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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

THE BROOKLYN BREWERY
CORPORATION, a New York
Corporation,

Plaintiff,

v.

BLACK OPS BREWING, INC., a
California Corporation,

Defendant.

No. 1:15-cv-01656-GEB-EPG

**ORDER GRANTING PLAINTIFF'S
MOTION FOR PRELIMINARY
INJUNCTION**

Plaintiff The Brooklyn Brewery Corporation ("Plaintiff") moves for a preliminary injunction enjoining and restraining Defendant Black Ops Brewing ("Defendant") from using the marks "Black Ops Brewing," "Black Ops," and "blackopsbrewery.com." (Pl.'s Proposed Order Granting Prelim. Inj. 1:19-21, ECF No. 3-13.) Plaintiff has submitted evidence evincing that Plaintiff markets and sells a brand of beer bearing Plaintiff's registered trademark "Brooklyn Black Ops." (Ottaway Decl. ¶¶ 4, 5, ECF No. 3-7.) Plaintiff argues that Defendant's "continu[ed] [] use [of the marks] 'Black Ops' and 'Black Ops Brewing' despite having actual knowledge of Plaintiff's superior rights, [constitutes] deliberate[] infring[ement] [of] Plaintiff's [registered mark] and trad[es] on Plaintiff's goodwill." (Pl.'s Memo. of P & A in Supp. of Pl.'s Mot. for Prelim. Inj. ("Mot.")

1 6:22-25, ECF No. 3-1.) Plaintiff also argues: "Plaintiff will
2 continue to suffer irreparable harm due to Defendant's
3 intentional infringement [upon Plaintiff's registered mark] if
4 Defendant is not preliminarily enjoined from using 'Black Ops,'
5 'Black Ops Brewery' and all similar marks." (Id. 21:23-25.)

6 **I. FACTUAL BACKGROUND**

7 Plaintiff has submitted averments establishing that it
8 is a beer brewer located in New York that produces a brand of
9 beer sold under the mark "Brooklyn Black Ops." (Decl. of Eric
10 Ottaway ("Ottaway Decl.") ¶4, ECF No. 3-7.) The preliminary
11 injunction factual record also contains evidence evincing that
12 Plaintiff's "Brooklyn Black Ops" product is a Russian Imperial
13 Stout beer that is "aged for four months in bourbon barrels,
14 bottled flat, and re-fermented with Champagne yeast," and is
15 currently sold on a limited seasonal basis. (Broussard Decl., ¶
16 12, Ex. 39 & 40, ECF Nos. 18-1, 18-40, 18-41.)

17 Plaintiff declares it has sold beer under the mark
18 "Brooklyn Black Ops" since 2007 and currently "sells beer under
19 [this mark] in [twenty-seven] states." (Ottaway Decl. ¶¶ 4, 5.)
20 Plaintiff's evidence demonstrates it owns a federal trademark
21 registration for "Brooklyn Black Ops," which issued in 2009.
22 (Ottaway Ex. 5, ECF No. 3-12.) Plaintiff avers that it has sold
23 tens of thousands of cases of its "Brooklyn Black Ops" beer
24 during the last eight years. (Ottaway Decl. ¶ 4.) Plaintiff
25 further declares its beer is sold and promoted through
26 distributors, in carefully selected retail and specialty stores,
27 at bars and restaurants, and at festivals and entertainment
28 events. (Id.) Plaintiff also avers: "[Plaintiff] and [its]

1 customers and distributors, as well as others in the trade and in
2 the media, frequently refer to the beer as simply 'Black Ops,'
3 including when purchasing it at restaurants, bars and stores."
4 (Id.) Plaintiff declares that it has promoted its "Brooklyn
5 Black Ops" beer on its website and social media platforms,
6 through promotional events and sponsorships, print media, and
7 through promotions conducted by nationwide distributors and
8 retailers. (Id. ¶ 13.)

9 Plaintiff's averments evince that it is planning a
10 strategic launch of its entire beer portfolio, including its
11 "Brooklyn Black Ops" beer, in California, and is negotiating with
12 distributors and identifying potential retailers. (Id. ¶ 16.)

13 The preliminary injunction factual record establishes
14 that in 2015 Defendant opened a brewery called "Black Ops
15 Brewing". (Dabney Ex. 1, ECF No. 3-3.) Defendant avers that it
16 currently does not sell beer outside of Fresno County,
17 California. (Broussard Decl. ¶ 15.) Defendant further avers "it
18 uses the term 'Black Ops' only in conjunction with the name of
19 the brewery [; and that all of Black Ops Brewing's beers have
20 identifying names such as Valor, Shrapnel, and the Blonde
21 Bomber." (Id.) Plaintiff provides evidence demonstrating that the
22 term "Black Ops" appears on the label of each of the above-listed
23 Defendant produced beers. (Dabney Ex. 1.)

24 Further, Plaintiff provides evidence showing that on
25 March 24, 2015, Defendant applied for registration of the mark
26 "Black Ops Brewing" for beer and taproom services with the United
27 States Patent and Trademark Office ("PTO") on the Principal
28 Register. (Dabney Ex. 3, ECF No. 3-5.) On July 1, 2015 the PTO

1 issued an official letter rejecting Defendant's application.
2 (Dabney Ex. 4, ECF No. 3-6.) The PTO explained in the letter that
3 Defendant's mark "is highly similar in sound, appearance, meaning
4 and overall commercial impression to registrant's mark, Brooklyn
5 Black Ops." (Id.) The PTO also stated in the letter that the
6 parties' goods are identical (both beer), and that Defendant's
7 taproom services are related to the goods and services to which
8 Plaintiff's registered mark applies. (Id.) Further, the PTO
9 stated: "[i]t is likely that consumers will mistakenly believe
10 the goods and services emanate from the same source." (Id.) The
11 PTO also stated: "The overriding concern is not only to prevent
12 buyer confusion as to the source of the goods and services, but
13 to protect the [Plaintiff] from adverse commercial impact due to
14 use of a similar mark by a newcomer." (Id.)

15 Plaintiff provides evidence that supports its argument
16 that notwithstanding the PTO's rejection of Defendant's trademark
17 registration application, Defendant continues promoting and
18 selling beer and taproom services under the mark "Black Ops
19 Brewing." (Dabney Ex. 1.) Specifically, Plaintiff's evidence
20 shows that Defendant sells its beer through retail and specialty
21 stores, as well as at bars and restaurants; (Dabney Ex. 2, ECF
22 No. 3-4) and that Defendant advertises its beer and services on
23 its website at "blackopsbrewing.com" and on its Facebook page.
24 (Dabney Ex. 1 & 2.) Plaintiff avers that both Plaintiff and
25 Defendant's beer bottle products appear black as sold at retail,
26 are oversized, and are sold at retail in a single bottle, as
27 opposed to in six-packs. (Ottaway Decl. ¶¶ 10, 15.)

28 Plaintiff also avers that on July 20, 2015, Plaintiff

1 sent Defendant a letter demanding that Defendant cease all use of
2 the marks "Black Ops" and "Black Ops Brewing." (Dabney Decl. ¶
3 9.) Plaintiff has also provided evidence that Plaintiff renewed
4 its cease and desist demand on August 27, 2015. (Id.) Plaintiff's
5 evidence shows that Defendant continues using the marks to
6 promote and sell beer and taproom services. (Dabney Ex. 1 & 2.)

7 **II. LEGAL STANDARD**

8 To obtain a preliminary injunction, Plaintiff "must
9 establish that [(1)] [it] is likely to succeed on the merits,
10 [(2)] that [it] is likely to suffer irreparable harm in the
11 absence of preliminary relief, [(3)] that the balance of equities
12 tips in [its] favor, and that [(4)] an injunction is in the
13 public interest." See Serv., Inc. v. Winsor Grain, Inc., 868 F.
14 Supp. 2d 998, 1001 (E.D. Cal. 2012). A preliminary injunction is
15 considered an "extraordinary remedy that may only be awarded upon
16 a clear showing that the plaintiff is entitled to such relief."
17 Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 22 (2008).

18 **III. DISCUSSION**

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

20 Plaintiff's Complaint consists of two claims under the
21 Lanham Act and two California state claims, all of which are
22 premised upon trademark infringement allegations. These claims
23 are "substantially congruent" and therefore they can all be
24 analyzed under the federal trademark Lanham Act. Clearly v. News
25 Corp., 30 F.3d 1255, 1263 (9th Cir. 1994).

26 To establish a trademark infringement claim under the
27 Lanham Act, Plaintiff "must prove: (1) that it has a protectable
28 ownership interest in the mark; and (2) that the defendant's use

1 of the mark is likely to cause consumer confusion.'" Network
2 Automation , Inc. v. Advanced Sys. Concept, Inc., 638 F.3d 1137,
3 1144 (9th Cir. 2011) (quoting Dep't of Parks & Recreation v.
4 Bazaar Del Mundo Inc., 448 F.3d 1118, 1124 (9th Cir. 2006)).

5 **1. Plaintiff's Protectable Ownership Interest in the**
6 **Marks**

7 Plaintiff argues: "With respect to the first element
8 for infringement, Plaintiff owns an **incontestable** federal
9 registration for 'Brooklyn Black Ops'" and cites to Exhibit 5
10 attached to the Ottaway Declaration (ECF No. 3-12) in support of
11 its argument. Mot. 9:2-5. This exhibit shows Plaintiff owns a
12 federal trademark registration for the mark "Brooklyn Black Ops,"
13 which issued for beer in 2009.¹ Under the Lanham Act "[a] mark
14 attains incontestable status in a category if the registrant
15 continuously uses the mark for five consecutive years after
16 registering it in that category" Entrepreneur Media, Inc.
17 v. Smith, 279 F.3d 1135, 1139 n.1 (9th Cir. 2002) (citing Lanham
18 Trade-Mark Act, 15 U.S.C. § 1065²). Plaintiff avers that it has
19 continuously sold, and continues to sell, its "Brooklyn Black
20 Ops" product since the mark's registration in 2009. (Ottaway
21 Decl. ¶¶ 4,5.) Therefore, Plaintiff's evidence demonstrates that
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23 ¹ Plaintiff also supports its likelihood of success argument by contending it
24 "owns a common law mark for 'Black Ops' for beer." (Mot. 9:10.) Defendant
25 counters that "[c]ommon law trademarks are only enforceable within the
26 geographic region where the trademark owner was using it in business." (Opp'n
27 11:2-4 (citing Optimal Pets, Inc. v. Nutri-Vet, LLC, 877 F. Supp. 2d 953, 958-
28 59 (C.D. Cal. 2012)).) However, this issue need not be decided in light of
rulings on other issues.

² 15 U.S.C. § 1065 prescribes: ". . . the right of the owner to use [its]
registered mark in commerce for the goods or services on or in connection with
which such registered mark has been continuous for five consecutive years
subsequent to the date of such registration and is still in use in commerce,
shall be incontestable . . .".

1 it owns an incontestable federal registration for "Brooklyn Black
2 Ops" for beer.

3 When a mark achieves incontestable registration status,
4 15 U.S.C. § 1115(b) prescribes that this status is "prima facie
5 evidence of the validity of the registered mark and of the
6 registration of the mark, of the registrant's ownership of the
7 mark, and of the registrant's exclusive right to use the
8 registered mark in commerce or in connection with the goods or
9 services specified in the registration." Accordingly, Plaintiff
10 has demonstrated it has a protectable ownership interest in its
11 "Brooklyn Black Ops" mark.

12 **2. Likelihood of Consumer Confusion**

13 Plaintiff further argues that "[w]ith respect to the
14 second element for infringement, Defendant's use of 'Black Ops'
15 and 'Black Ops Brewing' (collectively, 'Defendant's Marks')
16 creates a likelihood of confusion with . . . Plaintiff's Brooklyn
17 Black Ops . . . mark[]." (Mot. 10:2-6.)

18 Defendant counters: "there is simply no merit to the
19 Plaintiff's bare assertion of public confusion between the
20 Plaintiff's 'Brooklyn Black Ops' aged Russian Imperial Stout
21 product and Defendant's products merely because 'Black Ops'
22 appears on the label." (Def.'s Opp'n to Pl.'s Mot. for Prelim.
23 Inj. ("Opp'n") 1:15-18, ECF No. 18.)

24 "[T]he likelihood of confusion is the central element
25 of a trademark infringement action." CytoSport, Inc. v. Vital
26 Pharm., Inc., 617 F. Supp. 2d 1051, 1065 (E.D. Cal. 2009). In AMF
27 Inc. v. Sleekcraft Boats, the Ninth Circuit developed the
28 following eight factors to guide the determination of likelihood

1 of confusion:

- 2 1. strength of the mark;
- 3 2. proximity of the goods;
- 4 3. similarity of the marks;
- 5 4. evidence of actual confusion;
- 6 5. marketing channels used;
- 7 6. type of goods and degree of care likely to be
- 8 exercised by the purchaser;
- 9 7. Defendant's intent in selecting the mark; and
- 10 8. likelihood of expansion of the product lines.

11 AMF Inc. v. Sleekcraft Boats, 599 F.2d 341, 348-349 (9th Cir.

12 1979), abrogated on other grounds by Mattel, Inc. v. Walking

13 Mountain Prod., 353 F.3d 792, 810 n.19 (9th Cir. 2003).

14 "The list of factors is not a scorecard – whether a

15 party 'wins' a majority of the factors is not the point. Some

16 factors are much more helpful than others, and the relative

17 importance of each individual factor will be case specific. [I]t

18 is often possible to reach a conclusion with respect to

19 likelihood of confusion after considering only a subset of the

20 factors." Thane Int'l v. Trek Bicycle Corp., 305 F.3d 894, 901

21 (9th Cir. 2002) (citations and internal quotations omitted).

22 **a. Strength of the Mark**

23 "Trademark law offers greater protection to marks that

24 are 'strong,' i.e., distinctive. The strength of a mark is

25 determined by its placement on a 'continuum of marks from

26 'generic,' afforded no protection; through 'descriptive' or

27 'suggestive,' given moderate protection; to 'arbitrary' or

28 'fanciful' awarded maximum protection.'" E. & J. Gallo Winery v.

1 Gallo Cattle Co., 967 F.2d 1280, 1291 (9th Cir. 1992) (quoting
2 Nutri/Sys., Inc. v. Con-Stan Indus., Inc., 809 F.2d 601, 605 (9th
3 Cir. 1987)). "Arbitrary marks are common words that have no
4 connection with the actual product – for example, 'Dutch Boy'
5 paint." Gerawan Farming, Inc. v. Prima Bella Produce, Inc., No.
6 CV F 10-0148 LJO JLT, 2011 WL 3348056 at *17 (E.D. Cal. Aug. 2,
7 2011) (citing Dreamwerks Prod. Grp., Inc. v. SKG Studio, 142 F.3d
8 1127, 1130, n. 7 (9th Cir. 1998)).

9 Plaintiff argues it "selected the name 'Black Ops' to
10 refer to a 'secret mission or campaign carried out by a military,
11 governmental, or other organization.'" (Mot. 3:8-11.) Plaintiff
12 contends its mark is "arbitrary because 'Black Ops' does **not**
13 describe or suggest the nature or character of Plaintiff's beer."
14 (Id. 17:5-7.)

15 Defendant counters: "As 'Brooklyn' refers to the
16 geographic area and brewery that produces the product, 'Black'
17 refers to a dark beer, and 'Ops' is suggestive of hops, an
18 ingredient in beer; the mark is, at best, merely suggestive."
19 (Opp'n 12:14-16.)

20 Plaintiff replies that that Defendant "improperly
21 dissects" the unitary phrase "Black Ops". (Pl.'s Reply in Supp.
22 of Mot. for Prelim. Inj. ("Reply") 2:14 n. 1, ECF No. 21.)

23 "A court may not review the validity of a composite-
24 term trademark by 'dissecting' the term and reviewing the
25 validity of its component parts individually." Self-Realization
26 Fellowship Church v. Ananda Church of Self-Realization, 59 F.3d
27 902, 912 (9th Cir. 1995). Plaintiff's mark "Brooklyn Black Ops,"
28 taken as a whole, does not describe or suggest a particular

1 quality of Plaintiff's beer. Plaintiff's mark "consists of common
2 words arranged in an arbitrary way that is non-descriptive of any
3 quality of [its product and is therefore] arbitrary and is
4 'awarded maximum protection.'" Off. Airline Guides, Inc. v. Goss,
5 6 F.3d 1385, 1390 (9th Cir. 1993).

6 **b. Proximity of the Goods**

7 The "proximity of the goods" factor concerns the
8 relatedness of goods. "For related goods, the danger presented is
9 that the public will mistakenly assume there is an association
10 between the producers of the related goods, though no such
11 association exists." Sleekcraft, 599 F.2d at 350. "The more
12 likely the public is to make such an association, the less
13 similarity in the marks is requisite to a finding of likelihood
14 of confusion." Id.; see also CytoSport, Inc., 617 F.Supp.2d at
15 1066, aff'd, 348 Fed. Appx. 288 (9th Cir. 2009) ("It is well
16 established that the greater the similarity between the products
17 or services, the greater the likelihood of confusion.") "Thus,
18 less similarity between the marks will suffice when the goods are
19 complementary, the products are sold to the same class of
20 purchasers, or the goods are similar in use and function." Id.
21 (internal citations omitted).

22 Plaintiff argues: "[t]he parties offer identical
23 products – beer – under their marks." (Mot. 14:14.)

24 Defendant counters:

25 The Plaintiff's "Brooklyn Black Ops" is a
26 highly specialized product (a Russian
27 Imperial Stout beer that is "*aged for four
28 months in bourbon barrels, bottled flat, and
re-fermented with Champagne yeast*") that
sells for \$29.99 a bottle. See, e.g., Pom
Wonderful, LLC v. Robert G. Hubbard, 775 F.3d

1 1118, 1127 (9th Cir. 2014)(purchasers of more
2 expensive goods are expected to be more
3 discerning and less likely to be confused).
4 On the other hand, Defendant Black Ops
5 Brewing, Inc. does not make any aged beers or
6 Russian Imperial Stouts. Instead, its beers
7 retail for less than \$7.00 a bottle and
8 consist of far less exotic fare; such as
9 IPAs, browns, and reds. Significant
10 differences in price decreases the likelihood
11 of confusion. L.A. Gear, Inc. v. Thorn McAn
12 Shoe Co., 988 F.2d 1117, 1134 (Fed. Cir.
13 1993).

14 (Opp'n 12:28-13:9.)

15 Both Plaintiff and Defendant use the mark in connection
16 with the sale of beer. Therefore, this factor 'weighs heavily' in
17 favor of finding a likelihood of confusion. See Sweetwater
18 Brewing Co., LLC v. Great Am. Rests., Inc., 266 F. Supp. 2d 457,
19 463 (E.D. Va. 2003)(finding infringement as a matter of law
20 because each party sold microbrews); see also Anheuser-Busch,
21 Inc. v. Caught-on-Bleu, Inc., 288 F.Supp.2d 105, 118 (D.N.H.
22 2003), aff'd, 105 Fed. Appx. 285 (1st Cir. 2004)(finding no
23 distinction between ale and lager for likelihood of confusion
24 purposes because they are both "beers").

25 **c. Similarity of the Marks**

26 "Similarity of the marks is tested on three levels:
27 sight, sound, and meaning. Each must be considered as they are
28 encountered in the marketplace. Although similarity is measured
by the marks as entities, similarities weigh more heavily than
differences." Sleekcraft, 599 F.2d at 351.

Each party's mark appears on the products respective
photographed below:

Plaintiff:

Defendant:

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Plaintiff contends that "the . . . marks are identical or substantially identical in sight, sound and meaning." (Mot. 11:9-10.) Specifically Plaintiff argues:

On beer bottles, Plaintiff's mark "Black Ops" is displayed in all-capitalized, large-block, white letters, with "Brooklyn" in smaller, deemphasized letters and coloring. (See, eg., Ottaway Decl. ¶ 10 & Ex. 1.) On beer bottles, Defendant's mark "Black Ops" is displayed in all-capitalized, large-block, white letters, with "Brewing, Inc." in smaller letters. (See, e.g., Dabney ex. 2 at p. 11.) "Black Ops" is spelled and pronounced identically in the parties' marks. The size and the color of the parties' bottles themselves are substantially similar, as both bottles are over-sized and appear black while on sale at retail with liquid in them. (Ottaway Decl. ¶¶ 10, 15 & Ex. 1; Dabney Ex. 2 at p. 11.) The parties' beer bottles are sold at retail as singles. (Id.) . . . Thus the parties' marks are substantially identical in sight, sound and meaning.

(Mot. 11:22-12:7.)

Moreover, "[i]t is well settled that if a mark comprises both a word and a design, then the word is normally accorded greater weight, because it would be used by purchasers to

1 request the goods." . . . This is
2 particularly the case with alcohol beverages,
3 which are "frequently purchased at bars and
clubs without the purchaser seeing any
bottles or labels."

4 (Mot. 12:16-13:8-10 (internal citations omitted).)

5 Defendant counters that "[i]n this dispute, the names
6 and logos of the parties are not the same." (Opp'n 14:5.)
7 Specifically Defendant rejoins:

8 The Plaintiff utilizes a large circular logo
9 featuring a prominently displayed white "B"
on a green circle backdrop, with "Brooklyn"
10 in large capitalized letters over it, and
"Brewery" capitalized on the bottom. It does
11 not utilize "Black" or "Ops" in its trade
name. Its "*Brooklyn Black Ops*" aged Russian
12 Imperial Stout product uses a completely
black 750 ml bottle and a champagne style
13 cork closing device. The bottle features a
large silver circle logo with a stylized "B"
14 in the center and a prominent label bearing
the name "*Brooklyn Black Ops*." It also
15 features a second stylized "B" in raised
relief using a circle emblem.

16 In contrast, the Defendant's beers have
17 identifying names like the "*Blonde Bomber*,"
"*Recon Red*," "*Bayonet Brown*," and "*Shrapnel*."
18 . . . Its emblem is red, white and blue and
reminiscent of aviator wings. The Defendant's
19 bottles are standard 22 oz. amber bottles,
topped with a standard bottle cap; that
20 prominently feature the individual product
names and labels. It uses the term "Black
21 Ops" only in conjunction with the name of the
brewery.

22 (Opp'n 14:5-21.)

23 "[I]n the case of alcoholic beverages, the degree of
24 similarity need not be as high as usual since the likelihood of
25 confusion is greater because drinks are frequently purchased at
26 bars and clubs without the purchaser seeing any bottles or
27 labels." A. Smith Bowman Distillery, Inc. v. Schenley Distillers,
28 Inc., 198 F.Supp. 822, 827-828 (D. Del. 1961). Defendant points

1 to differences between the labels. However, the sounds and
2 meanings of the two marks are identical. Further, alcoholic
3 beverages are often consumed in environments in which similarity
4 in sound and meaning are likely to factor heavily in building
5 consumer brand recognition and trademark association. *Id.*
6 Therefore, this factor weighs in favor of finding a likelihood of
7 confusion.

8 **d. Evidence of Actual Confusion**

9 "Evidence that the use of the two marks has already led
10 to confusion is persuasive proof that future confusion is
11 likely." Sleekcraft, 599 F.2d at 352. However, "[b]ecause of the
12 difficulty in garnering such evidence, the failure to prove
13 instances of actual confusion is not dispositive." *Id.* at 353.
14 "Consequently, this factor is weighed heavily only when there is
15 evidence of past confusion, or perhaps, when the particular
16 circumstances indicate such evidence should have been available."
17 *Id.*

18 Plaintiff argues: "Plaintiff does not yet have evidence
19 of actual confusion, as Defendant has just commenced sales and
20 its volume is relatively low. Moreover, Plaintiff will not
21 commence sales in California until 2016. Thus, this factor is
22 neutral in the likelihood of confusion analysis." (Mot. 20:24-
23 21:1.)

24 This factor weighs against finding of a likelihood of
25 confusion.

26 **e. Marketing Channels Used**

27 "Convergent marketing channels increase the likelihood
28 of confusion." Sleekcraft, 599 F.2d at 353. "In assessing

1 marketing channel convergence, courts consider whether the
2 parties' customer bases overlap and how the parties advertise and
3 market their products." Pom Wonderful LLC v. Hubbard, 775 F.3d
4 1118, 1130 (9th Cir. 2014). "Marketing channels can converge even
5 when different submarkets are involved so long as 'the general
6 class of . . . purchasers exposed to the products overlap.'" Id.

7 Plaintiff contends:

8 Defendant's beer is promoted and sold in the
9 same trade channels where Plaintiff's beer is
10 sold, and in some of the same stores where
11 Plaintiff's beer is likely to be sold.
12 Further, the parties use similar promotional
13 methods, including their respective websites
14 and Facebook, to promote their beers.
15 Finally, the parties' products are craft beer
16 which is marketed to the same class of
17 consumers. Thus, the parties' trade channels
18 are nearly identical.

19 (Mot. 16:7-16 (internal citations omitted).)

20 Plaintiff argues that it is "negotiating with
21 California distributors to commence distribution of its 'Brooklyn
22 Black Ops' . . . beer in 2016, at which time Plaintiff's beer
23 will be available in retail stores, bars, and restaurants
24 throughout California." (Mot. 15:25-28.)

25 Defendant rejoins:

26 [T]he parties do not share the same marketing
27 channels. The Plaintiff uses distributors and
28 sells its products east of the Mississippi.
It has not sold its goods on the West Coast,
including California. On the other hand, the
Defendant's goods are sold only in Fresno
County, California. It has no sales force or
distributors. Approximately three (3)
restaurants (in Fresno and Clovis,
California) carry its beer on tap and two
stores (both in Fresno) sell bottles of its
beer. The Defendant has never sold any of its
products outside of Fresno County, California
and thus, it has never sold any beer in any
location where "Brooklyn Black Ops" aged

1 Russian Imperial Stout, or any other of the
2 Plaintiff's products are available.

3 (Opp'n 15:23-16:4.)

4 Both parties utilize online social media to promote
5 their beer, and distribute their alcohol through retail stores
6 and restaurants. Moreover, Plaintiff is in the process of
7 negotiating with distributors for its product in California and
8 identifying potential retailers so that it could expand sales of
9 its "Brooklyn Black Ops" Russian Imperial Stout to California.
10 Where a federal registrant evinces a "present likelihood that the
11 federal registrant will expand [its product's] use into the area
12 of use of the intrastate user" the registrant is "entitled under
13 the authority of the Lanham act to injunctive relief." Mister
14 Donut of America, Inc. v. Mr. Donut, Inc., 418 F.2d 838, 844 (9th
15 Cir. 1969). Therefore the marketing channels converge factor
16 weighs in favor of finding a likelihood of confusion.

17 **f. Type of Goods and the Degree of Care Likely to**
18 **be Exercised by the Purchaser**

19 "We examine the relatedness of the parties' goods
20 because the more closely related the goods are, the more likely
21 consumers will be confused by similar marks . . . Related goods
22 are those products which would be reasonably thought by the
23 buying public to come from the same source if sold under the same
24 mark. In practice, this definition does not necessarily require a
25 close proximity before goods will be found related." Entrepreneur
26 Media, Inc. v. Smith, 279 F.3d 1135, 1147(9th Cir.
27 2002)(citations and quotations omitted).

28 Plaintiff argues in relevant part: "The goods here are

1 craft beers, which retail for under \$30. These 'common consumer
2 items' are regularly purchased by consumers not exercising a high
3 degree of care." (Mot. 18:19-22.)

4 Plaintiff further contends:

5 [T]he conditions under which consumers
6 purchase beers are frequently so "chaotic"
7 and "impuls[ive]" that less similarity
8 between marks used on beer is needed for a
9 finding of likelihood of confusion than the
10 similarity required for other types of
11 products. Guinness, 2002 WL 1543817 at * 6
("chaotic conditions under which alcoholic
beverages are purchased in bars, and the
impulse nature of these purchases" support a
likelihood of confusion - granting
preliminary injunction); . . .

12 (Id. 19:7-13.)

13 Defendant counters that Plaintiff's "Brooklyn Black
14 Ops" beer "sells for \$29.99 a bottle" and "[a] craft beer
15 consumer who is willing to pay over \$29.00 a bottle for a premium
16 Russian Imperial Stout . . . is not likely to mistake a blonde or
17 an IPA produced by Black Ops Brewing for such a premium and
18 specialized product simply because somewhere on the bottle, the
19 words 'Black Ops' can be found." (Opp'n 16:27-17:4.)

20 In assessing the likelihood of confusion to
21 the public, the standard used by the courts
22 is the typical buyer exercising ordinary
23 caution. Although the wholly indifferent may
24 be excluded, the standard includes the
25 ignorant and the credulous. When the buyer
26 has expertise in the field, a higher standard
is proper though it will not preclude a
finding that confusion is likely. Similarly,
when the goods are expensive, the buyer can
be expected to exercise greater care in his
purchases; again though confusion may still
be likely.

27 Sleekcraft, 599 F.2d at 353 (internal citations omitted).

28 Beer is a "common consumer[] item[] and [is] often

1 purchased several times a year[;] [a] reasonable consumer . . .
2 is [therefore] unlikely to exercise a high degree of care in
3 selecting" beer. K-Swiss, Inc. v. USA AISIQI Soes Inc., 291 F.
4 Supp. 2d 1116, 1125 (C.D. Cal. 2003); see also Guinness United
5 Distillers & Vintners B.V. v. Anheuser-Busch, Inc., No. 02
6 CIV.0861(LMM), 2002 WL 1543817, at *6 (July 12, 2002) ("[High
7 end] [b]eer and scotch are relatively low cost products, and the
8 average consumer is not likely to seek to identify the true
9 manufacturer of these products."). Therefore, due to the
10 relatively inexpensive nature of the parties' beer products and
11 the "chaotic" environment in which the parties' products are
12 likely to be purchased this factor weighs in favor of finding a
13 likelihood of confusion.

14 **g. Defendant's Intent in Selecting the Mark**

15 "When the alleged infringer knowingly adopts a mark
16 similar to another's, reviewing courts presume that the defendant
17 can accomplish his purpose: that is, that the public will be
18 deceived." Sleekcraft, 599 F.2d at 354.

19 Defendant argues that "[a]t the time of the selection
20 of the name, the Defendant was not aware of the existence of
21 Plaintiff['s mark]" (Opp'n. 17:11-12.) "[T]he Defendant
22 selected 'Black Ops Brewing, Inc.' for its name to honor the
23 owners family members' military service and because their friends
24 and neighbors serve in the local military installations." (Id.
25 17:8-10.) Even though the injunctive record supports Defendant's
26 assertion that it selected its mark in good faith, Defendant
27 continued using its mark after it became aware of Plaintiff's
28 registered mark. Although "[g]ood faith is less probative of the

1 likelihood of confusion, [and] may be given considerable weight
2 in fashioning a remedy," the good faith Defendant has shown in
3 its initial selection of the mark does not cause this factor
4 weighs in Defendant's favor. Sleekcraft, 599 F.2d at 354.

5 **h. Balance of the Pertinent Sleekcraft Factors**

6 Having examined the pertinent Sleekcraft factors, the
7 injunctive record evinces that Defendant's use of the marks
8 "Black Ops Brewing," "Black Ops," and "blackopsbrewery.com." is
9 "creates a likelihood that the consuming public will be confused
10 as to who makes what product." Thane Intern., 305 F.3d at 901.

11 **B. Irreparable Harm**

12 "To be entitled to injunctive relief, it is not
13 sufficient that [P]laintiff demonstrate a likelihood of success
14 on the merits of its claims. Plaintiff must also demonstrate that
15 absent the injunction, it will be irreparably harmed by
16 [D]efendant's alleged infringing conduct." CytoSport, 617 F.
17 Supp. 2d at 1080.

18 Plaintiff contends:

19 Plaintiff will continue to suffer irreparable
20 harm due to [D]efendant's intentional
21 infringement if Defendant is not
22 preliminarily enjoined from using "Black
23 Ops," "Black Ops Brewery" and all similar
24 marks. Plaintiff is planning its strategic
25 and long-anticipated launch of its entire
26 beer portfolio, including its popular "Black
27 Ops" beer, in California. Defendant's acts
28 have robbed Plaintiff of control over the
reputation of the beer sold under the "Black
Ops" mark - a reputation which Plaintiff has
spent eight years and a substantial amount of
resources building and carefully cultivating
- at a time when Plaintiff is most relying on
that reputation to support its expansion.

(Mot. 21:23-22:4.)

1 Plaintiff further argues that "California consumers who
2 anticipate the availability of Plaintiff's 'Black Ops' brand in
3 California will be misled by Defendant's preemptive flooding of
4 the California market with its imposter brand." (Id. 22:23-26.)
5 Plaintiff contends: "retailer interest in carrying Plaintiff's
6 beer is likely to be weakened by the existence of Defendant's
7 brand, as retailers are likely to perceive the parties' brands to
8 be the same or interchangeable." (Id. 23:3-5.)

9 Moreover, Plaintiff argues:

10 Because Plaintiff does not control the retail
11 establishments to which Defendant sells
12 "Black Ops" beer, the irreparable injury to
13 Plaintiff is substantially magnified because
14 the cache and aura around which Plaintiff's
15 "Black Ops" brand has been built will be
16 destroyed, which will cause the further loss
17 of customers and goodwill. Finally in this
18 regard, consumers who are unsatisfied with
19 Defendant's "Black Ops" beer will be unlikely
20 to purchase Plaintiff's "Black Ops" beer
21 thinking that it is connected with the "Black
22 Ops" beer that they did not enjoy.

23 (Id. 23:12-19 (internal citations omitted).)

24 Defendant counters: "Plaintiff's motion fails to
25 provide any evidence, let alone the required clear showing that
26 it will be immediately irreparably harmed if a preliminary
27 injunction does not issue." (Opp'n 19:3-5.)

28 In trademark cases, courts have found
irreparable harm in the loss of control of a
business's reputation, a loss of trade and
loss of goodwill. Opticians Ass'n of Am. v.
Indep. Opticians of Am., 920 F.2d 187, 195
(3rd Cir. 1990). Trademarks serve as the
identity of their owners and in them resides
the reputation and goodwill of their owners.
Thus, if another person infringes the marks,
that person borrows the owner's reputation
whose quality no longer lies within the
owner's control. Id. A trademark owner's loss

1 of the ability to control its marks, thus
2 create the potential for damage to its
3 reputation. Id. at 196.

4 CytoSport, Inc., 617 F. Supp. 2d at 1080.

5 In the context of trademark law, a finding of
6 irreparable harm must be grounded in evidence not in conclusory
7 or cursory allegations. Herb Reed Enterprises, LLC v. Florida
8 Entertainment Management, Inc., 736 F.3d 1239, 1249-1251 (9th
9 Cir. 2013), cert denied, 135 S. Ct. 57 (2014).

10 Plaintiff evidence demonstrates that Defendant's use of
11 the marks "Black Ops Brewing," "Black Ops," and
12 "blackopsbrewery.com." will cause Plaintiff to lose its ability
13 to control its brand reputation and goodwill, since what could be
14 perceived by consumers as the quality of Plaintiff's product
15 risks no longer being within Plaintiff's control. In trademark
16 cases, courts have found irreparable harm in the loss of control
17 of a business's reputation, a loss of trade and loss of goodwill.
18 CytoSport, Inc., 617 F. Supp. 2d at 1080.

19 "Irreparable harm must be of a peculiar nature, so that
20 compensation in money alone cannot atone for it. Grounds for
21 finding irreparable injury include loss of control of reputation,
22 loss of trade, and loss of good will." Opticians Ass'n of America
23 v. Independent Opticians of America , 920 F.2d 187, 195 (3d Cir.
24 1990). If Defendant uses Plaintiff's mark, Defendant "borrows
25 the [Plaintiff's] reputation, whose quality no longer lies within
26 [Plaintiff's] own control. This is an injury, even though the
27 borrower does not tarnish it, or divert any sales by its use" and
28 "creates the potential for damage to [Plaintiff's] reputation.
Potential damage to reputation constitutes irreparable injury for

1 the purpose of granting [Plaintiff's request for] a preliminary
2 injunction" Id.

3 **C. Balance of the Equities**

4 Plaintiff argues: "Any potential harm to Defendant that
5 may result from being preliminarily enjoined from infringing
6 Plaintiff's marks - an unlawful activity - is legally irrelevant
7 in light of Plaintiff's overwhelming likelihood of success on the
8 merits and the massive irreparable harm caused to Plaintiff by
9 Defendant's conduct." (Mot. 8-12.)

10 Defendant counters:

11 Here, the Plaintiff does not sell any beer in
12 this state, let alone the sole county where
13 the Defendant operates. In the highly
14 unlikely event that any consumer is somehow
15 confused between the Defendant's beer and the
16 Plaintiff's "Brooklyn Black Ops" aged Russian
17 Imperial Stout product, then the Plaintiff as
the more established and sizable business can
easily address such minor identity problems.
Therefore, the balance of the hardships also
weighs heavily against the issuance of a
preliminary injunction.

18 (Opp'n 20:4-9.)

19 Any harm suffered by Defendant will result from being
20 enjoined from engaging in unlawful trademark infringement. See
21 Triad Sys. Corp. v. Southeastern Express Co., 64 F.3d 1330, 1338
22 (9th Cir. 1994) (Defendant "cannot complain of the harm that will
23 befall it when properly forced to desist from its infringing
24 activities.") Therefore the balance of equities weighs in favor
25 of Plaintiff.

26 **D. Public Interest**

27 "In the trademark context, courts often define the
28 public interest at stake as the right of the public not to be

1 deceived or confused." CytoSport, 617 F. Supp. 2d at 1081.

2 Plaintiff has demonstrated a likelihood of consumer
3 confusion. Therefore, the public interest weighs in favor of
4 issuing a preliminary injunction.

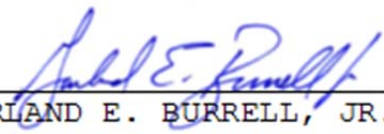
5 **IV. CONCLUSION**

6 For the foregoing reasons, Plaintiff's motion for a
7 preliminary injunction is GRANTED upon the terms set forth as
8 follows:

9 1. Plaintiff The Brooklyn Brewery Corporation shall post a
10 bond in the amount of \$85,000.00 with the Clerk within
11 fourteen (14) days from the date on which this Order is
12 filed. The injunction shall be effective immediately upon
13 the Court's receipt of Plaintiff's bond.

14 2. Defendant Black Ops Brewing, Inc., its principals,
15 employees, owners, agents, officers, directors,
16 attorneys, representatives, affiliates, subsidiaries, and
17 successors and assigns, and all those in active concert
18 or participation with any of them, are preliminary
19 enjoined and restrained from using the marks "Black Ops
20 Brewing," "Black Ops," "blackopsbrewery.com," or any
21 other mark that infringes or unfairly competes with
22 Plaintiff's "Brooklyn Black Ops" mark.

23 Dated: January 6, 2016

24
25 
26 _____
27 GARIAND E. BURRELL, JR.
28 Senior United States District Judge