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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

ADIDAS AMERICA, INC., a Delaware corporation; **ADIDAS AG**, a foreign entity; and **ADIDAS INTERNATIONAL MARKETING B.V.**, a foreign entity,

Plaintiffs,

v.

PUMA NORTH AMERICA, INC., a Delaware corporation,

Defendant.

No. 3:17-cv-00283

**PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION AND
MEMORANDUM IN SUPPORT
THEREOF**

Pursuant to Fed. R. Civ. P. 65(a)

ORAL ARGUMENT REQUESTED

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION
AND MEMORANDUM IN SUPPORT THEREOF

LEGAL134502557.1

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I. LOCAL RULE 7-1 CERTIFICATION

Pursuant to LR 7-1(a)(1)(A), plaintiffs adidas America, Inc., adidas AG, and adidas International Marketing B.V. (collectively, “adidas”) certify that defendant Puma North America, Inc. (“Puma”) has not yet made an appearance in this action, which was just filed today. adidas will promptly confer with counsel for Puma as soon as Puma identifies who is representing it in this action, and adidas will promptly notify the Court in the unlikely event that Puma consents to entry of a preliminary injunction.

II. MOTION

Pursuant to Fed. R. Civ. P. 65(a), adidas respectfully moves this Court for a preliminary injunction against Puma to prevent it from offering for sale and selling the “Vigor” soccer cleat depicted below, which bears a four-stripe design that clearly infringes adidas’s incontestable rights in the famous three-stripe trademark (the “Three-Stripe Mark”):



adidas is entitled to a preliminary injunction because: (1) it is likely to succeed on the merits of its trademark and trade dress infringement and dilution claims; (2) it is suffering irreparable harm to its goodwill and reputation and will continue to suffer irreparable harm absent injunctive relief; (3) the balance of hardships tips sharply in adidas’s favor; and (4) a preliminary injunction protecting consumers from confusion serves the public interest.

This motion is supported by the following memorandum, as well as the concurrently filed Declarations of Ernesto B. Bruce, Chris Murphy, Sara M. Vanderhoff, and Erich A.

Joachimsthaler, Ph.D. Additionally, adidas is concurrently filing a proposed Order granting this motion for a preliminary injunction.

III. SUPPORTING MEMORANDUM

A. INTRODUCTION

For over sixty years, adidas has manufactured, advertised, marketed, promoted, distributed, and sold footwear and apparel bearing its famous and distinctive Three-Stripe Mark, which is covered by numerous incontestable federal trademark registrations.

Although adidas's Three-Stripe Mark is famous among the general consuming public, it is particularly famous among soccer athletes, soccer fans, and consumers of soccer footwear, apparel, and equipment. As the sponsor of the FIFA World Cup, Major League Soccer, numerous famous international club teams and players, and many national soccer clubs and players, millions of people around the world and in the United States are exposed to the iconic Three-Stripe Mark in connection with the sport of soccer.

Over the last decade and a half, adidas has filed dozens of lawsuits before this very Court seeking to enforce its rights in the Three-Stripe Mark against infringers using two-stripe, three-stripe, and four-stripe imitations of adidas's famous Three-Stripe Mark. Time and time again, this Court has recognized the strength of the Three-Stripe Mark and has confirmed that such imitations of the Three-Stripe Mark are unlawful infringements. *See, e.g., adidas Am., Inc. v. Skechers USA, Inc.* ("Skechers"), 149 F. Supp. 3d 1222, 1234 (2016) (granting preliminary injunction); *adidas-Am., Inc. v. Payless ShoeSource, Inc.*, 529 F. Supp. 2d 1215, 1234 (D. Or. 2007) ("*Payless I*") (rejecting various defenses as a matter of law in case involving four-stripe shoes); *adidas-Am., Inc. v. Payless ShoeSource, Inc.*, No. CV01-1655-KI, 2008 WL 4279812 (D. Or. Sept. 12, 2008) ("*Payless II*") (affirming jury verdict regarding four-stripe shoes); *adidas-Salomon AG v. Target Corp.*, 228 F. Supp. 2d 1192, 1211 (D. Or. 2002) ("*Target*") (denying defendant's motion for summary judgment regarding four-stripe and two-stripe shoes).

Despite adidas's indisputable and longstanding rights in the Three-Stripe Mark, and despite the numerous Orders from this Court finding that the use of four-stripe designs by adidas's competitors infringes adidas's rights in its Three-Stripe Mark, Puma recently began offering for sale a soccer cleat bearing a four-stripe design that is confusingly similar to adidas's Three-Stripe Mark:



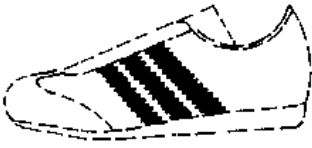

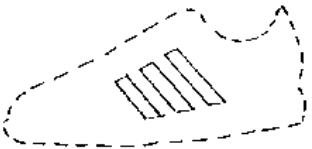


Puma's unauthorized use of a confusingly similar imitation of adidas's Three-Stripe Mark is irreparably harming—and will continue to irreparably harm—adidas's brand and its extremely valuable goodwill in the Three-Stripe Mark. This Court should, therefore, issue a preliminary injunction to protect the public from confusion and to stop Puma's blatant infringement, dilution, and unfair competition.

B. STATEMENT OF FACTS

1. The Famous Three-Stripe Mark

adidas is currently, and for many years has been, one of the world's leading manufacturers of athletic footwear, apparel, and sporting equipment. *See* Declaration of Chris Murphy ("Murphy Decl.") ¶ 7. Since at least as early as 1952, adidas has been using the Three-Stripe Mark on athletic footwear sold in the United States and worldwide. *Id.* The Three-Stripe Mark quickly came to signify the quality and reputation of adidas footwear; and by 1967, adidas expanded its use of the Three-Stripe Mark to apparel sold in the United States and worldwide. *Id.*

adidas is the owner of numerous federal trademark registrations for “footwear” issued by the United States Patent and Trademark Office (“PTO”), including:

Registration No.	Mark	Date of Registration
1,815,956		January 11, 1994
1,833,868		May 3, 1994
2,278,589		September 21, 1999
3,029,129		December 13, 2005
3,029,135		December 13, 2005

See Declaration of Sara M. Vanderhoff (“Vanderhoff Decl.”) ¶ 3, Ex. A. Affidavits for each of the above Registrations have been filed pursuant to Sections 8 and 15 of the Lanham Act, 15 U.S.C. §§ 1058 and 1065, and thus, these registrations are “incontestable.” *Id.* at ¶ 4.

adidas also owns numerous additional trademark registrations for the Three-Stripe Mark covering footwear and various items of apparel, some of which are also incontestable, including U.S. Reg. Nos. 870,136, 961,353, 2,016,963, 2,058,619, 2,278,591, 2,284,308, 2,909,861, 2,999,646, 3,029,127, 3,063,742, 3,063,745, 3,087,329, 3,183,656, 3,183,663, 3,236,505, and

4,910,643. *Id.* at ¶ 5, Ex. B. Additionally, adidas owns federal registrations for word marks incorporating the term “3 stripes,” including THE BRAND WITH THE 3 STRIPES, Reg. No. 1,674,229, for “sport and leisure wear.” *Id.* at ¶ 6, Ex. C.

For decades, adidas extensively and continuously has used and advertised the Three-Stripe Mark in connection with footwear and apparel, including soccer cleats, spending hundreds of millions of dollars promoting the mark and products bearing the mark. Murphy Decl. ¶ 18. As but one example, adidas’s “Sport 15” advertising campaign (which represented adidas’s biggest ad spend in the United States to date) features soccer superstar Lionel Messi and other famous athletes. *Id.* at ¶ 9, Ex. B.

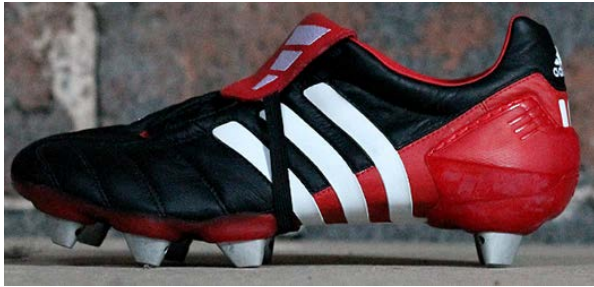
As part of its promotional efforts, adidas also uses the Three-Stripe Mark in connection with frequent sponsorships of sports tournaments, teams, and organizations, as well as professional athletes and collegiate sports programs. *Id.* at ¶¶ 11-15; *see also* Declaration of Ernesto B. Bruce (“Bruce Decl.”) ¶¶ 17-19. For example, adidas has long-term relationships with Arizona State University, Indiana University, the University of Kansas, the University of Nebraska, the University of Louisville, Mississippi State University, and the University of Miami. Murphy Decl. ¶ 11. Among many others, adidas sponsors: (i) NBA stars Damian Lillard, James Harden, Andrew Wiggins, Harrison Barnes, and Derrick Rose; (ii) baseball players Josh Harrison, Justin Upton, Kris Bryant, Carlos Correa, Melvin Upton Jr., and James Shields; (iii) professional golfer Sergio Garcia; and (iv) NFL stars Dak Prescott, Aaron Rodgers, DeMarco Murray, Jimmy Graham, and Von Miller—all of whom have further popularized adidas’s famous Three-Stripe Mark. *Id.* at ¶ 11. Additionally, for many years, adidas has sponsored the world-famous Boston Marathon and many other “prime time” events, teams, and individuals. *Id.* at ¶ 15. Such prominent use of the Three-Stripe Mark in connection with these sponsorship activities has further enhanced the Three-Stripe Mark’s recognition and fame. *Id.* at ¶¶ 10, 19.

Of particular importance here, adidas's fame and reputation among soccer players, fans, and enthusiasts is unparalleled. Not only has adidas been the official sponsor of the FIFA World Cup soccer tournament for more than forty years, adidas has sponsored numerous soccer stars, including David Beckham, Zinedine Zidane, Lionel Messi, Paul Pogba, Heather O'Reilly, Gareth Bale, Omar Gonzalez, and Christie Rampone. Bruce Decl. ¶ 18. In addition to international fame in the soccer arena, adidas is the official sponsor of Major League Soccer ("MLS") in North America, as well as the exclusive apparel provider for each of the MLS teams, including the Portland Timbers, Seattle Sounders, and L.A. Galaxy. *Id.* at ¶ 17. Through this arrangement, the Three-Stripe Mark is prominently displayed on every MLS team's uniform, further cementing adidas's brand associations with elite soccer players across the United States. *Id.* & Ex. E.

For over six decades, adidas has designed, manufactured, and sold soccer cleats bearing the Three-Stripe Mark. Bruce Decl. ¶¶ 3-4. In 1979, adidas released the Copa Mundial soccer cleat, which prominently features the Three-Stripe Mark. *Id.* at ¶ 4. The Copa Mundial shoe, depicted below, has remained one of the most popular soccer cleats in the United States for at least the last twenty years. *Id.* at ¶ 4, Ex. A.



In 1994, adidas began offering the Predator, another soccer cleat bearing the well-known Three-Stripe Mark. Bruce Decl. ¶ 4. The Predator has been updated and re-released several times since 1994, always prominently featuring the Three-Stripe Mark. Worn by soccer greats David Beckham, Zinedine Zidane, and Raul Gonzalez Blanco, among others, prominent use of the Three-Stripe Mark in connection with the Predator has further enhanced the Three-Stripe Mark's recognition and fame, particularly within the soccer category. *Id.* at ¶¶ 4-7. Photographs of two representative examples of the Predator appear below:



In recent years, annual sales of products bearing the Three-Stripe Mark have totaled in the billions of dollars globally and in excess of one billion dollars within the United States. Murphy Decl. ¶ 8. Sales within the soccer category alone have been in the hundreds of millions of dollars, and adidas has significant market share in the soccer segment. Bruce Decl. ¶¶ 7-9, Ex. C. As a result of adidas's extensive advertising and sales, the Three-Stripe Mark has achieved fame and tremendous public recognition, both internationally and in the United States. Murphy Decl. ¶ 10.

Because of adidas's extensive promotional efforts in the United States and around the world,¹ the public well recognizes and understands that the Three-Stripe Mark distinguishes and identifies adidas's merchandise. Murphy Decl. ¶ 17; Bruce Decl. ¶¶ 12-21. Indeed, unsolicited media articles named 2016 "the year of the Three Stripe" (Matt Vitone, "Year of the Three Stripe: Why Adidas Ruled Footwear in 2016," *Vamp*, Dec. 30, 2016), and have referred to "the iconic adidas three stripes" (Brettman, Allan, "World Cup Brings New Shoes, Uniforms from Adidas, Nike," *The Oregonian*, Feb. 17, 2014), adidas's "trademark three-stripe sneakers" (Brettman, Allan, "Adidas lifts 2012 forecast as sales in China soar in Q1," *The Oregonian*, May 1, 2012), adidas's "ubiquitous three stripes" (Brettman, Allan, "Going 'All In,'" *The Oregonian*, March 15, 2011), the "trademark three-stripe logo" (Pennington, Bill, "Belts That Do

¹ See Declaration of Erich A. Joachimsthaler, Ph.D. ("Joachimsthaler Decl.") ¶¶ 32-55 (discussing adidas's history).

More Than Hold Up Pants,” *New York Times*, July 27, 2009), the “iconic three stripes” (“Game Time,” *Footwear News*, June 16, 2008), the “signature three stripes” (Moore, Booth, “Ringing Endorsements; Form Follows Function with Much Olympic Wear, but Fashion and Funding are also at Play,” *L.A. Times*, August 13, 2004), the “famous brand with the three stripes” (Whiting, Sam, “Must Have,” *San Francisco Chronicle*, July 7, 2002), and the “legendary Adidas three stripes” (“Coty Inc.,” *Brand Strategy*, September 27, 1999). Murphy Decl. ¶ 17, Ex. F; *see also* Bruce Decl. ¶ 20, Ex. G (soccer-specific unsolicited media).

adidas has built up—and now owns—tremendously valuable goodwill symbolized by the Three-Stripe Mark. Murphy Decl. ¶ 19; Joachimsthaler Decl. ¶¶ 62-73. Because adidas continuously, exclusively, and prominently has used the Three-Stripe Mark in connection with its products, the Three-Stripe Mark enjoys wide public acceptance and association with adidas. Murphy Decl. ¶ 17; Joachimsthaler Decl. ¶¶ 76-84, 95-103, 107-08. Indeed, the Three-Stripe Mark has come to be recognized widely and favorably by the public as an indicator of the origin of adidas’s goods. Murphy Decl. ¶ 19; Joachimsthaler Decl. ¶¶ 76-84, 89.

2. History Between adidas and Puma

adidas and Puma share a common origin. In the 1920s, two brothers from Herzogenaurach, a little town in Franconia, Germany, shared a small shoemaking business that focused on the design, manufacture, and sale of athletic footwear. Each had their own role in the family business—Adolf (Adi) Dassler was the shoe designer, and his older brother, Rudolf Dassler led the company’s sales efforts. In the mid- to late-1940s, after World War II, the brothers parted ways, leading each to start his own shoe company. Adi eventually settled on the brand name “adidas” (short for “Adi Dassler”) for his company, and Rudolf eventually settled on the brand name “Puma.” To this day, both companies still call Herzogenaurach home, and they are located on opposite sides of the Mittlere Aurach River, which divides the town down the

middle (literally and figuratively). The parties have shared a well-documented competitive rivalry that still exists today.²

3. Puma’s Current Unlawful Activities

In blatant disregard of adidas’s well-established rights in the Three-Stripe Mark—and without authorization or approval from adidas—Puma recently released the “Vigor” soccer cleat that bears a confusingly similar imitation of adidas’s Three-Stripe Mark. Vanderhoff Decl. ¶¶ 7-8, Exs. D & E (the “Infringing Cleat”). Puma is actively promoting, advertising, and marketing the Infringing Cleat, touting the fact that it will be worn by Olivier Giroud, one of the most famous players on the Arsenal club in the English Premier League. *Id.* at ¶ 7, Ex. E. Promotional photographs of the Infringing Cleat, examples of which appear below, prominently feature the confusingly similar four-stripe design and are devoid of any Puma branding. *Id.*; *see also* Joachimsthaler Decl. ¶¶ 85-88.



Puma’s activities are thus likely to cause confusion among potential purchasers and the general public, particularly in the initial-interest and post-sale environment.

² *See, generally*, Barbara Smit, SNEAKER WARS: THE ENEMY BROTHERS WHO FOUNDED ADIDAS AND PUMA AND THE FAMILY FEUD THAT FOREVER CHANGED THE BUSINESS OF SPORT (2008); *see also* Joachimsthaler Decl. ¶¶ 32-35.

C. ARGUMENT

1. adidas Is Entitled to a Preliminary Injunction

A preliminary injunction should be imposed if the plaintiff can establish “that [it] is likely to succeed on the merits, that [it] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tip in [its] favor, and that the injunction is in the public interest.” *Marlyn Natraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 877 (9th Cir. 2009) (citing *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 21 (2008)). Here, because each of the four factors strongly favors adidas, a preliminary injunction is plainly warranted.

2. adidas Is Substantially Likely to Succeed on the Merits

The Lanham Act expressly authorizes injunctive relief in cases of trademark infringement, unfair competition, and dilution. *See* 15 U.S.C. §§ 1116 & 1125(c). To obtain that injunctive relief, adidas must show that (1) it owns a valid trademark, and (2) Puma’s mark is likely to cause confusion. *See* 15 U.S.C. § 1114(1); *Brookfield Commc’ns, Inc. v. W. Coast Entm’t Corp.*, 174 F.3d 1036, 1046 (9th Cir. 1999) (affirming preliminary injunction in trademark infringement action). adidas easily and conclusively satisfies these two elements.

The Three-Stripe Mark is covered by numerous incontestable federal registrations (*see* Vanderhoff Decl. ¶¶ 3–6), and the likelihood of confusion and dilution factors adopted by the Ninth Circuit weigh strongly in adidas’s favor. Specifically, adidas’s Three-Stripe Mark is valid, distinctive, strong, and famous, and Puma is knowingly using a confusingly similar mark on *identical* goods sold to *identical* consumers in *close proximity* to adidas’s goods in *identical* channels of trade. Puma’s actions constitute a bad faith effort to trade on adidas’s goodwill and the adidas Three-Stripe Mark.

a. adidas Owns Exclusive Rights in the Three-Stripe Mark

adidas’s numerous federal registrations covering the Three-Stripe Mark for footwear and apparel³—including many incontestable registrations—constitute “*conclusive evidence*” of adidas’s exclusive right to use the mark and the validity of that mark. 15 U.S.C. § 1115(b) (emphasis added); *see also Park ‘N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 192 (1985) (“Incontestable status provides ... conclusive evidence of the registrant’s exclusive right to use the registered mark.”) (internal quotations omitted); *Skechers*, 149 F. Supp. 3d at 1234.

b. Puma’s Footwear Infringes the Three-Stripe Mark

Well aware of adidas’s rights, Puma’s current conduct infringes the Three-Stripe Mark because it is causing or is likely to cause consumers to be deceived as to the source, affiliation, or sponsorship of the Infringing Cleat.

Likelihood of confusion is not limited to direct purchasers, but also includes a likelihood of initial interest and post-sale confusion.⁴ *See Karl Storz Endoscopy Am., Inc. v. Surgical Techs., Inc.*, 285 F.3d 848, 854 (9th Cir. 2002) (“The law in the Ninth Circuit is clear that ‘post-purchase confusion,’ *i.e.*, confusion on the part of someone other than the purchaser who, for example, simply sees the item after it has been purchased, can establish the required likelihood of confusion under the Lanham Act.”); *Acad. of Motion Picture Arts & Sci. v. Creative House Promotions, Inc.*, 944 F.2d 1446, 1454 (9th Cir. 1991) (finding likelihood of confusion in the post-sale confusion context); *Skechers*, 149 F. Supp. 3d at 1239 (“Consumer confusion can arise in a variety of contexts including point-of-sale (confusing the source at the time of purchase), post-sale (confusing someone other than the purchaser), and even ‘initial interest’ (using a

³ Vanderhoff Decl. ¶¶ 3–6, Exs. A, B, & C.

⁴ For purposes of the present Motion for Preliminary Injunction, adidas does *not* allege that consumers are likely to be confused by the Infringing Cleat at the point of purchase (*i.e.*, at the cash register in a retail store). Rather, adidas alleges that consumers viewing the Infringing Cleat in the *initial-interest* or *post-sale* environment (where Puma-related branding is virtually invisible) are likely to be confused into believing they are adidas cleats or, at a minimum, are affiliated with adidas.

confusingly similar mark to capture a buyer’s attention.”); *Payless I*, 529 F. Supp. 2d at 1234. Indeed, this Court has repeatedly “endorsed the use of both initial-interest and post-sale confusion in *factually identical* cases involving two- and four-stripe footwear that allegedly infringed adidas’ Three-Stripe Mark.” *Payless I*, 529 F. Supp. 2d at 1240 (emphasis in original) (citing *Target*, 228 F. Supp. 2d at 1211 and *ACI Int’l, Inc. v. adidas-Salomon AG*, 359 F. Supp. 2d 918, 921 (C.D. Cal. 2005)).

Regardless of the type of confusion alleged (i.e., initial-interest, point-of-sale, or post-sale),⁵ likelihood of confusion is determined by analyzing a number of factors, including:

- (1) strength of the mark;
- (2) proximity of the goods;
- (3) similarity of the marks;
- (4) evidence of actual confusion;
- (5) marketing channels used;
- (6) types of goods and the degree of care likely to be exercised by the purchaser;
- (7) defendant’s intent in selecting the mark; and
- (8) likelihood of expansion of the products line.

AMF Inc. v. Sleekcraft Boats (“*Sleekcraft*”), 599 F.2d 341, 348-49 (9th Cir. 1979).⁶ “Despite its universal application, the *Sleekcraft* factor test is not a rigid one, and ‘[o]ther variables may come into play depending on the particular facts presented.’” *Skechers*, 149 F. Supp. 3d at 1240 (quoting *Sleekcraft*, 599 F.2d at 348 n.11).

Here, the Three-Stripe Mark is strong and entitled to broad protection, and Puma has knowingly used a substantially similar reproduction of adidas’s Three-Stripe Mark in connection with the sale of the same products adidas sells under the Three-Stripe Mark and to the same target customers. Thus, Puma’s imitation of the Three-Stripe Mark is likely to cause confusion among consumers in the pre- and post-sale environments. *See, e.g., Acad. of Motion Picture Arts & Scis.*, 944 F.2d at 1454; *Payless I*, 529 F. Supp. 2d at 1234; *Target*, 228 F. Supp. 2d at 1212.

⁵ *Skechers*, 149 F. Supp. 3d at 1239.

⁶ The federal standard for determining trademark infringement, unfair competition, and likelihood of confusion is the same standard used for determining trademark infringement under Oregon law. *See Classic Instrument, Inc. v. VDO-Argo Instruments, Inc.*, 73 Or. App. 732, 737, 700 P.2d 677, 684 (1985).

(i) **Puma’s Infringing Footwear Bears Confusingly Similar Imitations of the Three-Stripe Mark**

The similarity between marks is a critical question in the likelihood of confusion analysis.⁷ See *GoTo.com, Inc. v. Walt Disney Co.*, 202 F.3d 1199, 1205-06 (9th Cir. 2000). “[T]he greater the similarity between the two marks at issue, the greater the likelihood of confusion.” *Id.* at 1206.

Like adidas’s use of the Three-Stripe Mark on footwear, Puma’s Infringing Cleat bears a design consisting of four diagonal, parallel stripes on the mid-foot portion of the shoe. See Vanderhoff Decl. ¶ 7. As this Court has made abundantly clear in several previous cases involving adidas’s Three-Stripe Mark, the use of *four* stripes does not shield it from liability. See *Payless I*, 529 F. Supp. 2d at 1235 (“Payless cannot avoid liability for infringement merely by adding (or subtracting) an identical, parallel stripe to adidas’[s] Three-Stripe Mark.”); see also *Target*, 228 F. Supp. 2d at 1211; *ACI Int’l, Inc.*, 359 F. Supp. 2d at 922 (“The Court expressly rejects [defendant’s] argument that confusion cannot occur because its shoe has two stripes instead of three....”). Indeed, in the *Payless* case, a jury concluded that over 100 different styles of four-stripe shoes infringed adidas’s Three-Stripe Mark. Vanderhoff Decl. ¶ 10, Ex. G.

Nor does Puma’s suspiciously tiny use of other elements on the shoe protect it (even assuming consumers could discern the miniscule puma on the heel of the shoe). “[W]hat is critical is the *overall* appearance of the mark as used in the marketplace, not a deconstructionist view of the different components of the marks” or the product. *Payless I*, 529 F. Supp. 2d at 1235 (citation omitted) (emphasis in original). As this Court held:

Although three stripes obviously do not equal four stripes, the issue is not simply the number of stripes. Instead, the issue is whether the total effect of the allegedly infringing design is likely to cause confusion in the minds of an ordinary

⁷ “The Ninth Circuit has developed three axioms that apply to the similarity analysis: 1) Marks should be considered in their entirety and as they appear in the marketplace; 2) Similarity is best adjudged by appearance, sound, and meaning; and 3) Similarities weigh more heavily than differences.” *Skechers*, 149 F. Supp. 3d at 1240 (internal quotations omitted).

purchaser. While there can be no debate that defendants' four stripe mark has one stripe more than adidas' Three Stripe Mark, so too there can be no debate that many of the other features of the stripes displayed on defendants' [shoes] are strikingly similar- if not identical- to the features of the Three-Stripe Mark. . . . This court cannot simply count the number of stripes and determine as a matter of law that four stripes are not confusingly similar to three stripes.

Target, 228 F. Supp. 2d at 1211. *See also Payless I*, 529 F. Supp. 2d at 1234 (“‘‘Considered in their entirety and as they appear in the marketplace,’ the stripe designs on [the defendant’s] athletic and casual shoes are similar to adidas’ Three–Stripe Mark.’’) (citation omitted); *Skechers*, 149 F. Supp. 3d at 1240 (quoting *Baker v. Master Printers Union of N.J.*, 34 F. Supp. 808, 811 (D.N.J. 1940) (“[F]ew would be stupid enough to make exact copies of another’s mark or symbol. It has been well said that the most successful form of copying is to employ enough points of similarity to confuse the public with enough points of difference to confuse the courts.’’)). Puma’s four-stripe design has the same overall appearance as adidas’s Three-Stripe Mark, is in the same location on the shoe as adidas’s Three-Stripe Mark, and is in the same diagonal orientation as adidas’s Three-Stripe Mark. This factor, therefore, plainly favors adidas.

(ii) Puma Is Offering Identical Goods to Identical Consumers

Puma’s Infringing Cleat is unquestionably related to the footwear sold by adidas in connection with the Three-Stripe Mark (which includes soccer cleats). *See Skechers*, 149 F. Supp. 3d at 1241 (holding that “[t]his factor also weighs strongly in adidas’s favor” where infringer and adidas both “make athletic and casual footwear”; “The products are reasonably interchangeable by buyers for the same purposes, and are, therefore, competitive.’’) (internal quotations omitted); *Payless I*, 529 F. Supp. 2d at 1235-36 (finding the defendant’s use of stripes on footwear to be use of a confusingly similar mark on identical goods); *Target*, 228 F. Supp. 2d at 1212-13 (finding the similarity of goods factor to weigh in adidas’s favor where the defendant was offering a striped athletic shoe). The fact that the parties’ footwear could not be more highly related heightens the risk that consumers will be confused. *See Brookfield Commc’ns, Inc.*, 174 F.3d at 1055-56 (“[R]elated goods are generally more likely than unrelated goods to confuse

the public as to the producers of the goods.”); *E. & J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1291 (9th Cir. 1992) (“Where goods are related or complementary, the danger of consumer confusion is heightened.”). The similarity-of-goods factor thus weighs very heavily in adidas’s favor. *See* 4 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION (“MCCARTHY”) § 24.22 (4th ed. 2016) (“Where the goods or services are directly competitive, the degree of similarity of marks needed to cause likely confusion is less than in the case of dissimilar goods or services.”).

Puma also is offering its Infringing Cleat to the same general population of purchasers as adidas and through the same marketing channels. *See* Vanderhoff Decl. ¶ 7; *see also Sleekcraft*, 599 F.2d at 353; *Payless I*, 529 F. Supp. 2d at 1237 (finding overlapping marketing channels, despite the fact that the parties sold their goods through different retail outlets and at different prices). In fact, the parties’ footwear can even be found in some of the same retail outlets. *See* Bruce Decl. ¶ 26. The existence of convergent marketing channels only increases the likelihood of confusion.⁸ *See Grey v. Campbell Soup Co.*, 650 F. Supp. 1166, 1175 (C.D. Cal. 1986) (finding an increased likelihood of confusion where plaintiff’s and defendant’s goods were sold to the same consumers, through many of the same stores, and in the same areas of the stores); *see also Anheuser-Busch, Inc. v. The Customer Co., Inc.*, 947 F. Supp. 422, 425 (N.D. Cal. 1996) (finding overlapping marketing channels weighed in favor of likelihood of confusion where the goods were found “on the same shelves”). Thus, this factor heavily favors adidas.

The relatedness of the goods and the use of common marketing channels, together with the similarity of the marks, are “the controlling troika in the *Sleekcraft* analysis.” *GoTo.com*,

⁸ “[E]ven if [Puma] could show the marketing channels were completely incongruous, ... this factor would not necessarily favor [Puma] because channels of trade are largely irrelevant in determining the likelihood of *post-sale* confusion.” *Skechers*, 149 F. Supp. 3d at 1242 (internal quotations omitted) (emphasis in original).

Inc., 202 F.3d at 1205. A preliminary injunction is warranted here based on the evidence related to these three factors alone.

(iii) The Three-Stripe Mark Is Strong

It is axiomatic that a strong mark is entitled to broad protection. *See, e.g.*, 2 MCCARTHY § 11:73 (“‘Strong’ marks are given ‘strong’ protection—protection over a wide range of related products and services and variations on visual and aural format”); *Entrepreneur Media, Inc. v. Smith*, 279 F.3d 1135, 1141 (9th Cir. 2002) (holding that stronger marks receive greater protection); *GoTo.com, Inc.*, 202 F.3d at 1207 (the stronger the mark “the greater protection the mark is accorded by trademark laws”). The strength of a mark is “evaluated in terms of its conceptual strength and commercial strength.” *GoTo.com, Inc.*, 202 F.3d at 1207 (finding the strength of plaintiff’s mark to be increased by the success of the company and its website). Conceptual strength is classified by the placement of the mark “along a spectrum of distinctiveness,”⁹ while commercial strength is determined based on acquired distinctiveness. *See E. & J. Gallo Winery*, 967 F.2d at 1291 (affirming summary judgment and finding plaintiff’s GALLO mark was strong).

“adidas’s Three-Stripe mark is conceptually strong because it is arbitrary.” *Skechers*, 149 F. Supp. 3d at 1242; *see also adidas-Salomon AG v. Target Corp.*, CIV.01-1582-RE, 2003 WL 25710435, at *6 (D. Or. Jan. 29, 2003) (finding that the Three-Stripe Mark is “arbitrary because three stripes do not define, describe or suggest the various products that bear them”). Additionally, the Three-Stripe Mark is subject to numerous incontestable trademark registrations, conclusively establishing its distinctiveness. *See KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 408 F.3d 596, 606 (9th Cir. 2005) (“[T]he challenger of an incontestable mark

⁹ *Skechers*, 149 F. Supp. 3d at 1242. “From weakest to strongest, marks are categorized as generic, descriptive, suggestive, and arbitrary or fanciful.” *Id.*

cannot assert that the most salient feature of the mark is descriptive and lacks secondary meaning.”).

As this Court held just last year: “The commercial strength of adidas’s Three-Stripe mark cannot be contested.” *Skechers*, 149 F. Supp. 3d at 1242; *see also* Murphy Decl. ¶¶ 7–19. For decades, adidas has spent tens of millions of dollars annually advertising and promoting the Three-Stripe Mark in connection with footwear and apparel. *See* Murphy Decl. ¶ 9; *see also* *Guess?, Inc. v. Tres Hermanos*, 993 F. Supp. 1277, 1280 (C.D. Cal. 1997) (holding that the strength of a mark is “demonstrated by extensive advertising”). adidas’s extensive promotion of its Three-Stripe Mark has resulted in billions of dollars in annual sales of products bearing the Three-Stripe Mark globally and in excess of one billion dollars within the United States. *See* Murphy Decl. ¶ 18; *see also* *Transgo, Inc. v. Ajac Transmission Parts Corp.*, 768 F.2d 1001, 1016 (9th Cir. 1985) (strength of the mark supported by extensive sales of products bearing the mark). And the Three-Stripe Mark also has been the subject of numerous unsolicited media references. *See* Murphy Decl. ¶ 17, Ex. F. Such evidence weighs heavily in favor of finding that the mark is strong. *Golden Door, Inc. v. Odisho*, 646 F.2d 347, 350-51 (9th Cir. 1987) (extensive media coverage supported finding that the mark was strong).

This Court has repeatedly held that the Three-Stripe Mark is both conceptually and commercially strong. *Skechers*, 149 F. Supp. 3d at 1242 (“Numerous judges have concluded that the Three-Stripe mark is strong and entitled to protection, and this Court agrees.”); *Payless I*, 529 F. Supp. 2d at 1238 (“I agree with this court’s previous conclusion that the Three-Stripe Mark is strong and entitled to protection.”); *Target*, 228 F. Supp. at 1206; *see also* *ACI Int’l, Inc.*, 359 F. Supp. 2d at 921. The evidence presently before the Court dictates the same finding here.

Because the Three-Stripe Mark is strong, it “casts a long shadow which competitors must avoid,” *Recot, Inc. v. Becton*, 214 F.3d 1322, 1328 (Fed. Cir. 2000) (internal quotation marks omitted), and “[t]here is no excuse for even approaching the well-known trademark.” *Nina Ricci*

S.A.R.L. v. E.T.F. Enters., 889 F.2d 1070, 1074 (Fed. Cir. 1989) (internal quotation marks omitted). Puma has not merely approached adidas’s strong and incontestable Three-Stripe Mark, Puma closely imitated the size, spacing, placement, and angle of the stripes comprising the Three-Stripe Mark.

(iv) Relatively Unsophisticated Consumers Are Likely to Be Confused by Puma’s Infringing Footwear

Purchasers of footwear are “not likely to exercise a great deal of care in distinguishing between trademarks when purchasing the goods.” *M’Otto Enter., v. Redsand, Inc.*, 831 F. Supp. 1491, 1502 (W.D. Wash. 1993); *see also Gucci Am., Inc. v. Action Activewear, Inc.*, 759 F. Supp. 1060, 1066 (S.D.N.Y. 1991) (“[T]he Court has no reason to conclude that the buyer of casual sportswear represents a particularly sophisticated group of consumers.”). Accordingly, this factor strongly favors adidas.

(v) Puma Has Acted in Bad Faith

“When one party knowingly adopts a mark similar to another’s, reviewing courts presume that the defendant will accomplish its purpose, and that the public will be deceived.” *Acad. of Motion Picture Arts & Sci.*, 944 F.2d at 1456. Although not necessary to establish infringement,¹⁰ Puma unquestionably acted in bad faith in creating the Infringing Cleat. There cannot be any dispute that Puma was aware of the Three-Stripe Mark—generally and as used on iconic adidas soccer cleats—when it began selling the Infringing Cleat. This Court can and should reasonably infer that Puma intentionally set out to trade on adidas’s goodwill and to deceive consumers. *See Acad. of Motion Picture Arts & Sci.*, 944 F.2d at 1456; *Official Airline Guides, Inc. v. Goss*, 6 F.3d 1385, 1394 (9th Cir. 1993) (“When an alleged infringer knowingly adopts a mark similar to another’s, courts will presume an intent to deceive the public.”); *Skechers*, 149 F. Supp. 3d at 1244 (finding bad faith in part because “Skechers knew that adidas

¹⁰ *See Dreamwerks Prod. Grp., Inc. v. SKG Studio*, 142 F.3d 1127, 1132 n.12 (9th Cir. 1998) (“Absence of malice is no defense to trademark infringement.”).

owns numerous incontestable registrations for the Three-Stripe mark ..., and yet Skechers' Cross-Court shoe incorporated a design that is very similar to adidas's well-known mark"); *Grey*, 650 F. Supp. at 1173 (finding plaintiff knowingly adopted her mark to trade on defendant's mark where plaintiff had been aware of defendant's mark prior to adopting her own mark). Accordingly, this factor also weighs heavily in favor of adidas.

(vi) Actual Confusion Is Not Required

Although adidas is not yet aware of evidence of actual confusion between Puma's Infringing Cleat and adidas's footwear, it is well settled that evidence of *actual* confusion is not necessary to a finding of *likelihood* of confusion. *See Golden Door, Inc.*, 646 F.2d at 351 (affirming preliminary injunction absent actual confusion). Evidence of actual confusion often is difficult to discover, particularly when a plaintiff is moving for a preliminary injunction and "has never had the opportunity to collect information on actual confusion." *Brookfield Commc'ns, Inc.*, 174 F.3d at 1060 (reversing denial of preliminary injunction).

adidas only recently learned of Puma's sales of the Infringing Cleat and has not yet had the opportunity to find (through discovery) instances of actual confusion. *See Vanderhoff Decl.* ¶ 13. In the past, however, adidas has introduced numerous consumer surveys demonstrating that the use of four parallel stripes on footwear is likely to cause confusion among consumers. *See id.* at ¶ 9. *See also Payless II*, 2008 WL 4279812 at *7 ("This court has ruled three times that Dr. Ford's likelihood of confusion survey evidence was admissible as evidence of actual confusion"); *Target*, 228 F. Supp. 2d at 1196-97 ("As evidence of post-sale confusion of potential purchasers of athletic shoes, adidas has submitted a double blind survey."). The results of those surveys demonstrate the likelihood that an "appreciable number" of consumers would be confused here. *Starbucks Corp. v. Lundberg*, No. CV02-948-HA, 2005 WL 3183858, at *9 (D. Or. Nov. 29, 2005) ("The percentage of consumers likely to be confused can be in the range of 10 to 15 percent or even lower.").

(vii) Likelihood of Expansion

adidas and Puma already are direct competitors in the footwear industry and in each other's markets, *see* Vanderhoff Decl. ¶ 11, thus, this factor weighs heavily in adidas's favor. *See M'Otto Enter.*, 831 F. Supp. at 1504.

(viii) Summary of the Likelihood of Confusion Factors

In light of the above, adidas's likely success on the merits of its trademark infringement and unfair competition claims is undeniable. Indeed, Puma's intentional, willful, and knowing use of a confusingly similar imitation of adidas's Three-Stripe Mark is textbook trademark infringement and unfair competition. *See Skechers*, 149 F. Supp. 3d at 1246 (finding that "adidas has demonstrated it is likely to establish on the merits that the [infringing marks] are likely to confuse consumers" where "[s]ix of the seven relevant *Sleekcraft* factors for analyzing whether there is a likelihood of confusion favor adidas, including the three critical factors: the similarity of the marks, the relatedness of the goods, and the marketing channels used"); *see also* Joachimsthaler Decl. ¶ 88.

c. adidas Is Likely to Succeed on its Dilution Claim

Trademark dilution protects an owner's investment in its mark—regardless of whether confusion is likely. *See Horphag Research Ltd. v. Garcia*, 475 F.3d 1029, 1035-36 (9th Cir. 2007) (affirming grant of summary judgment on plaintiff's trademark dilution claim). "To prove a violation, plaintiff must show (1) the mark is famous and distinctive;¹¹ (2) the defendant is making use of the mark in commerce; (3) the defendant's use began after the mark became

¹¹ Under the Trademark Dilution Revision Act of 2006, a court must consider all relevant factors when determining if a mark is famous, including:

- (i) The duration, extent, and geographic reach of advertising and publicity of the mark, whether advertised or publicized by the owner or third parties; (ii) The amount, volume, and geographic extent of sales of goods or services offered under the mark; (iii) The extent of actual recognition of the mark and
- (iv) Whether the mark was registered under the Act of March 3, 1881, or the Act of February 20, 1905, or on the principal register.

15 U.S.C. § 1125(c).

famous; and (4) the defendant's use of the mark is likely to cause dilution by blurring or dilution by tarnishment." *Jada Toys, Inc. v. Mattel, Inc.*, 518 F.3d 628, 634 (9th Cir. 2007). Puma's Infringing Cleat is likely to dilute the distinctive quality of adidas's Three-Stripe Mark.

For the same reasons discussed above related to the strength of adidas's Three-Stripe Mark, adidas has already shown the fame and distinctiveness of that mark—it has been extensively and continuously used, promoted, marketed, and advertised; recent annual sales of products bearing the Three-Stripe Mark within the United States have totaled in excess of one billion dollars; consumers have come to recognize the "iconic" Three-Stripe Mark and goods bearing that mark as originating with adidas; the media repeatedly makes unsolicited reference to the Three-Stripe Mark and its connection to the adidas brand; and the Three-Stripe Mark is subject to numerous federal trademark registrations, including several incontestable registrations.

This Court repeatedly has held that the Three-Stripe Mark is famous based on virtually identical evidence to that presented here. *See Skechers*, 149 F. Supp. 3d at 1247 ("The Three-Stripe mark is unquestionably famous; past opinions from the District have thus held, and this Court agrees.") (internal citations omitted); *Payless I*, 529 F. Supp. 2d at 1245 ("adidas' Three-Stripe Mark is famous, and has been famous since as early as 1970. Indeed, this court has already recognized as much in two separate, but factually identical cases.") (citing *adidas Am., Inc. v. Kmart Corp.*, No. CV-05-120-ST, 2006 WL 2044857, at *12 (D. Or. June 15, 2006) (finding adidas's extensive use and marketing efforts to be sufficient evidence to withstand summary judgment on the issue of fame) and *Target*, 228 F. Supp. 2d at 1216 (same)).

adidas has also satisfied the remaining dilution factors. Puma unquestionably began selling the Infringing Cleat after the Three-Stripe Mark became famous, *see Vanderhoff Decl.* ¶ 8, Ex. E, and consumers indisputably perceive Puma's Infringing Cleat to be essentially the

same as adidas's Three-Stripe Mark,¹² thereby diluting the Three-Stripe Mark's source-identifying significance and value as a brand. *See Skechers*, 149 F. Supp. 3d at 1247-48.

3. adidas Is Suffering Irreparable Harm

The record is replete with significant and concrete evidence that Puma is causing adidas irreparable harm. *See generally* Bruce Decl. ¶¶ 22-27; Joachimsthaler Decl. ¶¶ 74-112. adidas has invested heavily in developing and cultivating, and has spent decades establishing, the Three-Stripe Mark and brand because they have significant benefits to adidas,¹³ including as a means to (1) differentiate adidas's products from those of others, (2) sustain relevance with and loyalty among adidas's target consumers, (3) build and sustain a competitive advantage in the increasingly crowded soccer footwear marketplace in which adidas actively competes with other brands for in-store retail space and digital media space, and (4) maintain positive associations (*e.g.*, quality) in the minds of consumers. Bruce Decl. ¶ 23; Joachimsthaler Decl. ¶¶ 17-20, 74-112.

When consumers are confused into believing the Infringing Cleat is an adidas shoe or that the Infringing Cleat is affiliated or associated with adidas, adidas loses the ability to control consumer interaction with and perception of its brand. Bruce Decl. ¶ 24; Joachimsthaler Decl. ¶¶ 88, 90-92, 99, 103-06, 109, 111. For example, the Three-Stripe Mark would no longer differentiate adidas products from Puma products and would not provide adidas with a

¹² *See Jada Toys, Inc.*, 518 F.3d at 634 (holding marks are identical if “a significant segment of the target group of customers sees the two marks as essentially the same”) (internal quotations and citations omitted); *Thane Int'l, Inc. v. Trek Bicycle Corp.*, 305 F.3d 894, 907 (9th Cir. 2002) (finding that a mark that incorporates the trademark owner's mark is identical or nearly identical for purposes of dilution); *Payless I*, 529 F. Supp. 2d at 1246 (“Although Payless' four-stripe designs are not identical to adidas'[s] Three-Stripe Mark, a reasonable fact-finder could conclude that the marks are ‘nearly identical’ or ‘essentially the same.’”).

¹³ *See* Joachimsthaler Decl. ¶¶ 14, 55 (noting adidas has been on Interbrand's list of top global brands for over fifteen years, and according to Interbrand, the adidas brand was valued at \$6.8 billion in 2015).

competitive advantage. Bruce Decl. ¶ 24; Joachimsthaler Decl. ¶¶ 88, 90-92, 99, 103-06, 109, 111.

Another example of potential harm to adidas is with regard to the unique associations consumers have with its brand. adidas has created and implemented numerous marketing campaigns and has affiliated itself with a number of carefully chosen athletes in order to create a unique and powerful brand identity for the Three-Stripe Mark and adidas. Bruce Decl. ¶ 25; Joachimsthaler Decl. ¶¶ 77-82, 84, 89, 94-96, 100, 102-03, 108. When another company, particularly a direct competitor such as Puma, uses similar stripes on its products, those associations become weakened or diluted and are no longer uniquely “adidas.” Bruce Decl. ¶ 25 Joachimsthaler Decl. ¶¶ 104, 106, 111.

Further, adidas does not control the imagery and messaging Puma uses to advertise or promote its products; as such, when consumers associate Puma and adidas based on the similarity of the trademarks on footwear they encounter, adidas loses the ability to control the positioning and goodwill of its own brand. Bruce Decl. ¶ 26; Joachimsthaler Decl. ¶¶ 91, 103, 106, 111. This directly affects consumer loyalty to the adidas brand. Bruce Decl. ¶ 26; Joachimsthaler Decl. ¶¶ 109, 111. adidas and Puma aggressively compete for limited shelf space at retail accounts, particularly in the critical Sporting Goods and Soccer Specialty channels. Bruce Decl. ¶ 26. When Puma is able to weaken customer or consumer loyalty or otherwise offer a product that uses branding similar to adidas (such as the four stripes on the Infringing Cleat), adidas’s positioning at retail is at risk. *Id.* These harms are irreparable and difficult if not impossible to quantify monetarily. *Id.* at ¶ 27; Joachimsthaler Decl. ¶ 110.

In sum, Puma, which competes directly with adidas,¹⁴ is threatening the substantial investment adidas has made in the Three-Stripe Mark by manufacturing footwear bearing

¹⁴ The fact that adidas and Puma are direct competitors in a crowded market also militates in favor of a finding of irreparable harm. Recently, the Third Circuit held that there was a likelihood of irreparable harm when the two products at issue “compete against each other ...

confusingly similar imitations of the Three-Stripe Mark. adidas is therefore suffering irreparable harm to its goodwill and reputation, and it will continue to suffer such irreparable harm in the absence of a preliminary injunction. *See Skechers*, 149 F. Supp. 3d at 1248 (“[I]nfringement undermines adidas’s substantial investment in building its brand and the reputation of its trademarks...”); *see also Treemo, Inc. v. Flipboard, Inc.*, 53 F. Supp. 3d 1342, 1367 (W.D. Wash. 2014) (finding irreparable harm where trademark owner had “invested substantial time and money in its specific design aesthetic”); *Well Care Pharm. II, LLC v. W’ Care, LLC*, No. 2:13-cv-00540-GMN-VCF, 2013 WL 3200111, at *8 (D. Nev. June 24, 2013) (“[T]he similarities between the marks and the identical market in which the parties operate will likely result in consumer confusion,” which “poses an ongoing risk of irreparable injury to Plaintiff’s goodwill and reputation.”); *Boldface Licensing + Branding v. By Lee Tillett, Inc.*, No. CV 12-10269-ABC-PJWX, 2013 WL 1685464, at *15 (C.D. Cal. Mar. 11, 2013) (defendant’s use of confusingly similar mark would likely result in lost business opportunities, customers, and goodwill).

Such harm is irreparable by its very nature because “[l]ike trying to un-ring a bell, trying to ‘compensate’ after the fact for damage to business goodwill and reputation cannot constitute a just or full compensation.” 5 MCCARTHY § 30:46. Thus, in the absence of a preliminary injunction, adidas will continue to suffer harm to its goodwill and reputation—*i.e.*, harm not compensable by money damages.

4. The Ongoing Injury to adidas Outweighs any Purported Harm to Puma

Because the likelihood of confusion and dilution factors strongly favor adidas, the balance of hardships also tips sharply in adidas’s favor. *See Ocean Garden, Inc. v. Marktrade*

[and] are often sold side-by-side on retail shelves.” *Groupe SEB USA, Inc. v. Euro-Pro Operating LLC*, 774 F.3d 192, 205 (3d Cir. 2014). Here, just like in the case before the Third Circuit, adidas and Puma are direct competitors, *see Vanderhoff Decl.* ¶ 11, and the two companies sell competing footwear through the same retail outlets. *See Bruce Decl.* ¶¶ 25-26.

Co., 953 F.2d 500, 508 (9th Cir. 1991) (affirming preliminary injunction). The potential loss of goodwill resulting from Puma's infringement of the Three-Stripe Mark tips the balance of hardships even further in adidas's favor. *See Dr. Seuss Enter., L.P. v. Penguin Books, U.S.A.*, 109 F.3d 1394, 1406 (9th Cir. 1997) (plaintiff's substantial goodwill outweighed defendant's expense).

In contrast, Puma has no legally protectable interest¹⁵ in continuing to misappropriate the Three-Stripe Mark and otherwise trade on adidas's goodwill. "Advantages built upon a deliberate plagiarized make-up do not ... give the borrower any standing to complain that his vested interests will be disturbed." *My-T Fine Corp. v. Samuels*, 69 F.2d 76, 78 (2d Cir. 1934) (Learned Hand, J.) (reversing denial of preliminary injunction); *see also Windsurfing Int'l v. AMF, Inc.*, 782 F.2d 995, 1003 n.12 (Fed. Cir. 1986) ("One who elects to build a business on a product found to infringe cannot be heard to complain if an injunction against continuing infringement destroys the business so elected."); *M'Otto Enter.*, 831 F. Supp. at 1504 ("There may well be harm to M'Otto from the issuance of an injunction on Redsand's behalf, but that harm occurs in the context of a party who took a calculated business risk that it would find itself in precisely such a position it will now occupy.").

As Judge Hernandez succinctly stated in a recent and factually similar case:

adidas has invested significant time, capital, and human resources in promoting and selling goods bearing its various marks. Without an injunction, Skechers can essentially free-ride off of these efforts, while at the same time undermining adidas's branding, quality control, and strategic planning.

¹⁵ Puma cannot point to any harm beyond being prohibited from selling the Infringing Cleat. Even if this harm were legally cognizable, Puma sells footwear bearing a variety of designs and under a variety of marks. Indeed, the Infringing Cleat represents just a tiny fraction of the footwear sold by Puma. Thus, if injunctive relief is granted, Puma will still be able to offer for sale the vast majority of its footwear and any purported harm would be negligible at best. *See Ocean Garden, Inc.*, 953 F.2d at 508 (affirming preliminary injunction where it would prevent defendants from using a confusingly similar mark and color combination).

Skechers, 149 F. Supp. 3d at 1250. In weighing Puma’s possible losses—*i.e.*, sales of infringing goods—against adidas’s possible losses—*i.e.*, the goodwill and reputation it has carefully cultivated—the balance weighs heavily in adidas’s favor.

5. A Preliminary Injunction Would Serve the Public Interest

An essential purpose of trademark law is to protect consumers from confusion. *See Entrepreneur Media, Inc.*, 279 F.3d at 1140 (“The Lanham Act provides national protection of trademarks in order to ... protect the ability of consumers to distinguish among competing producers.”) (quoting *Park ‘N Fly, Inc.*, 469 U.S. at 198). Because “adidas has made a strong showing that it is likely to succeed in proving that [Puma] is using marks that are confusingly similar or even identical to adidas’s marks,” and because the “very interest at issue in a trademark infringement case ... is avoiding the public from being confused or deceived about a product, the Court [should] find[] an injunction preventing [Puma] from selling these contested products will serve the public interest.” *Skechers*, 149 F. Supp. at 1251 (internal quotations omitted); *see also Brookfield Commc’ns, Inc.*, 174 F.3d at 1066 (granting preliminary injunction where plaintiff established a likelihood of confusion, finding that the preliminary injunction would “promote the public interest in protecting trademarks generally as well”); *see also Joachimsthaler Decl.* ¶¶ 21-31 (explaining benefits of brands to consumers).

D. CONCLUSION

For all of the foregoing reasons, to protect the public from confusion, and to prevent significant and irreparable harm to adidas, the Court should grant adidas’s motion for a preliminary injunction.

[Signature appears on following page.]

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