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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

<b>BOLDFACE LICENSING + BRANDING,</b>	)	CASE NO.: CV 12-10269 ABC (PJWx)
	)	
Plaintiff,	)	
	)	ORDER RE: DEFENDANT'S MOTION FOR
v.	)	A PRELIMINARY INJUNCTION
	)	
BY LEE TILLET, INC.	)	
	)	
Defendant.	)	
_____	)	

Pending before the Court is Defendant and Counterclaimant By Lee Tillett, Inc.'s ("Tillett's") motion for a preliminary injunction, filed on February 11, 2013. (Docket No. 30.) Plaintiff and Counterdefendant Boldface Licensing + Branding ("Boldface") opposed on February 19 and Tillett replied on February 25. The Court heard oral argument on Monday, March 11, 2013. For the reasons below, the motion is GRANTED.

**BACKGROUND<sup>1</sup>**

This case is the second of two trademark lawsuits involving

<sup>1</sup>The Court has reviewed the parties' objections to evidence and to the extent those objections are inconsistent with the Court's ruling, they are OVERRULED. The Court GRANTS both parties' requests for judicial notice.

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1 Boldface's nationwide rollout of a cosmetics line under the mark  
2 KHROMA BEAUTY BY KOURTNEY, KIM AND KHLOE, which is affiliated with the  
3 celebrity Kardashian sisters – Kourtney, Kim, and Khloe. By way of  
4 this motion, Tillett seeks to enjoin Boldface's use of the mark on its  
5 cosmetics throughout the United States, believing that the product  
6 launch has caused and will cause substantial consumer confusion with  
7 its federally registered KROMA mark for cosmetics. Similar issues  
8 were raised in the other lawsuit filed by a Los Angeles-based makeup  
9 studio using marks incorporating the word "Chroma" (the "Chroma  
10 case"). See Chroma Makeup Studio LLC v. Boldface Group Inc., No. CV  
11 12-9893 ABC (PJWx) (C.D. Cal., filed Nov. 19, 2012). The Court denied  
12 a preliminary injunction in the Chroma case because, although the  
13 plaintiff demonstrated that it owned valid common law rights in  
14 trademarks that were likely infringed, that it would be irreparably  
15 harmed by Boldface's product rollout, and that the public interest was  
16 served by an injunction, the balance of hardships tipped strongly  
17 against an injunction. The plaintiff there had only common law rights  
18 in an unregistered mark, which were limited in scope, and Boldface  
19 would have been injured far beyond the rights the plaintiff had  
20 established had it been enjoined even in the limited area where the  
21 plaintiff's rights were protected. However, in this case, Tillett has  
22 a federally registered trademark, which significantly changes the  
23 Court's balancing and ultimately justifies issuing the injunction in  
24 this case.

25 Tillett is a Florida-based company that sells beauty services and  
26 all-natural cosmetics under the trademark KROMA<sup>2</sup> in the United States

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27 <sup>2</sup>Tillett's marks have varied over the years, but have always  
28 (continued...)

1 and the United Kingdom. (Tillett Decl. ¶ 3.) Tillett has used the  
2 KROMA mark in connection with cosmetics continuously since 2004, and  
3 the cost of its products range from \$19 to over \$100. (Id. ¶¶ 6, 8.)  
4 Since 2008, Tillett has sold on average \$200,000 annually in KROMA  
5 products domestically, and has sold about \$1 million in products in  
6 the U.K. (Id. ¶¶ 13–14.) Those sales occur online and in stores in  
7 Florida, California, New York, New Jersey, Hawaii, South Carolina,  
8 Pennsylvania, and Connecticut, as well as in the U.K. (Id. ¶¶ 17–19.)  
9 Tillett has promoted and advertised KROMA products throughout the  
10 United States, and, as part of accelerated efforts starting in 2009,  
11 its products have been featured on the Oscars and Emmys, in Fashion  
12 Week events in New York and Miami, at high-profile entertainment and  
13 fashion events around the world, and in nationally televised shows and  
14 events. (Id. ¶¶ 25–31.)

15 Tillett filed a federal trademark application for the KROMA mark  
16 on cosmetics on November 12, 2010. The U.S. Patent and Trademark  
17 Office (“USPTO”) issued Registration No. 4079066 for the KROMA mark on  
18 January 3, 2012. (Tillett’s Request for Judicial Notice (“RJN”), Ex.  
19 A.)

20 Before this lawsuit, Tillett claims to have had prior  
21 interactions with Kim Kardashian’s representatives regarding KROMA  
22 products, although Kim Kardashian claims she was unaware of any of  
23 these interactions and that she never authorized her representatives  
24 to act as agents for her vis-a-vis Tillett. (Compare Tillett Decl. ¶¶  
25 32–35, Ex. D, with Kardashian Decl. ¶¶ 2–6.) For example, in May  
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27 <sup>2</sup>(...continued)  
28 included the work KROMA. (Tillett Decl. ¶ 7.) Examples of Tillett’s  
products appear in Appendix 1 to this Order.

1 2010, Tillett and a public relations and celebrity licensing company  
2 called TLK Fusion discussed possible product placement for KROMA  
3 products in the reality television show called The Spin Room,<sup>3</sup> on  
4 which Kim Kardashian was named as a producer. (Tillett Decl. ¶ 36,  
5 Exs. D, E.) Tillett and TLK Fusion also discussed the possibility of  
6 aligning KROMA products with a product line from Kim Kardashian. (Id.  
7 ¶¶ 37–38, Ex. F.) Tillett also sent Kim Kardashian a gift basket of  
8 KROMA products at TLK Fusion’s request. (Id. ¶ 39.) Tillett and TLK  
9 Fusion never reached any agreement regarding the KROMA products. (Id.  
10 ¶ 40.)

11 Boldface was founded by two women in April 2012 as a “celebrity  
12 cosmetics and beauty licensing company” with a business model to  
13 design, develop, and market cosmetics and beauty-related goods.  
14 (Ostoya Decl. ¶¶ 3, 6.) Before forming the company, in October 2011  
15 the founders of Boldface were approached by the Kardashians to submit  
16 a proposal to jointly develop a beauty and cosmetics line affiliated  
17 with the Kardashian sisters. (Id. ¶ 8.) The founders spent six  
18 months researching and developing the products, during which time they  
19 came up with the brand name KHROMA BEAUTY, among others. (Id.)  
20 Boldface then entered a licensing agreement with the Kardashians’  
21 companies to use their names and likenesses in connection with the  
22 development, manufacture, promotion, and sale of cosmetics, beauty  
23 products, and other related goods that would be marketed in connection  
24 with the Kardashians’ names and likenesses. (Id. ¶¶ 9–10.) During  
25 this period, Boldface claims not to have known about any prior

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27 <sup>3</sup> Tillett mistakenly identified the show as The SPINdustry, but  
28 Boldface explains that the show was called The Spin Room and “The  
SPINdustry” was the title of the first episode. (Kardashian  
Decl. ¶ 2.)

1 interactions between Tillett and TLK Fusion or any representative of  
2 the Kardashians. (Id. ¶ 13.)

3 Before presenting possible brand names to the Kardashians,  
4 Boldface used an attorney to conduct a trademark search. (Id. ¶ 14.)  
5 The search yielded dozens of uses of the word "chroma" and certain  
6 variants in International Class 3 (which covers cosmetics and beauty  
7 products), and in light of this, Boldface concluded that the public  
8 was using the word "chroma" and its variants to denote "color." (Id.  
9 ¶¶ 14–15.) After presenting three possible brand names, Boldface and  
10 the Kardashians gravitated toward the mark KHROMA BEAUTY, although  
11 they also discussed using KARDASHIAN KHROMA. (Id. ¶ 11.)

12 In June 2012, Boldface filed two trademark applications with the  
13 PTO for the marks "KHROMA BEAUTY BY KOURTNEY, KIM AND KHLOE" and  
14 "KARDASHIAN KHROMA," Serial Nos. 85/646521 and 85/642342, covering  
15 "personal care products including cosmetics, body and beauty care  
16 products" in International Class 3. (Tillett's RJN, Exs. C, E.) At  
17 this point, through news reports Tillett became aware of Boldface's  
18 intent to use the word "Khroma" in connection with cosmetics, and sent  
19 Boldface a brief cease-and-desist letter on June 28, 2012, requesting  
20 a response within two weeks. (Tillett Decl. ¶¶ 41–42; Ostoya Decl. ¶  
21 25, Ex. A.) Boldface responded three weeks later in an email, on July  
22 18, 2012, denying infringement, but not inviting any further response  
23 from Tillett. (Ostoya Decl. ¶ 26, Ex. B.) Tillett did not, in fact,  
24 respond to the email, and did not correspond again with Boldface until  
25 October 2012. (Id. ¶¶ 27, 29.)

26 In claimed reliance on Tillett's silence following its July 18  
27 email, Boldface moved forward with the KHROMA BEAUTY product launch  
28 by, for example, putting products and packaging into production in

1 August, inking deals with retail partners by September, and moving  
2 forward with press launches in September and October 2012. (Id. ¶  
3 28.) Boldface claims that, had Tillett responded to its July 18 email  
4 before it had moved forward in August, "Boldface could have changed  
5 the name without suffering serious harm." (Id. ¶ 31.) Amidst this  
6 activity, on September 26, 2012, the PTO issued office actions for  
7 both of Boldface's trademark applications initially refusing  
8 registration because, inter alia, Boldface's marks create likely  
9 confusion with Tillett's registration for KROMA on cosmetics.  
10 (Tillett's RJN, Ex. D.)<sup>4</sup> This prompted Tillett to send another – and  
11 much more detailed – cease-and-desist letter to Boldface on October  
12 26, 2012. (Ostoya Decl. ¶ 29, Ex. C.) Tillett explains that it was  
13 unaware of Boldface's activities related to the KHROMA BEAUTY products  
14 during this time and, in fact, had no reason to know about the  
15 activities because Boldface's federal applications were for intent to  
16 use the marks in the future. (Tillett Supp. Decl. ¶ 6.)

17 Boldface claims that, by the time it received the October letter,  
18 it could no longer viably change the name of the KHROMA BEAUTY  
19 products, so the parties engaged in settlement discussions. (Ostoya  
20 Decl. ¶ 30.) Those discussions obviously proved unsuccessful, and  
21 Tillett ended them on November 27, 2012. (Id.) Boldface thereafter  
22 filed this declaratory judgment action on November 30, 2012. (Docket  
23 No. 1.) In the meantime, the plaintiff in the Chroma case filed a  
24 motion for a preliminary injunction on December 5, 2012, and the Court  
25 denied it on January 23, 2013. Because it raised similar issues,

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<sup>4</sup>Boldface has six months from the date of those actions to respond.

1 Tillett waited for the resolution of that motion before meeting-and-  
2 conferring and filing the pending motion on February 11, 2013.

3 In parallel with these events and up through February 2013,  
4 Boldface indeed moved forward with its product rollout and expects  
5 that by the end of March 2013, KHROMA BEAUTY products will be in 5,321  
6 stores in 48 states. (Ostoya Decl. ¶ 37.)<sup>5</sup> The products are priced  
7 between \$6.49 and \$19.99. (Id. ¶ 22.) Currently, the products can be  
8 found in the following retail stores: Ulta, Sears, CVS, Fred Meyer,  
9 HEB, Burlington, and Walgreens Puerto Rico, including on those  
10 retailers' websites. (Id. ¶ 17.) By this month, the products will  
11 also be available in Duane Reade stores. (Id.) The products are also  
12 currently available on amazon.com and drugstore.com, including its  
13 alternate website, beauty.com (id. ¶ 18), and starting in April 2013,  
14 the products will also be sold on Boldface's website devoted to the  
15 products, khromabeauty.com (id. ¶ 20). Boldface is also in  
16 discussions with (and has received some orders from) international  
17 distributors, including in the European Union, Australia, Canada, and  
18 Japan. (Id. ¶ 19.) Boldface claims it could have rolled out higher-  
19 end (and higher-priced) products, but it chose to create cosmetics for  
20 the mass market at accessible prices, which would more likely reach  
21 the Kardashians' fan base. (Id. ¶¶ 23-24.)

22 Based on orders already placed, Boldface expects substantial  
23 sales through December 2013. (Id. ¶ 34.)<sup>11</sup> Boldface has already  
24 shipped a substantial amount of the KHROMA BEAUTY products to

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25 <sup>5</sup>Examples of Boldface's products are in Appendix 2 to this Order.

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27 <sup>11</sup>Because Boldface has filed its revenue figures and other  
28 financial information under seal, the Court will not set forth the  
exact figures in this Order, nor are the exact figures necessary to  
the resolution of this motion.

1 retailers, along with displays it has paid to manufacture; it holds  
2 more products in its warehouse and on order; and it is taking orders  
3 for more products to ensure shipments are on time. (Id. ¶¶ 35–37,  
4 42.) Because those orders were placed before this lawsuit was filed,  
5 Boldface claims it will incur prohibitive storage costs if it is  
6 enjoined from selling those products pending resolution of this case.  
7 (Id. ¶ 43.) Boldface has also rolled out an extensive advertising  
8 campaign through June 2013, primarily in print beauty and celebrity  
9 magazines; if an injunction issues, Boldface claims it will lose a  
10 portion of the money already spent and may breach its contracts with  
11 its retail partners. (Id. ¶ 40.)

12 On the other hand, Tillett claims that, as a result of the roll-  
13 out of the KHROMA BEAUTY products, it has experienced a significant  
14 impact on its business. For example, Tillett identifies 10 instances  
15 of purported consumer confusion over its and Boldface's products.  
16 (Tillett Decl. ¶¶ 48–58, Ex. G–O.) Tillett's U.K. distributor has  
17 also experienced purported instances of confusion. (Willey Decl. ¶¶  
18 9–13.) Tillett was notified of some of these alleged instances of  
19 confusion after emailing its clients and colleagues on February 5,  
20 2013, stating that if they "express how [they] feel about this name  
21 trademark infringement and consumer confusion in an email form it  
22 would be of GREAT help. For instance, how do you feel about our name  
23 being copied and/or would you think a customer would be confused if  
24 our line was to be on ULTA shelves too?" (Tillett Decl. ¶ 53, Ex. N.)  
25 Moreover, Tillett's U.K. distributor believes that a retail department  
26 store chain called Debenhams passed on distribution based upon  
27 confusion with the KHROMA BEAUTY products, although the only evidence  
28 of this is an email declining the distribution with the subject line



1 "KHROMA Beauty," when the chain's representative actually meant KROMA  
2 Makeup. (Id. ¶¶ 59–60; Willey Decl., Ex. B.) Tillett had been  
3 planning to use the Debenhams' deal to leverage similar deals with  
4 U.S. retailers. (Tillett Decl. ¶ 62.)

5 More generally, Tillett fears that its business will be  
6 irreparably harmed from Boldface's national product rollout. Tillett  
7 markets the KROMA products as all-natural, which is good for sensitive  
8 skin, and customers with sensitive skin might be placed at risk if  
9 they mistakenly purchase KHROMA BEAUTY products instead. (Tillett  
10 Decl. ¶¶ 63–64.) Further, Tillett claims that sales have dropped 25%  
11 since the launch of KHROMA BEAUTY products and that securing major  
12 retailers would be impossible in light of consumer confusion. (Id. ¶¶  
13 65–67.) In short, Tillett believes its business would be destroyed by  
14 the continued presence of the KHROMA BEAUTY products in the  
15 marketplace. (Id. ¶ 68.)

16 Boldface filed this lawsuit to obtain a declaration that the  
17 KHROMA BEAUTY products do not infringe Tillett's mark, and Tillett  
18 counterclaimed for trademark infringement and false designation of  
19 origin under the Lanham Act, 15 U.S.C. §§ 1114(a)(1) and 1125(a),  
20 trademark infringement under Cal. Bus. & Prof. Code § 14200, and  
21 unfair competition under Cal. Bus. & Prof. Code § 17200. Tillett now  
22 moves for a preliminary injunction based upon all of these claims,  
23 although it focuses on its Lanham Act claims, conceding that the  
24 analysis is the same under sections 14200 and 17200. (Mot. 7 n.2.)<sup>12</sup>

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26 <sup>12</sup>Tillett named the Kardashians' individual companies in its  
27 counterclaims, but did not direct the motion against those  
28 counterdefendants. It believes – and the Court agrees – that any  
injunction against Boldface would effectively block all infringing  
activity by all of the counterdefendants.

**LEGAL STANDARD**

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2 "A plaintiff seeking a preliminary injunction must establish that  
3 he is likely to succeed on the merits, that he is likely to suffer  
4 irreparable harm in the absence of preliminary relief, that the  
5 balance of hardships tips in his favor, and that an injunction is in  
6 the public interest." Winter v. Natural Res. Defense Council, Inc.,  
7 555 U.S. 7, 20 (2008); Marlyn Nutraceuticals, Inc. v. Mucos Pharma  
8 GmbH & Co., 571 F.3d 873, 877 (9th Cir. 2009). This recitation of the  
9 requirements for a preliminary injunction did not completely erase the  
10 Ninth Circuit's "sliding scale" approach, which provided that "the  
11 elements of the preliminary injunction test are balanced, so that a  
12 stronger showing of one element may offset a weaker showing of  
13 another." Vanguard Outdoor, LLC v. City of Los Angeles, 648 F.3d 737,  
14 739 (9th Cir. 2011).

15 "In one version of the 'sliding scale,' a preliminary injunction  
16 could issue where the likelihood of success is such that serious  
17 questions going to the merits were raised and the balance of hardships  
18 tips sharply in [plaintiff's] favor." Id. at 740 (internal quotation  
19 marks omitted; brackets in original). This "serious questions" test  
20 survived Winter. Id. Therefore, "serious questions going to the  
21 merits and a hardship balance that tips sharply in the plaintiff's  
22 favor can support issuance of an injunction, so long as the plaintiff  
23 also shows a likelihood of irreparable injury and that the injunction  
24 is in the public interest." Id. (internal quotation marks omitted).

**DISCUSSION****A. Likelihood of Success on the Merits**

26  
27 In order to show trademark infringement under the Lanham Act, the  
28 plaintiff must demonstrate that the defendant is "using a mark

1 confusingly similar to a valid, protectable trademark" owned by the  
2 plaintiff. Brookfield Commc'ns, Inc. v. W. Coast Entm't Corp., 174  
3 F.3d 1036, 1046 (9th Cir. 1999).

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5 1. Validity

6 To be valid, a trademark must be "distinctive." Zobmondo Entm't,  
7 LLC v. Falls Media, LLC, 602 F.3d 1108, 1113 (9th Cir. 2010). Marks  
8 are generally classified in one of five categories of distinctiveness:  
9 (1) generic; (2) descriptive; (3) suggestive; (4) arbitrary; or (5)  
10 fanciful. Id. "Suggestive, arbitrary, and fanciful marks are  
11 considered 'inherently distinctive' and are automatically entitled to  
12 federal trademark protection because 'their intrinsic nature serves to  
13 identify a particular source of a product.'" Id. Generic marks are  
14 never entitled to trademark protection and descriptive marks may  
15 become protected if they have acquired "secondary meaning," that is,  
16 "acquired distinctiveness 'as used on or in connection with the  
17 [trademark owner's] goods in commerce.'" Id.

18 Federal registration of a trademark creates a presumption that  
19 the mark is valid, and where the PTO registers a mark without proof of  
20 secondary meaning, "the presumption is that the mark is inherently  
21 distinctive." Id. at 1113-14. This shifts the burden to the alleged  
22 infringer to demonstrate that the mark is not protectable. Id. at  
23 1114. Here, Boldface has not challenged the validity of Tillett's  
24 registration of the KROMA trademark, which was registered on the  
25 Principal Register without proof of secondary meaning, so at this  
26 stage the Court assumes it is inherently distinctive and valid.

1           2.    Likelihood of Confusion

2           The touchstone of a Lanham Act claim is the likelihood of  
3 consumer confusion, which "requires the factfinder to determine  
4 whether a 'reasonably prudent consumer in the marketplace is likely to  
5 be confused as to the origin of the good or service bearing one of the  
6 marks.'" Surfvivor Media, Inc. v. Survivor Prods., 406 F.3d 625, 630  
7 (9th Cir. 2005). Likelihood of confusion is determined by evaluating  
8 the familiar factors outlined in AMF Inc. v. Sleekcraft Boats, 599  
9 F.2d 341, 348–49 (9th Cir. 1979): (1) strength of the marks; (2)  
10 relatedness of the goods; (3) similarity of the marks; (4) evidence of  
11 actual confusion; (5) marketing channels; (6) degree of consumer care;  
12 (7) defendant's intent in selecting the mark; and (8) likelihood of  
13 expansion of the product lines. Surfvivor, 406 F.3d at 631. "[T]his  
14 eight-factor test for likelihood of confusion is pliant," so the  
15 "relative importance of each individual factor will be case-specific"  
16 and even a "subset of the factors" could demonstrate likely confusion.  
17 Brookfield, 174 F.3d at 1054.

18           Although this case implicates both "forward" and "reverse"  
19 confusion, it appears to be primarily focused on reverse confusion,  
20 given that Tillett's overarching concern is that the KHROMA BEAUTY  
21 products will overcome Tillett's business. (See, e.g., Mot. 2.) The  
22 difference between forward and reverse confusion turns on how  
23 consumers are potentially deceived as to source: "Forward confusion  
24 occurs when customers believe that goods bearing the junior mark came  
25 from, or were sponsored by, the senior mark holder," whereas "reverse  
26 confusion occurs when consumers dealing with the senior mark holder  
27 believe that they are doing business with the junior one." Surfvivor,  
28 406 F.3d at 630 (citing Dreamwerks Prod. Group, Inc. v. SKG Studio,

1 142 F.3d 1127, 1129–30 & n.5 (9th Cir. 1998)). Claims of reverse  
2 confusion “protect the small senior user from losing control over its  
3 identity in ‘the rising tide of publicity associated with the junior  
4 mark.’” Walter v. Mattel, Inc., 210 F.3d 1108, 1110 (9th Cir. 2000).  
5 For reverse confusion, the first three Sleekcraft factors are  
6 “pivotal.” Dreamwerks, 142 F.3d at 1130.

7 a. Similarity of the Marks

8 “‘The more similar the marks in terms of appearance, sound, and  
9 meaning, the greater the likelihood of confusion.’” Network  
10 Automation, Inc. v. Advanced Sys. Concepts, Inc., 638 F.3d 1137, 1150  
11 (9th Cir. 2011). In evaluating appearance, sound, and meaning, the  
12 Court follows three “axioms”: “first, the marks must be considered in  
13 their entirety and as they appear in the marketplace; second,  
14 similarity is adjudged in terms of appearance, sound, and meaning; and  
15 third, similarities are weighed more heavily than differences.”  
16 GoTo.com, Inc. v. Walt Disney Co., 202 F.3d 1199, 1206 (9th Cir.  
17 2000).

18 Sound and Meaning. Neither “kroma” nor “khroma” have any meaning  
19 in English, but Tillett claims without dispute that they are both  
20 derived from the word “chroma,” which is the Greek word for “color.”  
21 Moreover, the words “kroma” and “khroma” sound identical, despite the  
22 different spelling. See Surfivor, 406 F.3d at 633 (treating  
23 “survivor” and “surfivor” as phonetically “nearly identical”). These  
24 two subfactors weigh in favor of finding likely confusion.

25 Sight. As the marks are used in the marketplace, they often  
26 appear nearly identical to consumers. The heart of both parties’  
27 marks are, in fact, the words KHROMA and KROMA, which appear  
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1 prominently on the parties' products in all capital letters in a  
2 similar font:



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7 Further, despite Boldface's registrations and its claim that it  
8 "always" uses the complete mark of KHROMA BEAUTY BY KOURTNEY, KIM AND  
9 KHLOE in advertising and on its products (Ostoya Decl. ¶ 16), the  
10 words "KHROMA" and "KHROMA BEAUTY" often appear in the marketplace  
11 alone, apart from the Kardashians' names.<sup>13</sup> For example:

- 12 • On Boldface's Facebook and Twitter pages, Boldface calls the  
13 product line "Khroma Beauty"; magazines covering the product  
14 launch call it "Khroma Beauty"; and a search of Twitter  
15 messages (called "tweets") reveals that the users frequently  
16 call the product line "Khroma Beauty." (Kuo Decl. ¶¶ 2-5,  
17 Exs. A-C.)
- 18 • The KHROMA BEAUTY false eyelashes product bears the word  
19 KHROMA alone on the packaging. (Gipson Supp. Decl. ¶ 6, Ex.  
20 A.)
- 21 • Boldface's two websites for the KHROMA BEAUTY products are  
22 www.khromabeauty.com (United States) and www.khromabeauty.eu  
23 (U.K.). (Gipson Decl. ¶¶ 6-8.)
- 24 • On websites selling the KHROMA BEAUTY products like  
25 Ulta.com, the products are identified only as "Khroma  
26 Beauty" products and the additional words on the packaging  
27 are frequently illegible. (Id., Ex. I.)<sup>14</sup>

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<sup>13</sup>As Tillett points out, Boldface is not even using the actual mark KHROMA BEAUTY BY KOURTNEY, KIM AND KHLOE on its products; instead, the actual use is "KOURTNEY KIM KHLOE KHROMA BEAUTY."

<sup>14</sup>In some reverse confusion cases, the addition of a "house mark" may aggravate, rather than mitigate, confusion by enhancing the risk that consumers would associate the plaintiff's products with the defendant. See Glow Indus., Inc. v. Lopez, 252 F. Supp. 2d 962, 995 (C.D. Cal. 2002). At this stage, though, there is no specific evidence to suggest that consumers would more likely associate

(continued...)

1 Perhaps most telling, Boldface includes a "TM" symbol on its product  
2 packaging next to the word KHROMA, rather than at the end of the  
3 entire phrase, conveying the message that the prominent word KHROMA is  
4 Boldface's trademark.<sup>15</sup>

5 Moreover, both parties' marks are derivative of the word  
6 "chroma," but both have replaced the "C" with a "K." While Tillett  
7 also eliminated the "H," that variant of one letter is insignificant  
8 in this case, especially because the parties varied the word "chroma"  
9 in almost exactly the same way. See Dreamwerks, 142 F.3d at 1131  
10 (expressing doubt that "substituting one vowel for another and  
11 capitalizing a middle consonant dispels the similarity between the  
12 marks.") Thus, the visual similarity factor weighs strongly in favor  
13 of likely confusion.

14 b. Relatedness of the Goods

15 Under this factor, parties need not be direct competitors, but  
16 the goods must be "reasonably thought by the buying public to come  
17 from the same source if sold under the same mark." Rearden LLC v.

18 \_\_\_\_\_  
19 <sup>14</sup>(...continued)

20 Tillett's products with Boldface because the Kardashians' names and  
21 images appear on Boldface's products. This evidence is unnecessary  
22 because the similarity factor weighs strongly in favor of likely  
23 confusion even without it. But see Cohn v. Petsmart, Inc., 281 F.3d  
837, 842 (9th Cir. 2002) (per curiam) (noting in reverse confusion  
case that the "emphasis on [] housemarks 'has the potential to reduce  
or eliminate likelihood of confusion.'").

24 <sup>15</sup>In the Chroma case, the Court suggested that the plaintiff's  
25 focus on only the words KHROMA and CHROMA improperly attempted to  
26 strip away other portions of the parties' marks, contrary to the Ninth  
27 Circuit's dictate to look at the marks as a whole and as they appear  
28 in the marketplace. See GoTo.com, 202 F.3d at 1206. In that case,  
though, the record was not nearly as strong as it is here to  
demonstrate that Boldface's mark frequently appears simply as KHROMA  
or KHROMA BEAUTY.

1 Rearden Commerce, Inc., 683 F.3d 1190, 1212 (9th Cir. 2012) (internal  
2 quotation marks omitted). To be related, the goods may be  
3 "complementary"; "sold to the same class of purchasers"; or "similar  
4 in use and function." Sleekcraft, 599 F.2d at 350. The ultimate  
5 question is whether customers are "'likely to associate' the two  
6 product lines." Surfvivor, 406 F.3d at 633.

7 In this case, the parties both sell cosmetics, and in fact, some  
8 of their products are identical, such as blush, compacts, gloss, lip  
9 kits, foundation, eye shadow, and bronzer. The Ninth Circuit has  
10 found far more disparate products and services sufficiently related to  
11 support finding likely confusion. See, e.g., Dreamwerks, 142 F.3d at  
12 1131 (making movies and promoting sci-fi merchandise); Brookfield, 174  
13 F.3d at 1056 (website providing entertainment information and website  
14 primarily renting and selling video tapes); Fleishman Distilling Corp.  
15 v. Maier Brewing Co., 314 F.2d 149, 155 (9th Cir. 1963) (beer and  
16 whisky); see also Gerawan Farming, Inc. v. Prima Bella Produce, Inc.,  
17 No. CV F 10-0148 LJO JLT, 2011 WL 3348056, at \*19 (E.D. Cal. Aug. 2,  
18 2011) (corn and stone fruit/grapes). Although Tillett offers its  
19 products at a somewhat higher price point than Boldface's products and  
20 does not sell products to mass retailers, these differences are  
21 insignificant in this case. See Glow Indus., Inc. v. Lopez, 252 F.  
22 Supp. 2d 962, 993 (C.D. Cal. 2002) (finding "lotion, shower gel, and  
23 fragrance products" related and rejecting argument that products were  
24 unrelated because one was a "niche" product and the other was sold in  
25 mass-market retailers).

26 Boldface argues that this factor weighs less heavily in favor of  
27 finding likely confusion when "advertisements are clearly labeled or  
28 consumers exercise a high degree of care" in purchasing cosmetics,



1 "because rather than being misled, the consumer would merely be  
2 confronted with choices among similar products." Network Automation,  
3 638 F.3d at 1150. While this might have applied in the Chroma case to  
4 lessen confusion there, it does not mitigate confusion here. On this  
5 record, Boldface's products are not so "clearly labeled" to dispel  
6 confusion, and, because the marks are so similar, even purchasers of  
7 high-end cosmetics exercising great care in their purchasing decisions  
8 could easily be confused. A consumer might visit Ulta.com, for  
9 example, and see Boldface's products marked prominently with the words  
10 KHROMA or KHROMA BEAUTY, and either overlook the additional "H," or  
11 simply believe that Tillett had varied its name slightly. Under the  
12 circumstances here, this factor weighs strongly in favor of likely  
13 confusion.

14 c. Strength of the Mark

15 "The stronger a mark – meaning the more likely it is to be  
16 remembered and associated in the public mind with the mark's owner –  
17 the greater the protection it is accorded by the trademark laws.'" Network Automation, 638 F.3d at 1149. In assessing a mark's strength,  
18 the Court must analyze both its "conceptual" and "commercial"  
19 strength. Id. Conceptual strength involves classifying the mark on  
20 the spectrum of distinctiveness, while commercial strength is based on  
21 "actual marketplace recognition," including advertising  
22 expenditures. Id.; see also Glow, 252 F. Supp. 2d at 989 (noting that  
23 commercial strength is evaluated in light of "any advertising or  
24 marketing campaign by the junior user that has resulted in 'a  
25 saturation in the public awareness of the junior user's mark.'). In  
26 reverse confusion cases, the Court evaluates the conceptual strength  
27 of the senior user, but for commercial strength, "the focus is on the  
28

1 relative strengths of the marks so as to gauge the ability of the  
2 junior user's marks to overcome the senior user's mark." Visible Sys.  
3 Corp. v. Unisys Corp., 551 F.3d 65, 74 (1st Cir. 2008).

4 As to the parties' comparative commercial strength, Tillett's  
5 KROMA mark has some commercial strength, but Boldface's marks are far  
6 stronger and could easily overwhelm Tillett's efforts. Since 2008,  
7 Tillett has sold on average \$200,000 annually in KROMA products  
8 domestically, including in stores in Florida, California, New York,  
9 New Jersey, Hawaii, South Carolina, Pennsylvania, and Connecticut.<sup>16</sup>  
10 Tillett does not provide context for these sales, so there is no way  
11 to gauge how much strength those sales created in the cosmetics  
12 industry generally, or even in the high-end cosmetics market  
13 specifically. See Glow, 252 F. Supp. 2d at 983 ("Whether a volume of  
14 sales is significant will vary with the product and the market. The  
15 numbers that result in . . . relief in one case may not be significant  
16 in another.") (ellipsis in original)). Tillett has also promoted and  
17 advertised KROMA products throughout the United States; and its  
18 products have been featured on the Oscars and Emmys, in Fashion Week  
19 events in New York and Miami, at high-profile entertainment and  
20 fashion events around the world, and in nationally televised shows and  
21 events. Given this exposure, there is at least a fair chance that  
22 consumers of high-end cosmetics would recognize Tillett's KROMA  
23 products.

24 \_\_\_\_\_  
25 <sup>16</sup>The Court agrees with Boldface that Tillett's overseas sales  
26 and promotional activities do not demonstrate whether domestic  
27 purchasers recognize Tillett's mark in the United States. See 5 J.  
28 Thomas McCarthy, McCarthy On Trademarks & Unfair Competition § 29:2  
(4th ed. 2013) ("In many situations, the foreign activities of a party  
are not relevant evidence in a trademark dispute concerning U.S.  
rights.").

1 Compared to these efforts, though, Boldface's commercial strength  
2 far surpasses Tillett's. Boldface's marks are backed by the  
3 Kardashian's nationwide fame, and Boldface's product line has received  
4 extensive nationwide media coverage, has been shown to millions of  
5 viewers on an episode of the Kardashians' reality television show, has  
6 been promoted on each of the Kardashian sisters' websites and social  
7 media pages, and in the national press. The products are now in 5,321  
8 stores in 48 states, and by April 2013 the products will be available  
9 on Boldface's website. And this is just Boldface's initial launch.  
10 Boldface's "ability to saturate the marketplace creates a potential  
11 that consumers will assume that [Tillett's] mark refers to [Boldface],  
12 and thus perceive that the businesses are somehow associated." Cohn  
13 v. Petsmart, Inc., 281 F.3d 837, 842 (9th Cir. 2002) (per curiam).

14 As for conceptual strength, Boldface has not challenged the  
15 presumption of inherent distinctiveness created by Tillett's federal  
16 registration. Even so, a federally registered mark is not  
17 automatically considered conceptually strong. See Miss World (UK)  
18 Ltd. v. Mrs. Am. Pageants, Inc., 856 F.2d 1445, 1448-49 (9th Cir.  
19 1988). Tillett has not argued that its KROMA mark is arbitrary or  
20 fanciful, so the Court assumes for the purpose of this motion that  
21 Tillett's mark is suggestive.<sup>17</sup> As a result, "unlike arbitrary or  
22 fanciful marks which are typically strong, suggestive marks are  
23 presumptively weak." Brookfield, 174 F.3d at 1058.

24 \_\_\_\_\_  
25 <sup>17</sup>In the Chroma case, the Court analyzed the distinctiveness of  
26 plaintiff's marks incorporating the word "chroma" and concluded that  
27 they were suggestive. For those same reasons, the Court would likely  
28 conclude that Tillett's mark is suggestive here. But because Boldface  
has not attacked the validity of Tillett's registration and Tillett  
has not argued that the KROMA mark is arbitrary or fanciful, the Court  
assumes without analysis that Tillett's mark is suggestive.

1 Boldface attempts to further weaken Tillett's KROMA mark by  
2 demonstrating that it exists in a "crowded field" of uses of similar  
3 marks on similar products. "[A] mark which is hemmed in on all sides  
4 by similar marks on similar goods cannot be very 'distinctive.' It is  
5 merely one of a crowd of marks. In such a crowd, customers will not  
6 likely be confused between any two of the crowd and may have learned  
7 to carefully pick out one from the other." Miss World, 856 F.2d at  
8 1449 (internal quotation marks omitted); see also Glow, 252 F. Supp.  
9 2d at 990-91 (finding suggestive mark weak because it "competes in an  
10 exceedingly crowded field of beauty products using the word 'glow' in  
11 some manner as a trade name or trademark").

12 Boldface argues that Tillett's KROMA mark is weak because there  
13 are "dozens" of third-party PTO registrations and applications  
14 incorporating the word "chroma" and its phonetic equivalents in the  
15 PTO's International Class 3 goods, some of which Boldface listed in  
16 its response to Tillett's June 2012 cease-and-desist letter. (Ostoya  
17 Decl., Ex. B; see also Boldface's RJN, Ex. 2 (including over 300 pages  
18 of PTO search results).) In the Chroma case, the Court relied on  
19 third-party registrations and applications incorporating the word  
20 "chroma" on cosmetics and beauty products to find the plaintiff's mark  
21 conceptually weak.

22 Upon further research and briefing from the parties in this case,  
23 the Court is now convinced that these third-party registrations are  
24 not probative of conceptual weakness without evidence that the marks  
25 were actually used in commerce and viewed by consumers. See, e.g., 2  
26 J. Thomas McCarthy, McCarthy On Trademarks & Unfair Competition §  
27 11:89 (4th ed. 2013) (hereafter McCarthy) ("The mere citation of third  
28 party registrations is not proof of third party uses for the purpose

1 of showing a crowded field and relative weakness" because "[t]hird  
2 party registrations are not evidence of use 'so as to have conditioned  
3 the mind of prospective purchasers.'" (emphasis in original)); see  
4 also Olde Tyme Foods, Inc. v. Roundy's, Inc., 961 F.2d 200, 203-04  
5 (Fed. Cir. 1992) ("Much of the undisputed record evidence relates to  
6 third party registrations, which admittedly are given little weight  
7 but which nevertheless are relevant when evaluating likelihood of  
8 confusion. As to strength of the mark, however, registration evidence  
9 may not be given any weight." (emphasis in original)); Scarves by  
10 Vera, Inc. v. Todo Imports Ltd., 544 F.2d 1167, 1173 (2d Cir. 1976)  
11 ("The significance of third-party trademarks depends wholly upon their  
12 usage. Defendant introduced no evidence that these trademarks were  
13 actually used by third parties, that they were well promoted or that  
14 they were recognized by consumers."); AMF Inc. v. Am. Leisure Prods.,  
15 Inc., 474 F.2d 1403, 1406 (C.C.P.A. 1973) ("The existence of [third-  
16 party] registrations is not evidence of what happens in the market  
17 place or that customers are familiar with them[.]"); Teledyne Techs.,  
18 Inc. v. W. Skyways, Inc., 78 U.S.P.Q.2d 1203, 2006 WL 337553, at \*4  
19 (T.T.A.B. 2006) ("[Third party] registrations are not evidence that  
20 the marks are in use, much less that purchasers are familiar with  
21 them."), aff'd 208 F. App'x 886, 889-90 (Fed. Cir. 2006) (unpublished  
22 disposition). Because Boldface has offered no evidence to show that  
23 any of the marks reflected in the registrations and applications were  
24 in fact used in commerce, this evidence does not show that Tillett's  
25 KROMA mark is weakened because it is used in a "crowded field" of  
26 similar marks on similar goods.<sup>18</sup>

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27 <sup>18</sup>It also appears that some of these registrations have expired  
28 (continued...)

1 Boldface has also identified other uses of the word "kroma" in  
2 the marketplace in connection with beauty services, such as "Kroma  
3 Kolor Laboratories," "Kroma Salon," "Salon Kroma of Cary," and "Kroma  
4 Hair Design." (Drapeau Decl., Ex. B.) Unlike PTO registrations and  
5 applications, these marks appear to be names of businesses used in the  
6 marketplace and likely have been viewed by consumers. Even so, they  
7 have little probative value in assessing uses of the word "kroma" to  
8 establish a "crowded field" for cosmetics: "Kroma Kolor Laboratories"  
9 appears to manufacture hair color, not cosmetics; and the other  
10 businesses appear to be hair salons, although one indicates it also  
11 provides make-up services. This evidence does not show that the field  
12 of cosmetics is so crowded with marks similar to Tillett's KROMA mark  
13 that the strength of Tillett's mark is weakened.

14 Even if Boldface's evidence of a "crowded field" weakened the  
15 conceptual strength of Tillett's KROMA mark, this factor is  
16 significantly less important here where the parties' marks are so  
17 similar and the goods on which the marks appear are nearly identical.  
18 See Brookfield, 174 F.3d at 1058-59 ("Because the products involved  
19 are closely related and [the defendant's trademark] is nearly  
20 identical to [the plaintiff's] trademark, the strength of the mark is  
21 of diminished importance in the likelihood of confusion analysis."  
22 (citing McCarthy, § 11:76 ("Whether a mark is weak or not is of little  
23 importance where the conflicting mark is almost identical and the

24  
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26 <sup>18</sup>(...continued)  
27 or have been cancelled due to non-use, and some of the applications  
28 have "intent to use" status only. By their nature, those applications  
and canceled registrations cannot be proof that those marks are used  
in the marketplace and viewed by consumers.

1 goods are closely related.")); see also GoTo.com, 202 F.3d at 1208  
 2 (relying on Brookfield and McCarthy for same).

3 In the end, the parties' comparative commercial strength favors  
 4 finding likely confusion, and the conceptual strength of Tillett's  
 5 KROMA mark is neutral.

6 d. Actual Confusion

7 Although not required, "'actual confusion among significant  
 8 numbers of consumers provides strong support for the likelihood of  
 9 confusion.'" Network Automation, 638 F.3d at 1151. Boldface claims  
 10 that it has not received a single indication of confusion from its  
 11 distributors, its retailers, or the press. (Ostoya Decl. ¶ 33.) In  
 12 contrast, Tillett claims that commenters on social media and news  
 13 sites regularly confuse the parties' marks (Tillett Decl. ¶ 47; Gipson  
 14 Decl., Ex. L), and Tillett cites 10 purported instances of actual  
 15 confusion in the United States (Tillett Decl. ¶¶ 48–58).<sup>19</sup> Of these  
 16 examples, eight show actual consumer confusion (all errors in  
 17 original):

- 18 • An August 7, 2012, message from the owner of Lovelo Beauty  
 19 LLC: Beauty Writer/Blogger, who wrote, "I have also heard  
 20 that Kim K. and sisters are coming out with a line at the  
 end of the year called Khroma . . . is this related to you?"  
 (Tillett Decl. ¶ 48, Ex. G.)
- 21 • An October 29, 2012 telephone call from a customer who said  
 22 she was on the internet and was looking at the Kardashians'  
 23 cosmetics line, but then saw Tillett's online presence, and  
 called to ask if it was affiliated with the Kardashians.  
 (Id. ¶ 50.)<sup>20</sup>

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25 <sup>19</sup>Tillett cites other instances of actual confusion in the U.K.,  
 26 but again, this evidence is not relevant to the likelihood of  
 27 confusion analysis. See supra, n.16.

28 <sup>20</sup>The Court rejects Boldface's argument that this instance of  
 confusion should be disregarded as simply a "misdirected" phone call.

- 1 • A January 20, 2013, email from a client stating, "I was  
2 confused when I was in Ulta and wondered why you would  
change the spelling of your name." (Id. ¶ 52, Ex. J.)
- 3 • A February 10, 2013, email from a client stating, "During  
4 the holidays while passing through Sears, I saw a makeup  
5 display saying Khroma. I was so excited to see Lee's make  
6 up in the major department stores. As I got closer to the  
7 display it read Khroma Beauty by the Kardashian sisters. I  
8 was taken aback by how easy it was for the Kardashian's to  
9 infringe on Lee's trademark. I was so upset I even took a  
picture with my phone and sent it to Lee. Since then a few  
of my friends think that Less sold her company to the  
Kardashi[a]n's. My friends know that I have been going to  
Kroma for years and when they too saw it in the stores they  
thought it was Lee's brand just under the Kardashi[a]n's  
name. This is a wrong that needs to be made right." (Id. ¶  
54, Ex. K.)
- 10 • A February 5, 2013, email from a colleague stating, "As a  
11 colleague of yours I was shocked when I saw the Kardashian  
12 KHROMA Makeup line that was coming out into the market place  
13 . . . At first glance I thought it was yours the font looks  
14 the same, how deceiving was that. When I worked for you I  
15 remember that you went to California to meet with the  
16 Kardashian's Public Relation Group at their request. I  
17 first thought that maybe you had sold them the rights to  
18 your company and makeup line. I could not believe that you  
19 would do that since you worked so hard developing, marketing  
20 of such a fantastic line. I'm sure you will prevail when  
21 everything is presented through your legal representatives."  
22 (Id. ¶ 55, Ex. L.)
- 23 • A February 5, 2013 email from a client stating, "I received  
24 a catalog in the mail from ULTA, featuring 'KHROMA' makeup  
25 line. I first thought this was your makeup line 'KROMA,'  
26 the name was almost identical as was the pronunciation of  
27 your brand. It was confusing, especially because the cheap  
28 prices listed on the ULTA catalog didn't seem to match your  
higher quality product price. I can see this causing a lot  
of confusion, even the style of the name 'KHROMA' is  
basically identical to yours." (Id. ¶ 56, Ex. M.)
- A February 5, 2013, email from a client stating, "I did, in  
fact, see something in a magazine for Khroma. Made me do a  
double take realizing this is NOT my favorite make-up  
product! I do believe it is 'too close' and actually resent  
another company using such a similar name." (Id. ¶ 57, Ex.  
N.)
- A February 7, 2013, email from a client stating, "When I  
have needed to make an appointment, I have become confused.  
Many times I Google the web for Kroma makeup. When I did  
this, I was provided with imagery and websites such as Ulta  
for your makeup. At first glance I thought it was your



1           makeup. As I am a longtime loyal customer, I have no[w]  
 2           overlooked this error. However, it can be as I am sure you  
 3           are aware, very disconcerting to your typical customer. If  
 4           I were just purchasing makeup I would most likely have  
 5           bought the makeup this way. Since I am also a client for  
 6           brow services & such, I continue to look further for your  
 7           phone number and email to make a reservation. I do feel you  
 8           have possibly lost much business due to this. I feel  
 9           terrible for you. Your makeup is wonderful and the quality  
 10          is unmatched in my opinion. You also give a delightful  
 11          personal touch that no store bought makeup can deliver. If  
 12          there is any way that you are able to get rid of this label  
 13          confusion it would be great!" (Id. ¶ 58, Ex. O.)<sup>21</sup>

8           Boldface attacks the messages sent after February 5, 2013 because  
 9           they came in response to an email from Tillett asking customers and  
 10          colleagues if they have experienced confusion. Yet, there is no  
 11          evidence that the respondents are employees of Tillett or otherwise  
 12          "in close association and intimate contact" with Tillett, so the Court  
 13          will not discount their statements on that basis. See Walter, 210  
 14          F.3d at 1111.

15          This evidence of actual confusion is not overwhelming, especially  
 16          in light of Boldface's extensive product rollout. Cf. Entrepreneur  
 17          Media, Inc. v. Smith, 279 F.3d 1135, 1151 (9th Cir. 2002) (finding one  
 18          instance of actual confusion unpersuasive because "use of a mark must  
 19          be likely to confuse an appreciable number of people as to the source  
 20          of the product." (emphasis in original)). Nevertheless, evidence of  
 21          actual confusion is hard to come by at this stage and there are enough  
 22          instances to favor finding likely confusion here.<sup>22</sup>

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24                   <sup>21</sup>The Court agrees with Boldface that the email from a graphic  
 25                   artist that Tillett claims worked for Kim Kardashian in the past does  
 26                   not show actual confusion because the email itself does not reference  
 27                   the Kardashians. (Tillett Decl. ¶ 49, Ex. H.) The Court also agrees  
 28                   that the January 16, 2013 email from a client does not demonstrate  
 29                   actual confusion. (Id. ¶ 51, Ex. I.)

<sup>22</sup>The Court rejects Tillett's evidence of "online confusion"  
 (continued...)

1 e. Overlapping Marketing Channels

2 “Convergent marketing channels increase the likelihood of  
3 confusion.” Network Automation, 638 F.3d at 1151. Here, there is  
4 some overlap between the parties’ marketing channels, which weighs in  
5 favor of a likelihood of confusion. The parties target slightly  
6 different segments of the cosmetics market: Tillett’s higher-end  
7 products are sold in its flagship store, hotels, and spas and through  
8 its website, while Boldface’s products are lower-priced and sold in  
9 retail store chains and on their websites. Nevertheless, Tillett had  
10 discussions with TLK Fusion about possible product placement for KROMA  
11 products in projects related to Kim Kardashian, suggesting that there  
12 is overlap between the channels for Tillett’s and Boldface’s  
13 products.<sup>23</sup> Moreover, Tillett has made efforts to promote its  
14 products nationally and expand into mass retail stores, such as with  
15 the potential placement of its products with a U.K. retailer, which it  
16 claims could have spurred placement in domestic retailers as well.  
17 This evidence supports finding that the parties’ marketing channels  
18 overlap enough to create likely confusion among consumers. The fact  
19 that both parties sell products online adds little weight to this  
20 factor. See id. (noting that “the shared use of a ubiquitous  
21 marketing channel” like the internet “does not shed much light on the  
22 likelihood of consumer confusion”).

23  
24  
25 \_\_\_\_\_  
26 <sup>22</sup>(...continued)  
27 because it lacks foundation for how the identified websites actually  
28 operate. (Gipson ¶¶ 8–10, 18.)

<sup>23</sup>While Kim Kardashian and Boldface deny knowledge of these  
discussions, there is no dispute that they occurred.

1                   f.    Degree of Customer Care

2           Low consumer care increases the likelihood of confusion. Id. at  
3 1152. This factor focuses on the nature, cost, and marketing channels  
4 of the goods at issue. Id. This factor weighs against finding likely  
5 confusion because Tillett sells "high end cosmetics" to an "upscale  
6 clientele" who likely exercise care in selecting Tillett's higher-  
7 priced products. (Tillett Decl. ¶ 5.) Tillett argues that the Court  
8 should focus on the purchasers of Boldface's mass-market products, who  
9 probably exercise less care in selecting cosmetics. This might be  
10 true when those purchasers select among competing lower-priced  
11 cosmetics lines, but here, purchasers of the lower-priced KHROMA  
12 products would likely take care before paying higher prices for  
13 Tillet's KROMA products.

14           The customer care factor, however, is entitled to only minimal  
15 weight in this case. As noted above, given the similarity of the  
16 parties' marks and relatedness of the goods on which those marks  
17 appear, even purchasers exercising a high degree of care would likely  
18 be confused, and some, in fact, have been confused. Therefore, even  
19 the high degree of care exercised by purchasers does not dispel the  
20 likely confusion created by Boldface's KHROMA BEAUTY mark.

21                   g.    Intent

22           The intent factor generally carries minimal weight because "'an  
23 intent to confuse customers is not required for a finding of trademark  
24 infringement.'" GoTo.com, 202 F.3d at 1208. On the other hand,  
25 "'intent to deceive is strong evidence of a likelihood of confusion'"  
26 because, "'[w]hen the alleged infringer knowingly adopts a mark  
27 similar to another's, reviewing courts presume that the defendant can  
28 accomplish his purpose: that is, that the public will be deceived.'"

1 Entrepreneur Media, 279 F.3d at 1148. Therefore, “[w]here an alleged  
2 infringer chooses a mark he knows to be similar to another, one can  
3 infer an intent to confuse.” Id.

4 This case, however, is one of reverse confusion, so the intent  
5 inquiry must focus on “whether the defendant was aware of the senior  
6 user’s use of the mark in question, or whether the defendant conducted  
7 an adequate name search for other companies marketing similar goods or  
8 services under that mark.” Commerce Nat’l Ins. Servs., Inc. v.  
9 Commerce Ins. Agency, Inc., 214 F.3d 432, 444 (3d Cir. 2000); cf.  
10 Cohn, 281 F.3d at 843 (citing Commerce and finding intent factor  
11 neutral because “Cohn did not present evidence that Petsmart intended  
12 to copy Cohn’s mark or that Petsmart should have known of Cohn’s  
13 senior trademark rights.”). Thus, in a reverse confusion case, the  
14 intent factor favors finding likely confusion “where the alleged  
15 infringer adopted his mark with knowledge, actual or constructive,  
16 that it was another’s trademark[.]’” Survivor, 406 F.3d at 634.

17 Here, Boldface was unquestionably aware of Tillett’s rights and  
18 still proceeded with the multi-million-dollar rollout of the KHROMA  
19 BEAUTY product line. As early as January 2012, Boldface had  
20 constructive knowledge of Tillett’s rights when Tillett’s registration  
21 issued. It is unclear whether Boldface’s initial trademark search  
22 uncovered Tillett’s registration (although even a cursory PTO search  
23 should have)<sup>24</sup>; yet, by June 2012, Boldface had actual knowledge of  
24 Tillett’s rights through Tillett’s first cease-and-desist letter.

25 \_\_\_\_\_  
26 <sup>24</sup>(See Mantell Decl. ¶ 2 (explaining that PTO search submitted in  
27 Boldface’s RJN, Ex. 2, did not contain the results of the initial  
28 search conducted by Boldface’s counsel before adopting the KHROMA  
marks).)

1 Undeterred, Boldface began its extensive KHROMA BEAUTY product rollout  
2 in August 2012 that has continued unabated, even after Boldface  
3 received refusals of its trademark applications from the PTO in  
4 September 2012, putting Boldface on notice that its marks created  
5 likely confusion with Tillett's registration; after Tillett sent a  
6 second cease-and-desist letter in October 2012; and after settlement  
7 negotiations ended in November 2012.<sup>25</sup> This factor therefore weighs  
8 in favor of likely confusion.

9 h. Expansion of Product Lines

10 The expansion of product lines factor does not carry much weight  
11 here because the parties already directly compete with overlapping  
12 products. See Network Automation, 638 F.3d at 1153 (finding expansion  
13 factor "unimportant" because parties already directly competed). Even  
14 so, Tillett offers evidence that, as of 2009, it has increased its  
15 efforts to promote the KROMA products nationally and attempted to  
16 expand beyond its current retail locations through discussions with a  
17 U.K. retailer that may have spurred expansion into additional U.S.  
18 retail markets. This evidence suggests a "strong possibility of  
19 expansion into competing markets." M2 Software, Inc. v. Madacy

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22 <sup>25</sup>The Court need not resolve the parties' dispute over whether  
23 Kim Kardashian knew about Tillett's interactions with TLK Fusion in  
24 2010 because, even absent this evidence, the record amply demonstrates  
25 Boldface's knowledge of Tillett's rights and its calculation to move  
26 forward with the KHROMA BEAUTY products notwithstanding. The Court  
27 also fails to see the significance of Tillett's prior application for  
28 the KROMA mark, which was denied by the PTO in light of a then-active  
registration for the mark "KROMA BONDZ" on cosmetics, which has since  
been cancelled. (Opp. 6.) In any case, when Tillett applied to  
register the mark KROMA in 2004, the company that owned the KROMA  
BONDZ mark had ceased doing business, although its mark was still on  
the Principal Register. (Gipson Supp. Decl., Ex. J.)

1 Entm't Corp., 421 F.3d 1073, 1085 (9th Cir. 2005) (emphasis in  
2 original). This factor thus favors finding likely confusion.<sup>26</sup>

3 3. Conclusion on the Merits

4 An overall evaluation of the Sleekcraft factors demonstrates that  
5 a factfinder would likely find a likelihood of confusion here. Six of  
6 the factors favor Tillett: similarity of the marks; relatedness of the  
7 goods; actual confusion; overlapping marketing channels; Boldface's  
8 intent; and expansion of product lines. The other two factors either  
9 weigh partly in Tillett's favor or are neutral: Boldface's  
10 commercially strong mark supports finding likely confusion, although  
11 the conceptual strength of Tillett's mark is neutral; and the customer  
12 care factor has little impact on the analysis. Therefore, Tillett has  
13 demonstrated likely success on the merits of its infringement claims.

14 **B. Likelihood of Irreparable Harm**

15 Tillett argues that irreparable harm may be presumed from its  
16 showing of likelihood of success on its trademark infringement claims.  
17 That proposition is doubtful following the Supreme Court's decisions  
18 in eBay inc. v. MercExchange, L.L.C., 547 U.S. 388 (2006) and Winter  
19 v. Natural Resources Defense Council, Inc., 555 U.S. 7 (2008). Cf.  
20 Flexible Lifeline Sys., Inc. v. Precision Lift, Inc., 654 F.3d 989,  
21 994–95 (9th Cir. 2011) (per curiam) (rejecting long-standing rule  
22 presuming irreparable harm from a likelihood of prevailing on the  
23 merits of a copyright infringement claim in light of eBay and Winter).  
24 But see Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co., 571

25 \_\_\_\_\_  
26 <sup>26</sup>Boldface attacks Tillett's lost opportunity with a U.K. retail  
27 chain on various grounds. Even assuming these attacks are  
28 meritorious, Boldface's nationwide presence likely eliminates  
Tillett's current and future opportunities for expansion into mass-  
market retailers, creating significant irreparable harm.

1 F.3d 873, 877 (9th Cir. 2009) (accepting the presumption of  
2 irreparable harm upon a showing of trademark infringement without  
3 analysis). The Court need not decide whether a presumption of  
4 irreparable harm still exists in trademark cases because Tillett has  
5 shown actual irreparable harm here.

6 Tillett has demonstrated that it will likely lose business  
7 opportunities, customers, and goodwill due to Boldface's use of the  
8 confusingly similar KHROMA BEAUTY marks. See Stuhlberg Int'l Sales  
9 Co. v. John D. Brush & Co., 240 F.3d 832, 841 (9th Cir. 2001) (finding  
10 loss of customers and goodwill created irreparable harm). The Court  
11 has little doubt that, in short order, the KHROMA BEAUTY products will  
12 likely eliminate Tillett's business entirely, creating irreparable  
13 harm sufficient to justify an injunction.

14 Boldface argues that Tillett has not shown irreparable harm  
15 because it unreasonably delayed in enforcing its rights following  
16 Boldface's July 2012 response to Tillett's June 2012 cease-and-desist  
17 letter. See, e.g., Oakland Tribune, Inc. v. Chronicle Publ'g Co., 762  
18 F.2d 1374, 1377 (9th Cir. 1985) ("Plaintiff's long delay before  
19 seeking a preliminary injunction implies a lack of urgency and  
20 irreparable harm."); McCarthy, § 31:32 ("It has often been held that  
21 unreasonable delay in filing suit and/or moving for a preliminary  
22 injunction can contribute to a defeat of a motion for preliminary  
23 injunction not upon the ground of laches, but for the reason that  
24 delay negates the moving party's ability to show the kind of  
25 'irreparable injury' needed for preliminary relief."). Although  
26 Tillett could have moved more quickly in enforcing its rights, its  
27 delay was not unreasonable under the circumstances and does not  
28 undermine its claims of irreparable harm.

1 Boldface does not dispute that Tillett sent its first cease-and-  
2 desist letter promptly on June 28, 2012, when it learned of Boldface's  
3 planned product launch. Boldface responded three weeks later on July  
4 18, 2012, defending the use of the KHROMA BEAUTY marks. In that  
5 email, Boldface did not request a further response from Tillett, and  
6 unsurprisingly, none came. Boldface chose to rely on Tillett's  
7 silence to move forward with its product launch beginning in August  
8 2012; although Boldface does not identify a specific date in August,  
9 that could have been as few as 13 days later.

10 Tillett contends without contradiction that it was unaware of  
11 Boldface's activities in August and September 2012. (Tillett Supp.  
12 Decl. ¶ 6.) Boldface's applications were pending during this time,  
13 but because they were "intent-to-use" applications, they would not  
14 have suggested to Tillett that Boldface would move forward so quickly.  
15 An intent-to-use application can remain pending for years before the  
16 registration issues based upon use in commerce. See Spin Master, Ltd.  
17 v. Zobmondo Entm't, LLC, 778 F. Supp. 2d 1052, 1060 (C.D. Cal. 2011)  
18 (explaining that the "intent-to-use" process allows for up to three  
19 years from a notice of allowance of a mark to demonstrate use in  
20 commerce). In any case, Tillett reasonably waited for the PTO to act  
21 on the applications to determine its next enforcement steps.

22 Then, on September 28, 2012, the PTO issued initial refusals,  
23 finding likely confusion between Boldface's marks and Tillett's mark.  
24 A month later, Tillett sent its second cease-and-desist letter on  
25 October 28, 2012. The parties engaged in settlement negotiations,  
26 which ended on November 27, 2012, and Boldface filed suit three days  
27 later. Tillett spent three weeks finding local counsel in this  
28 District (Tillett Supp. Decl. ¶ 14), and by the time it found counsel,



1 the preliminary injunction motion in the Chroma case had been filed.  
2 It then reasonably waited for the Court to resolve the preliminary  
3 injunction motion, which raised issues that overlapped with this case.  
4 Once the Court denied that motion on January 23, 2013, Tillett filed  
5 the instant motion on February 11, 2013.

6 Again, while Tillett could have moved more quickly in seeking an  
7 injunction, the delay here was not unreasonable. See, e.g., GoTo.com,  
8 202 F.3d at 1209 (excusing five-month delay between filing suit and  
9 moving for preliminary injunction); Ocean Garden, Inc. v. Marktrade  
10 Co., 953 F.2d 500, 508 (9th Cir. 1991) (excusing six-month delay  
11 between filing complaint and moving for preliminary injunction in part  
12 because the parties were engaged in settlement negotiations). The  
13 Court finds the likelihood of irreparable harm satisfied in this case.

#### 14 **C. Public Interest**

15 The public interest favors an injunction to prevent likely  
16 confusion in this case. See Mattel, Inc. v. MCA Records, Inc., 296  
17 F.3d 894, 905 (9th Cir. 2002); Entrepreneur Media, 279 F.3d at 1148.  
18 This is particularly true here because Tillett has presented evidence  
19 that confusion is already occurring, suggesting it will continue to  
20 occur absent an injunction. Given that Boldface has not contested  
21 validity and Tillett has shown a strong likelihood of prevailing, the  
22 Court finds no merit in Boldface's argument that an injunction would  
23 undermine the "broad societal interest in preserving common, useful  
24 words for the public domain." Entrepreneur Media, 279 F.3d at 1148.  
25 To the contrary, because Tillett has shown a likelihood of confusion,  
26 the paramount interest here is avoiding confusion among consumers.  
27 See Internet Specialties W., Inc. v. Milon-DiGiorgio Enters., 559 F.3d  
28 985, 993-94 (9th Cir. 2009) (approving injunction that reflected "the

1 usual public interest concern in trademark cases: avoiding confusion  
2 to consumers," and rejecting focus on the "burden imposed on the  
3 public by the injunction"). Nor is the Court convinced that the harm  
4 to Boldface's distributors and other third parties undermines an  
5 injunction here, given that they are selling Boldface's infringing  
6 products.

7 **D. Balance of Hardships**

8 Even if Tillett has shown it will likely prevail on the merits  
9 of its claim, "an injunction is a matter of equitable discretion; it  
10 does not follow from success on the merits as a matter of course."  
11 Winter, 555 U.S. at 32. Instead, "[a] preliminary injunction is an  
12 extraordinary remedy never awarded as of right" and the Court "'must  
13 balance the competing claims of injury and must consider the effect on  
14 each party of the granting or withholding of the requested relief.'" Id.  
15 at 24. In trademark infringement cases, "a court must consider  
16 the impact granting or denying a motion for a preliminary injunction  
17 will have on the respective enterprises. Thus the relative size and  
18 strength of each enterprise may be pertinent to this inquiry." Int'l  
19 Jensen, Inc. v. Metrosound U.S.A., Inc., 4 F.3d 819, 827 (9th Cir.  
20 1993).

21 Here, the Court is well-aware of the impact an injunction will  
22 have on Boldface's business, which could amount to millions of dollars  
23 in losses. But the Court is also fully convinced that withholding an  
24 injunction will destroy Tillett's business, which it has built over a  
25 decade, causing losses of hundreds of thousands (and perhaps millions)  
26 of dollars in past investment and future revenue. The difference  
27 between the two is that Tillett has superior rights to Boldface. As a  
28 result, the balance of hardships tips sharply in Tillett's favor.

1 The equities also rest firmly with Tillett. Boldface moved  
2 forward with its multi-million-dollar product rollout using a  
3 trademark it knew was similar to Tillett's registered mark based upon  
4 the thinnest of reeds: as few as 13 days of silence from Tillett after  
5 receipt of Boldface's July 18 email. While it admittedly could have  
6 changed the KHROMA BEAUTY marks at that time "without suffering  
7 serious harm" (Ostoya Decl. ¶ 31), it did not. And it forged ahead  
8 even when a neutral arbiter in the PTO sided with Tillett's view that  
9 the KHROMA BEAUTY marks caused likely confusion. This is precisely  
10 the type of case in which "any injury that [Boldface] may suffer if  
11 preliminarily enjoined may be discounted by the fact that [Boldface]  
12 brought the injury upon [itself] by intentionally adopting deceptively  
13 similar trademarks and packaging." Moroccanoil, Inc. v. Moroccan  
14 Gold, LLC, 590 F. Supp. 2d 1271, 1282 (C.D. Cal. 2008); cf. Cadence  
15 Design Sys., Inc. v. Avant! Corp., 125 F.3d 824, 829 (9th Cir. 1997)  
16 ("[A] defendant who knowingly infringes another's copyright 'cannot  
17 complain of the harm that will befall it when properly forced to  
18 desist from its infringing activities.'").

#### 19 **E. Scope of the Injunction**

20 Boldface briefly suggests that the injunction may only cover  
21 markets in which Tillett does business, despite the existence of a  
22 federal registration, citing Fairway Foods v. Fairway Markets, 227  
23 F.2d 193, 198 (9th Cir. 1955). In Fairway Foods, the Ninth Circuit  
24 reversed the district court's grant of an injunction enjoining the  
25 senior federal registrant from using its trademark in territory  
26 occupied by the local junior user based only upon the registrant's  
27 desire to expand its business into that area in the future. Id. This  
28 doctrine is frequently called the "Dawn Donut" rule, based upon the

1 rule announced in Dawn Donut Co. v. Hart's Food Stores, Inc., 267 F.2d  
2 358, 364 (2d Cir. 1959):

3 [I]f the use of the marks by the registrant and the  
4 unauthorized user are confined to two sufficiently  
5 distinct and geographically separate markets, with no  
6 likelihood that the registrant will expand his use into  
7 defendant's market, so that no public confusion is  
8 possible, then the registrant is not entitled to enjoin  
9 the junior user's use of the mark.

7 Id. (citing Fairway Foods).

8 The Ninth Circuit later explained that Fairway Foods addressed a  
9 narrow factual scenario; in that circumstance, "where the federal  
10 registrant and the intrastate user of conflictingly similar trade  
11 marks are using the respective marks in geographically separate and  
12 distinct market areas, with no real competition between them, and  
13 where there is no present likelihood that the federal registrant will  
14 expand his use into the area of use of the intrastate user, there is  
15 no cause shown for injunctive relief based on infringement." Mister  
16 Donut of Am., Inc. v. Mr. Donut, Inc., 418 F.2d 838, 844 (9th Cir.  
17 1969). On the other hand, "where a federal registrant has expanded  
18 its business to the point that the use of the conflictingly similar  
19 marks by the registrant and the unauthorized user are no longer  
20 confined to separate and distinct market areas and there is  
21 established the likelihood of public confusion, the federal registrant  
22 is entitled under the authority of the Lanham Act to injunctive  
23 relief." Id. (citing Dawn Donut).

24 The Court declines to apply the Dawn Donut/Fairway Foods rule to  
25 this case for two reasons. First, Tillett sells products over the  
26 internet and across the country, has promoted them in nationwide  
27 media, and has engaged in discussions with a U.K. retailer in the hope  
28 of using that deal to spur further retail deals in the United States.

1 As in Mister Donut, this evidence demonstrates a "present likelihood"  
2 that Tillett will expand nationally into areas occupied by Boldface.  
3 (See Ostoya Decl. ¶ 39 (stating that KHROMA BEAUTY products will be in  
4 48 states by March 2013).)

5 Perhaps more important, applying the Dawn Donut/Fairway Foods  
6 rule in this reverse confusion case would have a significant adverse  
7 impact on Tillett's rights arising from its federal registration. As  
8 McCarthy explains, a federal registration creates a "nationwide right,  
9 but the injunctive remedy does not ripen until the registrant shows a  
10 likelihood of entry into the disputed territory" because there is no  
11 likelihood of confusion in that area unless and until the registrant  
12 enters that market or is likely to do so. McCarthy, § 26:33 (emphasis  
13 in original). This rule makes sense in forward-confusion cases with  
14 remote junior users occupying limited geographic locations as in Dawn  
15 Donut and Fairway Foods, but not so when the case involves reverse  
16 confusion with a nationwide junior user.

17 Reverse confusion is actionable because "the senior user loses  
18 the value of the trademark – its product identity, corporate identity,  
19 control over its goodwill and reputation, and ability to move into new  
20 markets." Commerce, 214 F.3d at 444 (emphasis added). If, as in  
21 this case, the junior user is barred from using its mark in only those  
22 areas in which the registrant does business, then it is free to occupy  
23 the rest of the country. That presence could be significant enough to  
24 eliminate the registrant's identity, goodwill, and reputation even in  
25 those areas the registrant occupies. And even if the registrant can  
26 preserve its identity in some areas, it has no incentive to expand its  
27 business into any territories already occupied by the junior user.  
28 Even though the registrant could get an injunction once it enters each

1 new market, see McCarthy, § 26:33, it would likely have to expend  
2 significant time and money to dispel the confusion created by the  
3 junior user's prior presence. And by that point, it may be too late –  
4 the junior user's presence in other areas in the country may be so  
5 strong that the registrant's goodwill cannot be recovered. In order  
6 to protect a registrant's nationwide right from reverse confusion  
7 created by a nationwide junior user, then, an injunction must be  
8 nationwide as well. Because Dawn Donut and Fairway Foods did not  
9 address reverse confusion, the Court declines to limit an injunction  
10 on that basis.

11 Boldface further suggests that, because the KHROMA BEAUTY  
12 products are already in the marketplace and there are millions of  
13 units in production, an injunction barring the sale of these products  
14 would amount to a "mandatory injunction," which is "particularly  
15 disfavored.'" Marlyn Nutraceuticals, 571 F.3d at 879. The Court does  
16 not agree. While an injunction here might have the effect of  
17 requiring retailers to remove KHROMA BEAUTY products from shelves and  
18 preventing Boldface from distributing any more products, it does not  
19 itself mandate any affirmative conduct such as a product recall or  
20 restitution to customers who have already bought KHROMA BEAUTY  
21 products. See id. (remanding preliminary injunction requiring a  
22 product recall and restitution as unjustified mandatory injunction).

23 Moreover, as the Ninth Circuit has explained, an injunction  
24 returning the parties to their positions prior to infringement does  
25 not alter the status quo ante litem. "The status quo ante litem  
26 refers not simply to any situation before the filing of a lawsuit, but  
27 instead to 'the last uncontested status which preceded the pending  
28 controversy.'" Goto.com, 202 F.3d at 1210. In this case, the last

1 uncontested status existed before Boldface began using the KHROMA  
2 BEAUTY trademarks. Id. ("In this case, the status quo ante litem  
3 existed before Disney began using its allegedly infringing logo.").  
4 If this were not the case, then "plaintiffs could never bring suit  
5 once infringing conduct had begun." Id.

6 In any case, Tillett has agreed to tailor the injunction to  
7 permit Boldface's retailers to sell through products in their  
8 possession (Reply 22), which the Court finds appropriate.

9 **F. Bond**

10 Under Federal Rule of Civil Procedure 65(c), upon obtaining an  
11 injunction, the movant must post a bond "in an amount that the court  
12 considers proper to pay the costs and damages sustained by any party  
13 found to have been wrongfully enjoined and restrained." The Court has  
14 wide discretion to set any amount for the bond. GoTo.com, 202 F.3d at  
15 1211. Boldface requests a bond of millions of dollars, far surpassing  
16 an amount Tillett could pay. The Court finds that amount – or  
17 anything approaching it – inappropriate because it would essentially  
18 deny Tillett the benefit of the injunction. See id.; see also Cal. ex  
19 rel. Van De Kamp v. Tahoe Regional Planning Agency, 766 F.2d 1319,  
20 1325, as amended, 775 F.3d 998 (9th Cir. 1985). Further, Tillett has  
21 demonstrated a strong likelihood of success on the merits, which "tips  
22 in favor of a minimal bond or no bond at all." Van de Kamp, 766 F.2d  
23 at 1326. The Court finds that a \$50,000 bond is appropriate under the  
24 circumstances. GoTo.com, 202 F.3d at 1211 (finding \$25,000 bond  
25 appropriate for injunction against the Walt Disney Company, which had  
26 requested at least \$20 million).

1  
2 **CONCLUSION AND STAY**

3 For the reasons above, Tillett's motion for a preliminary  
4 injunction is GRANTED.

5 At oral argument, Boldface's counsel requested that the Court  
6 stay the injunction pending appeal. Boldface does not have a right to  
7 a stay; instead, the Court may exercise discretion depending on the  
8 circumstances of the particular case. Lair v. Bullock, 697 F.3d 1200,  
9 1203 (9th Cir. 2012). In order to stay an injunction, the Court must  
10 consider "(1) whether the stay applicant has made a strong showing  
11 that he is likely to succeed on the merits; (2) whether the applicant  
12 will be irreparably injured absent a stay; (3) whether issuance of the  
13 stay will substantially injure the other parties interested in the  
14 proceeding; and (4) where the public interest lies.'" Id. (quoting  
15 Nken v. Holder, 556 U.S. 418, 434 (2009)). The party requesting the  
16 stay bears the burden to show that a stay is warranted, id., and the  
17 first two factors are the most critical, id. at 1204.

18 Here, the Court's analysis on the issuance of the preliminary  
19 injunction dictates that a stay is not warranted. See id. at 1203 n.2  
20 (noting that "[t]here is a substantial overlap between these and the  
21 factors governing preliminary injunctions."). However, the Court  
22 will stay entry of the preliminary injunction for at least seven days  
23 pursuant to Ninth Circuit Rule 27-2, provided that Boldface seeks a  
24 stay from the Ninth Circuit within that time. If Boldface seeks a  
25 stay, the Court will stay entry of the injunction until the Ninth  
26 Circuit rules on that request. If after the expiration of seven days  
27 Boldface has not sought a stay from the Ninth Circuit, the Court will  
28 enter the injunction without further notice to the parties. Tillett  
is not required to post the bond ordered by the Court until the Court



1 enters the injunction. The parties are ORDERED to update the Court of  
2 the status of this matter, as well as their further settlement  
3 efforts, **no later than seven days from the date of this Order.**

4 Further, Tillett is ORDERED to lodge a proposed injunction  
5 consistent with this opinion **within five days of the date of this**  
6 **Order.**

7 **DATED:** March 11, 2013



8 **AUDREY B. COLLINS**  
9 **UNITED STATES DISTRICT JUDGE**

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APPENDIX 1

# KROMA<sup>®</sup>

CREATED BY NATURE. REFINED BY LEE TILLET.

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APPENDIX 2

