter circuits have reached the same conclusion. *See Marshak v. Treadwell*, 240 F.3d 184, 190 (3d Cir. 2001) (finding that appellate court’s review of a permanent injunction in a trademark-infringement case gave it pendent appellate jurisdiction over an order cancelling a trademark); *Self-Realization Fellowship Church v. Ananda Church of Self-Realization*, 59 F.3d 902, 906 (9th Cir. 1995) (same).

With jurisdiction out of the way, Kaabo argues that cancellation was improper because the “cancellation order . . . [was] intertwined with the trademark infringement issue” and there was no infringement. But for the reasons we’ve already explained, Kaabo did infringe Hammer’s mark. So the cancellation was appropriate.

AFFIRMED.