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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Servpro Industries Incorporated, et al.,

No. CV-17-00862-PHX-ROS

10 Plaintiffs,

ORDER

11 v.

12 Zerorez of Phoenix LLC, et al.,

13 Defendants.
14

15 Since 2003, Servpro Industries Inc. has used its registered trademark “Like it
16 Never Even Happened” in advertising its restoration and cleaning services. For
17 approximately three months in early 2017, Zerorez of Phoenix LLC used the phrase
18 “Like it Never Happened” in its advertisements for carpet cleaning services. Servpro
19 believes those advertisements infringed its trademark as a matter of law. Zerorez
20 believes consideration of the larger context shows it did not infringe the trademark as a
21 matter of law. Zerorez is correct.

22 **BACKGROUND**

23 For purposes of resolving the motion for summary judgment filed by Zerorez, the
24 Court describes the record in the light most favorable to Servpro. Fortunately, most of
25 the relevant facts are undisputed.

26 **A. Servpro’s Business and Advertising**

27 Servpro “is one of the world’s largest providers of cleanup and restoration
28 products and services.” (Doc. 1 at 4). Servpro has more than 1,700 franchisees operating

1 in the United States with eighteen franchisees in the Phoenix area. Servpro describes the
2 services its franchisees offer as “carpet, furniture and drapery cleaning services;
3 restoration of building structures damaged by fire, water and other catastrophes both
4 indoors and outdoors; restoration of furniture damaged by fire, water and other
5 catastrophes; and mold remediation services.” (Doc. 1 at 5).

6 In marketing its services, Servpro uses a “House Logo” as “the primary identifier
7 for the company.” (Doc. 79-1 at 65). Servpro’s House Logo is:



12 In addition to its House Logo, Servpro also uses a phrase it describes as its “Brand
13 Descriptor.” That phrase is usually portrayed as:

14 **Fire & Water - Cleanup & Restoration™**

15 In advertisements, the Brand Descriptor is usually “positioned below the SERVPRO
16 House Logo.” (Doc. 79-1 at 70).

17 Finally, Servpro uses what it calls a “Branding Statement,” which is actually the
18 trademark at issue in this litigation. The trademark is “Like it never even happened.”
19 Servpro requires franchisees include the trademark in “[e]very ad and marketing piece . .
20 . except small advertisements where space does not permit.” (Doc. 79-1 at 69).
21 Typically, the trademark is placed at the bottom of an advertisement. (Doc. 79-1 at 69).
22 Servpro and its franchisees often include the House Logo, Brand Descriptor, and
23 Branding Statement in advertisements. One such example is:
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B. Zerorez’s Business and Advertising

Zerorez Franchising, Inc. “is a carpet, upholstery and hard-surface (e.g. stone and granite) cleaning company.” (Doc. 98 at 3). There are numerous Zerorez franchisees throughout the country, one of which is Zerorez of Phoenix LLC (“Zerorez”). Zerorez Franchising differentiates itself from other carpet cleaning services by touting its “patented cleaning system with Empowered Water.” Zerorez Franchising describes “Empowered Water” as an alternative to traditional water and soap mixtures. Zerorez performs cleaning services but does not perform “any restoration services” similar to those provided by Servpro.

Zerorez Franchising owns a number of trademarks, including “Zerorez” and “Empowered Water.” The “primary logo” used by Zerorez Franchising and its franchisees is a trademark consisting of three rows of three concentric circles:

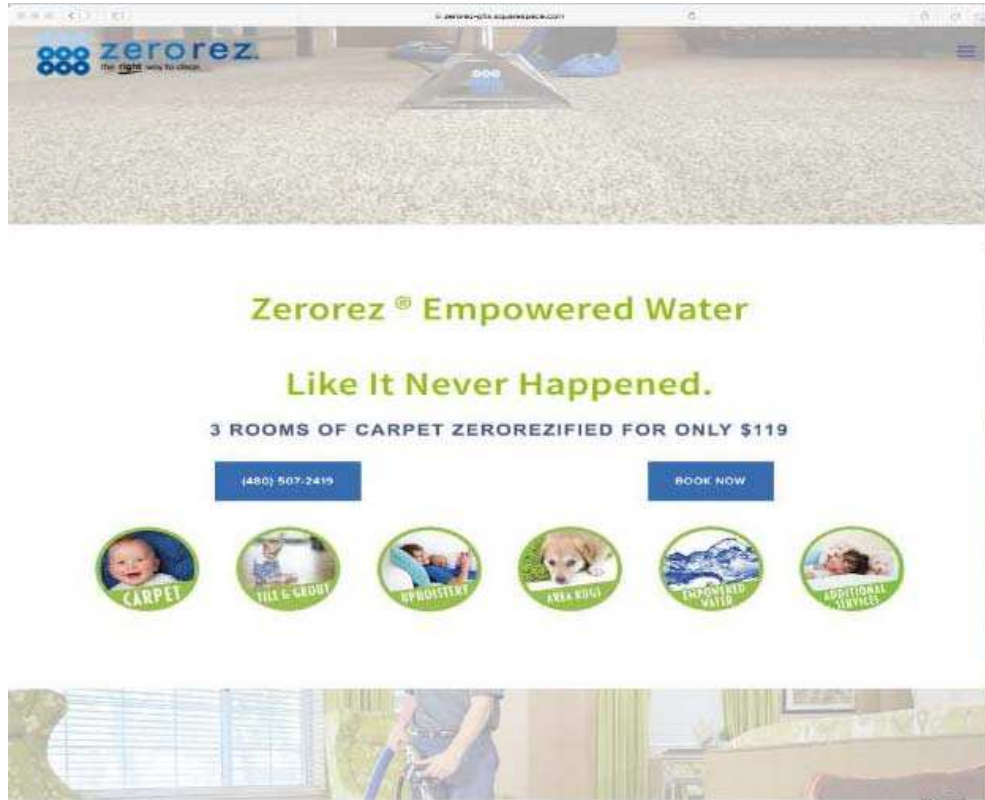


All of the Zerorez advertisements in the record include one or more of the trademarks.

C. Zerorez’s Alleged Infringement

On December 7, 2016, a few Zerorez employees attended a marketing meeting. (Doc. 98 at 36). At that meeting, a Zerorez employee suggested “the theme and tagline

1 'Like it Never Happened.'" The meeting participants agreed to use the phrase in future
2 advertisements. On January 1, 2017, Zerorez updated its website to include the phrase on
3 its homepage. From January 1 to March 27, 2017, visitors to the homepage encountered
4 the following:



19 Of particular importance, that webpage included the “primary logo,” two instances of
20 “Zerorez,” one instance of “Zerorezified,” and one instance of “Empowered Water.”
21 From January 16 through March 27, 2017, Zerorez also used the “Like it Never
22 Happened” phrase on billboard advertisements such as:



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10 Again, that billboard prominently features the primary logo and the Zerorez name.
11 Zerorez also used the “Like it Never Happened” phrase in radio ads, on its Facebook
12 page, and on a direct mail postcard. The radio ads included Zerorez’s name. The
13 Facebook page and direct mail postcard used Zerorez’s name and its primary logo.

14 Shortly after Zerorez started using “Like it Never Happened,” a Zerorez employee
15 saw two Servpro employees wearing shirts with the Servpro House Logo and “Like it
16 never even happened.” (Doc. 98 at 48). The Zerorez employee sent a text message to
17 other Zerorez employees stating “I just saw some Serve Pro [sic] guys. Their shirts say
18 ‘like it never even happened.’ It’s trademarked. We aren’t using the ‘even’ but do we
19 want to get that close?” Another Zerorez employee responded “Clorox cleanup has a
20 commercial titled. Like it never happened.” Another employee stated they had
21 researched the issue and concluded the Zerorez “version was safe.” (Doc. 83-3 at 14).
22 Zerorez continued to use the phrase.

23 In late February 2017, Servpro learned Zerorez was using the phrase. On March
24 23, 2017, Servpro filed the present case, accusing Zerorez of infringing its trademark
25 under federal law and unfair competition under Arizona law. The parties pursued
26 discovery and in June 2018, they filed cross-motions for summary judgment.

27 ANALYSIS

28 The parties’ motions focus on Servpro’s claim for trademark infringement under

1 federal law but the federal and state law claims all share a common requirement. For
2 Servpro to prevail on any of its claims, it must prove Zerorez’s use of the phrase was
3 “likely to cause consumer confusion.” *Network Automation, Inc. v. Advanced Sys.*
4 *Concepts, Inc.*, 638 F.3d 1137, 1144 (9th Cir. 2011) (federal trademark law requires
5 likelihood of consumer confusion); *Angel’s Gate Inc. v. All-Star Grand Canyon Tours*
6 *Inc.*, No. CV-12-08181-NVW, 2013 WL 12114580, at *3 (D. Ariz. Sept. 30, 2013) (state
7 unfair competition requires likelihood of consumer confusion). If use of the phrase did
8 not create a likelihood of consumer confusion, Zerorez is entitled to summary judgment
9 on all of Servpro’s claims. Therefore, the likelihood of confusion is the appropriate
10 focus.

11 “The test for likelihood of confusion is whether a ‘reasonably prudent consumer’
12 in the marketplace is likely to be confused as to the origin of the good or service bearing
13 one of the marks.” *Dreamwerks Prod. Grp., Inc. v. SKG Studio*, 142 F.3d 1127, 1129
14 (9th Cir. 1998). This requires the confusion “be probable, not simply a possibility.”
15 *Murray v. Cable NBC*, 86 F.3d 858, 861 (9th Cir. 1996). Here, the relevant inquiry is
16 whether, viewing the record in the light most favorable to Servpro, a reasonable
17 consumer seeing or hearing Zerorez’s use of the phrase “Like it Never Happened,” would
18 mistakenly conclude Zerorez had some association with Servpro.

19 In 1979, the Ninth Circuit promulgated an eight-factor test to guide the likelihood
20 of confusion analysis. *AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348-49 (9th Cir.
21 1979). Since promulgating that test, the Ninth Circuit has repeatedly stressed the eight
22 factors should be viewed as providing a general framework for determining the relevant
23 question. Thus, applying the eight factors “is not like counting beans.” *One Indus., LLC*
24 *v. Jim O’Neal Distrib., Inc.*, 578 F.3d 1154, 1162 (9th Cir. 2009). The eight-factor test is
25 meant only as “an adaptable proxy for consumer confusion, not a rote checklist.”
26 *Network Automation*, 638 F.3d at 1145. And while some of the “factors are much more
27 important than others . . . the relative importance of each individual factor [is] case-
28 specific.” *Brookfield Comm’ns, Inc. v. W. Coast Entm’t Corp.*, 174 F.3d 1036, 1054 (9th

1 Cir. 1999). *See also Multi Time Machine, Inc. v. Amazon.com, Inc.*, 804 F.3d 930, 936
2 (9th Cir. 2015) (noting the eight factors “are not exhaustive and other variables may
3 come into play depending on the particular facts presented”). Accordingly, in evaluating
4 the eight factors, the Court must consider “the analysis as a whole” and determine what a
5 holistic view of the evidence “reveals about the ultimate question” of consumer
6 confusion. *Entrepreneur Media, Inc. v. Smith*, 279 F.3d 1135, 1141 (9th Cir. 2002).

7 **1. Strength of the Mark**

8 The first factor is the strength of the mark. “The scope of the trademark protection
9 that [courts] give marks depends upon the strength of the mark, with stronger marks
10 receiving greater protection than weak ones.” *Entrepreneur*, 279 F.3d at 1141. “This
11 ‘strength’ of the trademark is evaluated in terms of its conceptual strength and
12 commercial strength.” *GoTo.com, Inc. v. Walt Disney Co.*, 202 F.3d 1199, 1207 (9th Cir.
13 2000). Assessing “conceptual strength” requires locating the trademark on the “spectrum
14 of increasing inherent distinctiveness.” *Id.* And assessing “commercial strength”
15 requires determining “the strength of the mark in the marketplace.” *One Indus., LLC v.*
16 *Jim O’Neal Distrib., Inc.*, 578 F.3d 1154, 1164 (9th Cir. 2009).

17 A mark’s conceptual strength “is determined by its placement on a continuum of
18 marks from ‘generic,’ afforded no protection; through ‘descriptive’ or ‘suggestive,’ given
19 moderate protection; to ‘arbitrary’ or ‘fanciful’ awarded maximum protection.” *E. & J.*
20 *Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1291 (9th Cir. 1992). Identifying the
21 exact boundaries of these categories is difficult because “[c]ategorizing trademarks is
22 necessarily an imperfect science.” *Fortune Dynamic, Inc. v. Victoria’s Secret Stores*
23 *Brand Mgmt., Inc.*, 618 F.3d 1025, 1033 (9th Cir. 2010). But it is clear that Servpro’s
24 mark is not generic because it does not “give the general name of the product” or
25 “embrace an entire class of products.” *Entrepreneur*, 279 F.3d at 1141 n.2. It is also
26 clear that the mark is not “arbitrary” or “fanciful.” That is, the mark “Like it never even
27 happened” is not “arbitrary” because it has some connection to Servpro’s services and it
28 is not “fanciful” because it is not a phrase “invented solely to function as a trademark.”

1 *Id.* Thus, the mark must be either “descriptive” or “suggestive.”

2 In general, a descriptive mark “directly describe[s] the quality or features of the
3 product” while “[a] suggestive mark conveys an impression of a good but requires the
4 exercise of some imagination and perception to reach a conclusion as to the product’s
5 nature.” *Brookfield*, 174 F.3d at 1058 n. 19. In context, Servpro’s mark could qualify as
6 either. It is unnecessary to more precisely classify the mark because both descriptive and
7 suggestive marks are “inherently” weak. *Am. Int’l Grp., Inc. v. Am. Int’l Bank*, 926 F.2d
8 829, 832 (9th Cir. 1991). And the mark’s inherent weakness weighs against a likelihood
9 of confusion.

10 The conceptual weakness of Servpro’s mark is exacerbated by the fact that the
11 mark is a common phrase in the context of cleaning. As explained in a leading treatise,
12 “[u]ndoubtedly, common phrases and bits of slang which are in routine everyday use are
13 relatively weak as trademarks simply because their common occurrence makes it difficult
14 for them to stand out as source identifiers.” *McCarthy on Trademarks and Unfair*
15 *Competition* 11:87 (4th ed.). Zerorez submitted evidence that “like it never happened” is
16 commonly used in the context of cleaning services or products. Servpro claims that
17 evidence is inadmissible because the documents have not been “authenticated” and the
18 documents contain “hearsay within hearsay.” (Doc. 98 at 57). The documents may or
19 may not be admissible at trial. But more importantly, the Court does not need to rely on
20 Zerorez’s evidence to observe “like it never even happened” is a common phrase people
21 use in the context of cleaning. *See, e.g., State v. Oberender*, No. A14-0477, 2014 WL
22 3892708, at *1 (Minn. Ct. App. Aug. 11, 2014) (citing testimony of individual who
23 believed completion of probation would mean his record “could be clean like it never
24 even happened”). And a phrase that “has been part of the American vernacular for
25 decades” makes for a very weak trademark.¹ *Isle of Capri Casinos, Inc. v. Flynt*, No.

26 _____
27 ¹ Servpro has trademarked a variety of basic statements and then attempted to enforce its
28 trademark rights against potential competitors. For example, Servpro sued Zerorez
Franchising Systems in Tennessee after a Zerorez franchisee used the phrase “Here to
Help.” *Servpro Intellectual Prop., Inc. v. Zerorez Franchising Sys., Inc.*, No. 3:17-CV-
00699-JPM, 2018 WL 3364372, at *1 (M.D. Tenn. July 9, 2018).

1 2:16-CV-06148-CAS (MRWX), 2016 WL 6495380, at *4 (C.D. Cal. Nov. 1, 2016).

2 Moving beyond the mark’s “conceptual strength,” the Court must also consider the
3 mark’s “commercial strength.” That requires taking “into account a mark’s actual
4 marketplace recognition.” *Fortune Dynamic, Inc. v. Victoria’s Secret Stores Brand*
5 *Mgmt., Inc.*, 618 F.3d 1025, 1034 (9th Cir. 2010). While evidence of actual consumer
6 recognition likely would be best, marketplace recognition can also be established through
7 evidence of “extensive advertising, length of exclusive use,” and a large amount of sales.
8 *Accuride Int’l, Inc. v. Accuride Corp.*, 871 F.2d 1531, 1536 (9th Cir. 1989) (noting
9 “descriptive or suggestive mark may be strengthened” through advertising etc.).

10 Servpro has used the mark in millions of dollars of advertising and has had billions
11 in sales since it started using the mark. The available evidence, however, indicates that
12 the mark was always used in conjunction with Servpro’s other marks. And Servpro’s
13 own documentation identifies its “House Logo” as its primary identifier. Therefore,
14 while the mark was “strengthened” through Servpro’s advertising and sales, it was
15 always accompanied by other marks, meaning the mark had less source-identifying
16 ability than if it had been the primary focus of the marketing expenditures. Accordingly,
17 the alleged “commercial strength” of the mark is less than one might expect when there
18 are millions of dollars in advertisements and billions of dollars in sales.

19 Given the conceptual weakness of the mark and the way in which it was used in
20 the marketplace, the mark is very weak. The first factor weighs strongly against a finding
21 of likelihood of confusion.

22 **2. Proximity or Relatedness of the Goods or Services**

23 The second factor involves the similarity in the goods or services provided by
24 Servpro and Zerorez. When two entities provide similar services, there may be a greater
25 likelihood of confusion because consumers might “mistakenly assume there is an
26 association between” the two entities. *Network Automation, Inc. v. Advanced Sys.*
27 *Concepts, Inc.*, 638 F.3d 1137, 1150 (9th Cir. 2011). Alternatively, “the proximity of
28 goods [might] become less important if advertisements are clearly labeled or consumers

1 exercise a high degree of care, because rather than being misled, the consumer would
2 merely be confronted with choices among similar products.” *Id.* In other words, the fact
3 that entities provide similar services can support or weaken the likelihood of confusion,
4 depending on the context.

5 Servpro and Zerorez provide overlapping services but they are not entirely
6 interchangeable. While Servpro is adamant that it provides carpet cleaning services that
7 compete directly with Zerorez, there is no real dispute that Servpro’s business focuses on
8 the much broader category of restoration services. For example, Zerorez submitted
9 evidence that 98% of Servpro’s revenue comes from services other than carpet cleaning
10 while Zerorez only performs carpet cleaning and closely related services such as hard
11 surface cleaning.² Thus, while the parties provide the same services, Servpro
12 overwhelming targets and serves a different population than Zerorez. Given that
13 consumers interested in restoration services due to a fire or flood are distinct from
14 consumers interested in basic carpet cleaning, Servpro and Zerorez do not provide
15 meaningfully overlapping services. This factor, therefore, weighs against a likelihood of
16 confusion.

17 **3. Similarity of the Marks**

18 The third factor is similarity of the marks. The Ninth Circuit has instructed that
19 “[s]imilarity is best adjudged by appearance, sound, and meaning.” *Fortune Dynamic,*
20 *Inc. v. Victoria’s Secret Stores Brand Mgmt., Inc.*, 618 F.3d 1025, 1032 (9th Cir. 2010).
21 Crucially, however, a court must also take into account how the marks “appear in the
22 marketplace.”

23 The “appearance, sound, and meaning” of the mark and the phrase Zerorez used
24 are effectively the same. Zerorez did not use the word “even” but that is a minor change

25 ² Servpro objects to the 98% figure as inadmissible but it is based on documents
26 produced by Servpro. Servpro claims the relevant numbers were “generated by Servpro’s
27 system based on information provided to Servpro by third parties (Servpro’s Arizona
28 franchisees)” and “Servpro does not prepare the numbers and does not verify that any
particular number was reported accurately.” (Doc. 98 at 7). Servpro does not explain
why it is entitled to produce documents as responsive to discovery requests and then
disclaim the authenticity of those documents when they are not helpful to its case.
Therefore, the Court will consider the 98% figure.

1 that did not alter the meaning of the phrase. Thus, it would appear that this factor
2 supports a finding of likelihood of confusion. But the Ninth Circuit has instructed courts
3 to assess the similarity of the marks in the context of how consumers encountered them.

4 The mark and Zerorez’s use of the similar phrase were experienced very
5 differently in the marketplace. Servpro used its mark in advertising but always included
6 its other marks. Servpro has not cited any instances where it used “Like it never even
7 happened” as a standalone mark meant to identify its services. As for Zerorez, all of the
8 advertisements using “Like it Never Happened” also contained its own name and other
9 marks, such as Zerorez’s primary mark of six concentric circles. In these circumstances,
10 the mark and very similar phrase were used as secondary identifiers for the businesses.
11 This is very similar to the situation in *Cohn v. Petsmart*, 281 F.3d 837 (9th Cir. 2002).

12 In *Cohn*, a veterinarian had named his business the “Critter Clinic” and “began
13 advertising it as a place ‘Where Pets are Family.’” *Id.* at 839. Shortly thereafter,
14 “Petsmart began using the same slogan to promote its national chain of pet supplies
15 stores.” *Id.* After the veterinarian sued Petsmart for trademark infringement, the district
16 court granted summary judgment to Petsmart by concluding there was no likelihood of
17 confusion. The veterinarian appealed.

18 The Ninth Circuit evaluated the veterinarian’s claim using the eight-factor test. In
19 reviewing the factor addressed to the similarity of the marks, the Ninth Circuit noted that
20 “although the parties superficially use the identical slogan as a trademark, consumers will
21 actually encounter the trademarks differently in the marketplace.” *Id.* at 842. In the
22 Ninth Circuit’s view, the veterinarian and Petsmart used the slogan “merely as a tagline
23 to their distinctive business names: as ‘Critter Clinic—Where Pets are Family,’ and
24 ‘Petsmart—Where Pets are Family.’” *Id.* at 842. There was no likelihood of confusion
25 because both parties had emphasized their “housemarks,” *i.e.* “Critter Clinic” and
26 “Petsmart,” and not the trademarked slogan. In other words, the emphasis on the
27 “housemarks” meant “[t]he names ‘Petsmart’ and ‘Critter Clinic’ present[ed] the
28 dominant commercial identity” such that usage of the same slogan could not have been

1 confusing. *Id.*

2 Just like in *Cohn*, consumers in the market encountered Servpro's mark and
3 Zerorez's phrase in different ways. "Like it never even happened" and "Like it never
4 happened" were always accompanied by other obvious indications of the entity behind
5 the usage. That is, consumers encountered the mark or phrase only in conjunction with
6 the "dominant commercial identity" of the underlying entity. *Id.* This means that,
7 despite the mark and phrase being very similar, the manner in which consumers actually
8 encountered the mark or phrase weighs strongly against any likelihood of confusion.

9 **4. Evidence of Actual Confusion**

10 The fourth factor involves evidence of actual consumer confusion. Servpro
11 presents no such evidence. Generally, this factor should be given little weight. *Cohn*,
12 281 F.3d at 842. But given the amount of advertising and sales Servpro cites as evidence
13 of the strength of its mark, it is curious that no evidence of actual confusion was
14 submitted. Therefore, this factors weighs slightly against a finding of likelihood of
15 confusion.

16 **5. Marketing Channels Used**

17 The fifth factor requires looking to the marketing channels used by Servpro and
18 Zerorez. In general, two entities using the same marketing channels increases the
19 likelihood of confusion. *Network Automation, Inc. v. Advanced Sys. Concepts, Inc.*, 638
20 F.3d 1137, 1151 (9th Cir. 2011). This factor is most helpful when the two entities belong
21 to a niche market and advertise in specialized outlets, such as trade magazines. *Id.* But
22 this factor "does not shed much light on the likelihood of consumer confusion" when the
23 two entities use standard channels, such as television, radio, and Internet. *Id.* Here,
24 Servpro and Zerorez both used radio, billboards, and the Internet. There is no evidence
25 that either party advertised in specialized outlets. Therefore, this factor merits little
26 weight.

27 **6. Degree of Care Consumers are Likely to Exercise**

28 The sixth factor requires assessing the nature of the goods or services and the type

1 of consumer who would be interested in those goods or services. Generally, consumers
2 are expected to proceed with more care if the goods or services are specialized or of
3 uncommon importance. For example, “highly specialized professional purchasers”
4 responsible for the purchase of drawer mechanisms were “expected to exercise a high
5 degree of care.” *Accuride Int’l, Inc. v. Accuride Corp.*, 871 F.2d 1531, 1537 (9th Cir.
6 1989). Also, “reasonably attentive pet owners” were expected to “be particularly
7 attentive in selecting a veterinarian for their family pets.” *Cohn*, 281 F.3d at 843.
8 Consumers making impulsive purchasing decisions, however, are not expected to
9 exercise much care. *Nova Wines, Inc. v. Adler Fels Winery LLC*, 467 F. Supp. 2d 965,
10 981 (N.D. Cal. 2006).

11 Here, carpet cleaning services are not sold to professional purchasers, meaning it
12 would be inappropriate to impose a “high degree of care.” *Accuride*, 871 F.2d at 1537.
13 But “[c]arpet cleaning is not an impulsive decision or a quick purchase off the shelf.”
14 *Zerorez Franchising Sys., Inc. v. Distinctive Cleaning, Inc.*, 103 F. Supp. 3d 1032, 1044
15 (D. Minn. 2015). Moreover, “carpet cleaning requires a technician to enter the
16 consumer’s home to perform the service.” *Id.* This “elevates the ordinary purchaser’s
17 degree of care.” *Id.* While perhaps not as important as selection of a veterinarian,
18 selection of a carpeting cleaning service requires a moderate amount of care. The
19 elevated degree of care weighs against a likelihood of confusion.

20 Beyond the nature of the goods or services, there is also a general rule that there is
21 less likelihood of confusion as the goods or services increase in cost. *Brookfield*
22 *Commc’ns, Inc. v. W. Coast Entm’t Corp.*, 174 F.3d 1036, 1060 (9th Cir. 1999). The
23 Ninth Circuit has not explained what qualifies as “expensive” versus “inexpensive,” but
24 has offered a variety of examples. Watches costing “several hundred dollars” qualify as
25 expensive. *Multi Time*, 804 F.3d at 937. Public relations services costing thousands of
26 dollars are expensive. *Entrepreneur Media, Inc. v. Smith*, 279 F.3d 1135, 1152 (9th Cir.
27 2002). Wine, cheese, and mushrooms are inexpensive. *E. & J. Gallo v. Gallo Cattle Co.*,
28 967 F.2d 1280, 1293 (9th Cir. 1992); *Hokto Kinoko Co. v. Concord Farms, Inc.*, 738 F.3d

1 1085, 1096 (9th Cir. 2013)). As are “single-serve beverages like . . . juices or . . . energy
2 drink[s].” *Pom Wonderful LLC v. Hubbard*, 775 F.3d 1118, 1127 (9th Cir. 2014).

3 Here, the cost of the services is relatively expensive, ranging in the hundreds of
4 dollars. This cost places the services towards the end of the spectrum where consumers
5 are expected to exercise more care, weighing against a likelihood of confusion.

6 Both the nature of the services and the price of the services establish consumers
7 will exercise care when making their decisions. This factor, therefore, weighs against a
8 likelihood of confusion.

9 **7. Zerorez’s Intent in Selecting the Mark**

10 The seventh factor requires assessing why Zerorez started using the phrase.
11 Because it can be difficult to locate evidence of a party’s motive, the Ninth Circuit has
12 adopted a presumption that governs when an alleged infringer is aware of the trademark
13 before using a similar mark or phrase. “When one party knowingly adopts a mark similar
14 to another’s, reviewing courts presume that the defendant will accomplish its purpose,
15 and that the public will be deceived.” *Acad. of Motion Picture Arts & Scis. v. Creative*
16 *House Promotions, Inc.*, 944 F.2d 1446, 1456 (9th Cir. 1991). There is no clear evidence
17 Zerorez knew of Servpro’s mark before Zerorez decided to use the “Like it never
18 happened” phrase. But it is undisputed Zerorez learned of Servpro’s mark shortly after
19 Zerorez began using the phrase. And after learning of the mark, Zerorez did not
20 immediately stop using the phrase.

21 When confronted with a situation where there was no evidence an alleged
22 infringer knew of the mark prior to starting to use an identical phrase, but the alleged
23 infringer continued to use the phrase even after learning of the mark, the Ninth Circuit
24 concluded the factor regarding the alleged infringer’s intent was “essentially neutral.”
25 *Cohn v. Petsmart, Inc.*, 281 F.3d 837, 843 (9th Cir. 2002). Based on that conclusion, the
26 factor is also neutral in this case.

27 **8. Likelihood of Expansion of Product Lines**

28 The final factor involves the likelihood that the alleged infringer will expand its

1 business to compete with the mark holder. Servpro argues it and Zerorez “already
2 compete to a significant extent.” *Brookfield Commc’ns, Inc. v. W. Coast Entm’t Corp.*,
3 174 F.3d 1036, 1060 (9th Cir. 1999). If that were the case, the likelihood of expansion
4 factor would have little weight. *Id.* But as set forth above, it is not accurate to say
5 Servpro and Zerorez significantly compete. Their services overlap, but only at the
6 margins. Despite the lack of substantial overlap, this factor is still entitled to little weight
7 because Servpro has offered no evidence that it plans to target home carpet cleaning in
8 the future and Zerorez has no plans to expand and offer restoration services. Thus, this
9 factor is entitled to little weight.

10 **9. Summary of Factors**

11 Keeping in mind that the eight factors should not be evaluated in a mechanical
12 fashion, most of the factors weigh against there being a meaningful probability of
13 consumer confusion. And a few of the factors are so strong as to be sufficient on their
14 own. In this case, the most important factors are the strength of the mark and the way in
15 which consumers encountered the mark and the phrase. The mark is very weak. It has
16 little conceptual strength and is a common phrase in the context of cleaning. Moreover,
17 while the mark and the phrase are essentially identical, neither Servpro nor Zerorez relied
18 on the mark or phrase as their primary identifier. In advertising, “Like it never even
19 happened” was always accompanied by obvious indications that Servpro was the relevant
20 business while “Like it never happened” was always accompanied by obvious indications
21 that Zerorez was the relevant business. In these circumstances, viewing the record in the
22 light most favorable to Servpro, consumer confusion was, at best, merely theoretically
23 possible. To avoid summary judgment Servpro needed to establish a reasonable jury
24 could conclude confusion was “probable, not simply a possibility.” *Cohn v. Petsmart*,
25 281 F.3d 837, 842 (9th Cir. 2002). Servpro did not do so.

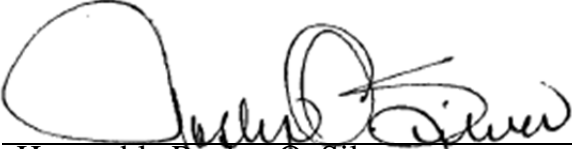
26 Accordingly,

27 **IT IS ORDERED** the Motion for Summary Judgment (Doc. 81, 89) is
28 **GRANTED**. The Clerk of Court is directed to enter judgment in favor of Defendants.

1 This Order shall not be sealed.

2 **IT IS FURTHER ORDERED** the Motion for Summary Judgment (Doc. 78) is
3 **DENIED.**

4 Dated this 7th day of September, 2018.

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8 Honorable Roslyn O. Silver
9 Senior United States District Judge
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