UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

Residential Energy Services Network, Inc. v. Building Science Institute, Ltd. Co., et al.

Residential Energy Services Network · No. 22-cv-1641-AGS-MSB · Decided November 21, 2025

SUMMARY

The United States District Court for the Southern District of California denied Building Science Institute's motion for reconsideration of a preliminary injunction concerning the use of "HERS" in connection with home energy ratings. The court held that the proffered evidence was not newly discovered, that subsequent legal authorities did not constitute an intervening change in controlling law, and that the defendant had not shown clear error regarding the treatment of a settlement agreement.

CASE DETAILS

COURT	United States District Court for the Southern District of California
WRITING FOR THE COURT	Andrew G. Schopler
JURISDICTION	United States District Court for the Southern District of California
DECIDED	November 21, 2025
DOCKET	22-cv-1641-AGS-MSB
DISPOSITION	other
PROCEDURAL POSTURE	Defendant moved for reconsideration of the court's prior preliminary-injunction ruling, challenging only the likelihood-of-success prong.
STANDARD OF REVIEW	Reconsideration is appropriate only upon newly discovered evidence, clear error or manifest injustice, or an intervening change in controlling law. Newly discovered evidence must have been unknown before the hearing and undiscoverable through reasonable diligence.
PRECEDENTIAL VALUE	unpublished district-court order
PARTIES	Building Science Institute, Ltd. Co. v. Residential Energy Services Network, Inc.

TOPICS

trademark infringement · trademark law · motion for reconsideration · injunctions · civil procedure

PRACTICE AREAS

trademark · civil procedure · commercial litigation · intellectual property · injunctive relief

QUESTIONS PRESENTED

1. Whether Building Science Institute presented newly discovered evidence warranting reconsideration of the preliminary injunction.
2. Whether intervening legal authority required reconsideration of the preliminary injunction's likelihood-of-success analysis.
3. Whether the court committed clear error by treating the California Energy Commission settlement agreement as akin to a license agreement.
4. Whether the unopposed motion for judicial notice should be granted.

HOLDINGS

1. Reconsideration was unwarranted because the evidence existed before the preliminary-injunction hearing and Building Science Institute failed to show that it could not have discovered and presented the evidence through reasonable diligence.
2. No intervening change in controlling law required reconsideration. Great Concepts made the challenge to the trademark more demanding, OpenAI was not binding and did not address the specific issue presented, and Heritage Alliance merely recognized discretion already reflected in the statute and existing case law.
3. The court did not commit clear error. Even if describing the California Energy Commission settlement agreement as "akin to a license" was imprecise, the court understood the agreement's essential facts and terms, so its prior ruling was not clearly erroneous.

KEY QUOTATIONS

> *"Reconsideration is appropriate if the district court (1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law."* (Opinion at 1)

> *"To be clearly erroneous, a decision must strike [the Court] as more than just maybe or probably wrong; it must be dead wrong."* (Opinion at 5)

FACTUAL BACKGROUND

Residential Energy Services Network owns the HERS trademark, and the court had preliminarily enjoined Building Science Institute from using "HERS" to describe a Home Energy Rating System. Building Science Institute relied on preexisting USPTO files, trademark-prosecution materials, California Energy Commission documents, and a settlement agreement to argue that the preliminary injunction should be reconsidered. It also argued that later trademark decisions and the court's characterization of the settlement agreement demonstrated a changed legal landscape or clear error.

PROCEDURAL HISTORY

The court previously preliminarily enjoined Building Science Institute from improperly using “HERS” to describe a Home Energy Rating System because the use likely infringed Residential Energy Services Network's trademark. Building Science Institute moved for reconsideration based on purported newly discovered evidence, intervening legal decisions, and clear error. The court denied reconsideration and granted an unopposed motion for judicial notice.

DISPOSITION

other

CASES CITED

- School District No. 1J, Multnomah County, Oregon v. ACandS, Inc., 5 F.3d 1255, 1263 (9th Cir. 1993)
- Frederick S. Wyle Professional Corp. v. Texaco, Inc., 764 F.2d 604, 609 (9th Cir. 1985)
- Wells Fargo Bank, N.A. v. Mahogany Meadows Avenue Trust, 979 F.3d 1209, 1218 (9th Cir. 2020)
- Great Concepts, LLC v. Chutter, Inc., 90 F.4th 1333, 1335–37, 1339–40 (Fed. Cir. 2024)
- Robi v. Five Platters, Inc., 918 F.2d 1439, 1444 (9th Cir. 1990)
- OpenAI, Inc. v. Open A.I., Inc., 719 F. Supp. 3d 1033 (N.D. Cal. 2024)
- OpenAI, Inc. v. Open A.I., Inc., No. 24-1963, 2024 WL 4763687 (9th Cir. Nov. 13, 2024)
- Heritage Alliance v. American Policy Roundtable, 133 F.4th 1063, 1070 (Fed. Cir. 2025)
- United States v. Hollis, 506 F.3d 415, 421 (5th Cir. 2007)

OPINION

1 UNITED STATES DISTRICT COURT 2 SOUTHERN DISTRICT OF CALIFORNIA 3 RESIDENTIAL ENERGY SERVICES Case No.: 22-cv-1641-AGS-MSB NETWORK, INC., 4 ORDER DENYING Plaintiff, 5 RECONSIDERATION (ECF 81) v. 6 BUILDING SCIENCE INSTITUTE, 7 LTD. CO., et al., 8 Defendants. 9 This Court preliminarily enjoined defendant Building Science Institute, Ltd. Co. 10 (BSI), from improperly using “HERS” to describe a Home Energy Rating System, as such 11 use likely infringed on plaintiff’s trademark.

BSI moves for reconsideration. 12 DISCUSSION 13 “Reconsideration is appropriate if the district court (1) is presented with newly 14 discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, 15 or (3) if there is an intervening change in controlling law.” School Dist. No. 1J, Multnomah 16 Cnty., Or. v. ACandS, Inc., 5 F.3d 1255, 1263 (9th Cir.

1993). BSI primarily argues that it 17 has presented “newly discovered evidence” and “legal decisions” that “came into existence 18 after the injunction issued,” while interspersing arguments about the Court’s supposed misunderstandings. (See ECF 93, at 2.) BSI only asks the Court to reconsider the “likelihood of success” prong of its preliminary-injunction order.

(ECF 81-1, at 8.) A. Newly Discovered Evidence BSI’s purported “newly discovered evidence” is not “new” by reconsideration- motion standards. A party moving for reconsideration on this ground must “show not only that this evidence was newly discovered or unknown to it until after the hearing, but also that it could not with reasonable diligence have discovered and produced such evidence at the hearing.” Frederick S. Wyle Pro.

Corp. v. Texaco, Inc., 764 F.2d 604, 609 (9th Cir. 1985). BSI presents four items of additional evidence that existed well before this litigation began: 1. The United States Patent and Trademark Office’s “files on Plaintiff’s two additional contemporaneously filed trademark applications which were rejected by the USPTO,” 2. “Plaintiff’s attorney’s trademark application prosecution files for the marks HERS®, HERS, and HERS/HOME ENERGY RATING SYSTEM[],” 3.

California Energy Commission documents “regarding the Settlement Agreement entered into between Plaintiff and the CEC,” and 4. Portions of “Plaintiff’s trademark attorney’s files regarding the intended scope of the Settlement Agreement with CEC.” (ECF 93, at 4.) But BSI had plenty of time to uncover this material during the nine weeks between the filing of the preliminary-injunction motion and the hearing on it.

(See ECF 18; ECF 27). BSI has the burden of explaining why a reasonably diligent attorney could not have found these items in the months before the hearing—let alone in the nearly two years between the preliminary injunction’s issuance and BSI’s belated motion for reconsideration. (See ECF 28; ECF 81.) It has not met that burden. See Wells Fargo Bank, N.A. v. Mahogany Meadows Ave. Trust, 979 F.3d 1209, 1218 (9th Cir.

2020) (noting that a reconsideration motion “may not be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier”). B. New Law Next, BSI asserts that “new law” demands a different result. But the main case it relies on—Great Concepts, LLC v. Chutter, Inc., 90 F.4th 1333 (Fed. Cir. 2024)—makes BSI’s burden of challenging this trademark more difficult, not less.

(See ECF 81-1, at 9–13; ECF 93, at 4–7.) At the time of the preliminary-injunction hearing, the Ninth Circuit had long held that “filing a fraudulent incontestability affidavit [alone] provides a basis for canceling the registration itself.” Robi v. Five Platters, Inc., 918 F.2d 1439, 1444 (9th Cir. 1990) (cleaned up). Chutter rejected that notion and adopted a more demanding process for litigants, like BSI, who dispute a trademark.

The court held that a trademark “registration” may not be cancelled in its entirety solely due to “fraud in connection with acquiring incontestable status,” but that such fraud is merely a basis for cancelling the “incontestable status.” Chutter, 90 F.4th at 1340.

After Chutter, BSI must first establish that the mark’s “incontestability status” was “obtained fraudulently,” warranting cancellation of its incontestability, and only then may it challenge the HERS mark’s registration. See id. at 1337, 1339. It’s unclear why this more rigorous legal framework mandates reconsideration of this Court’s prior ruling. Regardless, BSI’s new argument that RESNET engaged in fraud during the incontestability process is substantively unavailing as well.

In light of the “Settlement Agreement and two abandoned trademark applications,” BSI insists that the RESNET representative who filed for trademark incontestability committed fraud by declaring that “no final decision adverse to the owner’s claim of ownership of such mark for those goods/services, or to indicate membership in the collective membership organization, exists, or to the owner’s right to register the same or to keep the same on the register; and, no proceeding involving said rights pending and not disposed of in either the U.S. Patent and Trademark Office or the courts exists.” (ECF 81-6, at 46–47; see ECF 81-1, at 12.)

But BSI presents no authority that a settlement agreement is a “final decision adverse to the owner’s claim of ownership,” a “final decision adverse to” “the owner’s right to register,” or a “pending” “proceeding involving said rights.” (See ECF 81-6, at 46.) Nor does BSI offer any authority that a previously abandoned trademark application would qualify under those categories.

(Id.; cf. ECF 81-5, at 4 (showing that the USPTO refers to the process as a “NOTICE OF ABANDONMENT”).) Despite BSI’s argument to the contrary, our case is far different than Chutter. The Chutter representative signed the incontestability declaration while there were two “pending” actions that challenged the mark’s validity—a “cancellation proceeding in the PTO and [an] Eleventh Circuit appeal.” 90 F.4th at 1335–36.

BSI has presented no evidence of any “pending” challenges to the registered trademark when the RESNET representative made the foregoing declaration in August 2013. (See ECF 81-6, at 46.) So, BSI’s fraud-during-incontestability argument fails. BSI gestures at two other cases that don’t move the needle either.

First, OpenAI, Inc. v. Open A.I., Inc., 719 F. Supp. 3d 1033 (N.D. Cal. 2024), aff’d, No. 24-1963, 2024 WL 4763687 (9th Cir. Nov. 13, 2024), is a trial-court opinion that is not binding on this Court. It cannot qualify as “an intervening change in controlling law.” See ACandS, Inc., 5 F.3d at 1263. And the affirmance of that case on appeal doesn’t help BSI, because the Ninth Circuit never mentioned the specific issue—prior rejections of trademark applications— that BSI focuses on.

Second, BSI points to Heritage Alliance v. American Policy Roundtable, 133 F.4th 1063 (Fed. Cir. 2025), which held that the Trademark Trial and Appeal Board “has discretion not to accept” “five-plus years of prior continuous use as ‘prima facie evidence’ that the marks had acquired distinctiveness.” Id. at 1070. But that principle was already clear from the statute, which states that the Board “‘may accept’ such proof ‘as prima facie evidence that the mark has become distinctive.’” Id. (quoting 15 U.S.C. § 1052(f) with emphasis added in the opinion).

And, as the Heritage Alliance court itself noted, “our case law similarly recognizes the Board’s discretion to weigh the evidence” and to reject such prima facie evidence. Id. (collecting cases). Heritage Alliance is not an intervening change in controlling law.

C. Clear Error

Finally, BSI asserts that “the Court committed error in relying on Plaintiff’s representation of the Settlement Agreement with the [California Energy Commission] as being a license agreement.” (ECF 81-1, at 14.)

This is so, says BSI, because RESNET “misrepresented the significance of the Settlement Agreement between Plaintiff and the CEC” and “the Court apparently accepted” that misrepresentation “as true.” (Id. at 13.) “To be clearly erroneous, a decision must strike [the Court] as more than just maybe or probably wrong; it must be dead wrong.” United States v. Hollis, 506 F.3d 415, 421 (5th Cir.

2007). But the Court well understood the agreement’s import. In fact, after discussing the agreement during oral argument, the Court re-reviewed the document during arecess and later expanded upon the agreement-related analysis when issuing a final ruling the hearing’s end. (See ECF 29, at 32, 38, 46.) Even if the Court’s description of the agreement as “akin to a license” was imprecise (ECF 29, at 46), as BSI contends, the essential facts of that agreement—and the Court’s understanding of its terms—has not changed.

BSI has not met its burden to establish that the Court was “dead wrong” about the agreement. See Hollis, 506 F.3d at 421.

CONCLUSION

BSI’s reconsideration motion is DENIED. The unopposed judicial-notice motion is granted. (See ECF 81-3.)

Dated: November 21, 2025

Hon. Andrew G. Schopler
United States District Judge