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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

9 FLP LLC,

10 Plaintiff,

11 v.

12 Kimberly Wolf,

13 Defendant.

No. CV-17-00214-PHX-DGC
CV-17-00773 PHX DGC
(Consolidated)

ORDER

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15 Plaintiff FLP LLC moves for a preliminary injunction prohibiting Defendant
16 Kimberly Wolf and her company Liv-It! LLC (“Liv-It”) from using FLP’s federally
17 registered trademark, “LIVIT”. Doc. 62. Ms. Wolf moves to strike a footnote from
18 FLP’s reply. Doc. 70. The motions are fully briefed, and no party requests oral
19 argument. For the reasons stated below, the Court will deny both motions.¹

20 **I. Background.**

21 FLP and Liv-It are competing companies in the houseware industry. Both sell
22 their products to retail stores which then sell directly to consumers. FLP sells its products
23 under many names and trademarks. Doc. 62 at 2. FLP alleges that its chief executive
24 officer first thought of using the names “LIVE IT” and “LIVIT” in 2001, and finalized
25 artwork and a business plan for the names in August 2015. *Id.* at 2-3. In September
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28 ¹ The Court notes that FLP cites no legal basis for its requested injunctions against
Liv-It and Thomas Wolf who are not named as defendants in FLP’s complaint or
amended complaint. *See* Docs. 1, 36.

1 2015, FLP contracted for the manufacture of 266,400 product units “of the type FLP sells
2 in its usual course of business” with the “LIVIT” name displayed on the packaging. *Id.*
3 at 3.

4 Later that month, FLP filed an application with the U.S. Patent and Trademark
5 Office (“USPTO”) for trademark protection of the standard character mark “LIVE IT”.
6 *Id.* at 3-4. In November 2015, FLP also applied for trademark protection of the mark
7 “LIVIT” (the “Mark”). *Id.* at 4. Ms. Wolf then applied for trademark protection of the
8 mark “Liv-It!” in December 2015. *Id.* In October 2016, the USPTO granted FLP’s
9 application for “LIVIT” and suspended action on Ms. Wolf’s application for “Liv-It!”
10 because FLP’s application was filed first. *Id.* at 7. FLP abandoned its application for the
11 “LIVE IT” mark. *See* Doc. 64-1 at 19-20.

12 In February 2016, FLP discovered that Ms. Wolf was using the Mark on Liv-It’s
13 products and stopped using the Mark “to mitigate any losses that might occur because of
14 a potential challenge to the FLP Mark by the Wolf Parties.” Doc. 62 at 5. FLP submits
15 photographs of Liv-It’s products and website reflecting the Mark, some of which display
16 the ® symbol next to the Mark. Doc. 62-1 at 3-5, 16, 18-21. FLP alleges that it has sold
17 “tens of thousands of products bearing” the Mark and “gained substantial goodwill and
18 consumer recognition” of the Mark. Doc. 62 at 4-5. FLP further alleges that Liv-It’s use
19 of the Mark has caused consumer confusion and has prevented certain retail stores from
20 purchasing FLP’s products bearing the Mark. *Id.* at 11-12.

21 FLP’s amended complaint asserts claims for trademark infringement under the
22 Lanham Act and tortious interference with business expectancy. *See* Doc. 36. FLP filed
23 this motion for a preliminary injunction after it participated in a houseware industry trade
24 show in Chicago in March 2018 and observed Liv-It’s exhibit containing the Mark. *Id.*
25 at 11; Doc. 62-1 at 23.

26 **II. Legal Standard.**

27 “A preliminary injunction is an extraordinary remedy never awarded as a matter of
28 right.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). To obtain a

1 preliminary injunction, a plaintiff must show “that he is likely to succeed on the merits,
2 that he is likely to suffer irreparable harm in the absence of preliminary relief, that the
3 balance of equities tips in his favor, and that an injunction is in the public interest.” *Id.*
4 at 20; *see also All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011).
5 The burden is on FLP to make a “clear showing” that it is entitled to a preliminary
6 injunction. *See Lopez v. Brewer*, 680 F.3d 1068, 1072 (9th Cir. 2012).

7 **III. Discussion.**

8 FLP seeks preliminary relief only on its trademark infringement claim under the
9 Lanham Act, 15 U.S.C. §§ 1114, 1117, 1125. *See* Doc. 62. The Court therefore will not
10 address the parties’ arguments regarding FLP’s other claims. Nor will the Court address
11 FLP’s arguments regarding damages. *See* Doc. 62 at 13-14 (discussing entitlement to
12 costs, attorneys’ fees, profits, compensatory damages, and punitive damages).

13 To prevail on a trademark infringement claim, FLP must prove “(1) that it has a
14 protectible ownership interest in the mark; and (2) that [Ms. Wolf’s] use of the mark is
15 likely to cause consumer confusion, thereby infringing upon [FLP’s] rights to the mark.”
16 *Dep’t of Parks & Recreation for State of Cal. v. Bazaar Del Mundo Inc.*, 448 F.3d 1118,
17 1124 (9th Cir. 2006). The touchstone for trademark infringement is likelihood of
18 confusion, which asks whether a reasonably prudent consumer is “likely to be confused
19 as to the origin of the good or service bearing one of the marks.” *Rearden LLC v.*
20 *Rearden Commerce, Inc.*, 683 F.3d 1190, 1214 (9th Cir. 2012). This determination is
21 made by applying the well-established *Sleekcraft* factors: (1) strength of the mark,
22 (2) proximity of the goods, (3) similarity of the marks, (4) evidence of actual confusion,
23 (5) marketing channels used, (6) types of goods and degree of care exercised by
24 consumers, (7) defendant’s intent in selecting the mark, and (8) likelihood of expansion
25 of the product lines. *AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348-49 (9th Cir. 1979).
26 This eight-factor test is a “pliant” one, in which “the relative importance of each
27 individual factor will be case-specific.” *Brookfield Commc’ns, Inc. v. W. Coast Entm’t*
28 *Corp.*, 174 F.3d 1036, 1054 (9th Cir. 1999).

1 With respect to ownership, FLP’s federal registration of the Mark is “prima facie
2 evidence of its ownership[.]” *Dep’t of Parks & Recreation for State of Cal.*, 448 F.3d
3 at 1124. But Ms. Wolf argues that she owns the Mark because she can show prior use in
4 commerce. Doc. 64 at 11. She submits evidence that she organized Liv-It with the
5 Illinois Secretary of State in August 2015, more than two weeks before FLP placed its
6 purchase order and over three months before FLP applied for trademark protection of
7 “LIVIT.” Doc. 64-1 at 17. Ms. Wolf alleges that FLP’s principals knew of her company
8 and filed for trademark protection only to interfere. Doc. 64-1 at 8-9. She submits
9 declarations from two industry professionals who worked as broker representatives for
10 FLP, are familiar with FLP’s products, and never saw “LivIt” or “Live It” appear on any
11 FLP product or trade show exhibit. Doc. 64-1 at 27, 30. FLP’s reply disputes Ms.
12 Wolf’s assertions, but does not present evidence refuting the assertions or establishing its
13 own use of the Mark in commerce. *See* Doc. 69 at 3-5, 7. The Court cannot conclude
14 that FLP is likely to succeed in proving ownership where Ms. Wolf has presented
15 unchallenged evidence tending to rebut FLP’s prima facie evidence of ownership.

16 With respect to the likelihood of consumer confusion, FLP cites the *Sleekcraft*
17 factors but offers almost no analysis of their application to this case. *See* Doc. 62 at 15-
18 17. The only analysis FLP offers is that the parties are in “direct competition selling the
19 same types of household general merchandise[.]” and consumers are not likely to
20 exercise the diligence necessary to distinguish such inexpensive household items. *Id.*
21 at 17. The remainder of FLP’s motion simply offers legal standards followed by bare
22 conclusions. *See, e.g.*, Doc. 62 at 15-17.

23 Moreover, although FLP presents evidence of Liv-It’s packaging and advertising
24 containing the Mark (Doc. 62-1 at 3-5, 16, 18-21, 23), it submits no evidence depicting or
25 describing how the Mark appeared on FLP’s products to allow the Court to compare the
26 two. Nor does FLP present any evidence to support its assertions regarding the strength
27 of the Mark and the extent to which it has become associated with FLP. Without a more
28 thorough analysis of the relevant factors and supporting evidence, the Court cannot

1 conclude that FLP is likely to succeed in proving that Ms. Wolf’s use of the Mark is
2 likely to cause consumer confusion.

3 FLP also asserts that it is entitled to a preliminary injunction “regardless of the
4 presence or absence of actual or likely confusion . . . or of actual economic injury” under
5 15 U.S.C. § 1125(c). Doc. 62 at 13. That section addresses claims for dilution of
6 “famous” trademarks by blurring or tarnishment. *See* 15 U.S.C. § 1125(c)(1). FLP does
7 not allege, let alone present evidence to support, such a claim. And FLP provides no
8 authority for the proposition that this section entitles it to a preliminary injunction
9 without satisfying the *Winter* factors.

10 FLP’s overall lack of analysis seems to be based on an assumption that its motion
11 need not make the clear showing required because it can do so at a hearing on the motion.
12 *See, e.g.*, Doc. 69 at 7 (“Even if the issue is deemed to be in genuine dispute, it is not a
13 summary bar to injunctive relief, and is more properly the subject of an evidentiary
14 hearing.”), 8 (“This is subject to proof at an evidentiary hearing.”). FLP is mistaken.
15 First, neither FLP nor Ms. Wolf has requested a hearing. Second, even if the Court were
16 to hold a hearing, this would not relieve FLP of its burden of explaining – in its motion –
17 the grounds that entitle it to a preliminary injunction, along with supporting evidence.
18 *E.g.*, *Sprint Nextel Corp. v. Ezcom, Inc.*, No. CV1200222JFWVBKX, 2012 WL
19 12882422, at *1 (C.D. Cal. Feb. 13, 2012) (denying the plaintiffs’ motion for preliminary
20 injunction without a hearing because the “evidence in support of [the motion was]
21 woefully insufficient to demonstrate a likelihood of success on the merits”).

22 FLP has not submitted sufficient evidence or analysis to establish a likelihood of
23 success. Indeed, as Ms. Wolf notes in her response, FLP’s motion is almost entirely
24 copied from its complaint (*see* Doc. 6), with only four original paragraphs. Doc. 64 at 5.
25 While such a summary of facts and legal authority might be sufficient to state a claim for
26 purposes of Rule 12(b)(6), it falls fall short of the clear showing required to obtain the
27 extraordinary remedy of a preliminary injunction.²

28 ² FLP does not argue that it can satisfy the lesser standard of “serious questions

1 **IV. Ms. Wolf's Requests.**

2 **A. Motion to Strike.**

3 Motions to strike are viewed with disfavor and are not frequently granted. S.
4 Gensler, *Federal Rules of Civil Procedure, Rules and Commentary* at 302 (2017) (citing
5 cases). They “should not be granted unless it is clear that the matter to be stricken could
6 have no possible bearing on the subject matter of the litigation.” *Netflix, Inc. v.*
7 *Blockbuster, Inc.*, No. C06-02361 WHA, 2006 WL 2458717, at *8 (N.D. Cal. Aug. 22,
8 2006). The Court’s local rules attempt to curtail the overuse of motions to strike. *See*
9 LRCiv 7.2(m).

10 Ms. Wolf moves to strike a footnote from FLP’s reply because it allegedly
11 contains irrelevant false statements about a nonparty, Thomas Wolf. Doc. 70; *see*
12 Doc. 69 at 2 n.4. Ms. Wolf cites Ethical Rule 4.4 as the basis for her motion. *Id.* The
13 Court is aware of no authority holding that this rule provides a legal basis for granting
14 motions to strike. Moreover, the information contained in the footnote is irrelevant to
15 deciding FLP’s motion for injunctive relief and therefore has not been considered by the
16 Court. The Court will deny Ms. Wolf’s motion as unnecessary.

17 The Court also notes that has not considered the irrelevant information submitted
18 by both parties in the briefing on Ms. Wolf’s motion to strike. *See* Docs. 72, 73. The
19 parties are cautioned to avoid such unnecessary filings in the future.

20 **B. Attorneys’ Fees.**

21 Ms. Wolf requests that the Court award her attorneys’ fees and costs “for having
22 to file a third motion related to claims this Court has dismissed previously in two Orders
23 and for having to respond to FLP Parties[’] meritless [motion for a preliminary
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26 going to the merits.” *See Shell Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d 1281, 1291
27 (9th Cir. 2013) (quoting *All. For the Wild Rockies*, 632 F.3d at 1135). Under this
28 standard, FLP still must demonstrate a “fair chance of success on the merits.” *See*
Cascadia Wildlands v. Scott Timber Co., 715 F. App’x 621, 624-25 (9th Cir. 2017)
(quoting *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1362 (9th Cir. 1988)).
The Court finds that FLP’s summary of facts and legal standards does not create serious
questions going to the merits.

1 injunction].” Doc. 64 at 15-16. Ms. Wolf provides the Court with no legal basis for such
2 an award. The Court therefore will deny the request.

3 **IT IS ORDERED:**

- 4 1. FLP’s second and condensed application for preliminary injunction
5 (Doc. 62) is **denied**.
- 6 2. Ms. Wolf and Liv-It’s motion to strike portions of FLP’s reply (Doc. 70) is
7 **denied**.
- 8 3. Ms. Wolf’s request for attorneys’ fees and costs (Doc. 64 at 15-16) is
9 **denied**.

10 Dated this 26th day of July, 2018.

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15 David G. Campbell
16 United States District Judge
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