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**United States District Court
Central District of California**

VIDA ENTERPRISE CORPORATION,
Plaintiff,
v.
ANGELINA SWAN COLLECTION,
INC.,
Defendant.

Case № 2:22-cv-00915-ODW (JCx)

**ORDER GRANTING
DEFENDANT’S MOTION FOR
SUMMARY JUDGMENT [34]**

I. INTRODUCTION

Plaintiff Vida Enterprise Corporation holds the ANGELINA and SWAN trademarks, which it uses in connection with the sale of hats, socks, and other clothing items. Vida brings suit against Defendant Angelina Swan Collection (“ASC”), alleging that ASC infringed Vida’s marks by selling geles, a type of headwear, with the ANGELINA SWANN mark. ASC now moves for summary judgment on the grounds that there is no genuine dispute regarding the likelihood of consumer confusion. (Mot. Summ. J. (“Motion” or “Mot.”), ECF No. 34.) The Court carefully considered the papers filed in connection with the Motion and deemed the matter appropriate for decision without oral argument. Fed. R. Civ. P. 78; C.D. Cal. L.R. 7-15. For the following reasons, the Court **GRANTS** ASC’s Motion.

1 **II. BACKGROUND**

2 The following facts are taken from ASC’s Statement of Uncontroverted Facts
3 and Vida’s Statement of Genuine Disputes. (Def.’s Statement of Uncontroverted
4 Facts (“SUF”), ECF No. 34-3; Pl.’s Statement of Genuine Disputes (“SGD”), ECF
5 No. 35-27.) In setting forth these facts, the Court accepts as undisputed any supported
6 fact of ASC’s for which Vida does not provide contrary evidence. *See* C.D. Cal. L.R.
7 56-3 (“[T]he Court may assume that the material facts as claimed and adequately
8 supported by the moving party are admitted to exist without controversy except to the
9 extent that such material facts are . . . controverted by declaration or other written
10 evidence.”). In particular:

- 11 • Vida disputes the sale price of its hats by asserting that “[t]he products vary in
12 prices and may cost more or less,” and provides a single pincite to forty-seven
13 pages of Exhibit H without stating exactly how much more or less the hats cost.
14 (SGD 9.) Setting aside, for now, the more fundamental issues with Exhibit H,
15 the Court will not sift through a voluminous record to find evidence in support
16 of an incomplete contention. *Hochroh v. Ally Bank*, 461 F. Supp. 3d 986, 998
17 (D. Haw. 2020) (“[I]n multiple instances, Plaintiff did not
18 offer pinpoint citations [T]he Court will not comb through the needlessly
19 voluminous record to determine what evidence supports Plaintiff’s factual
20 assertions.”). The Court deems the price of the hats as asserted by ASC
21 undisputed for the purpose of this Motion.
- 22 • Vida disputes the sale price of a 12-pack of its socks by arguing that it sells
23 socks that cost up to \$34.99 “per pack,” (SGD 10), but its evidence does not
24 indicate how many socks are in the packs that cost \$34.99, (*see* Ex. H at 39,
25 ECF Nos. 35-9 through 35-16). The Court deems the price of a 12-pack of
26 socks as asserted by ASC undisputed for the purpose of this Motion.

1 **A. Vida**

2 Vida sells men’s, women’s, and children’s clothing on Amazon.com and in big
3 box stores such as Wal-Mart. (SUF 5.) Vida is the owner of the ANGELINA mark,
4 U.S. Trademark Reg. Nos. 1,687,176 and 4,399,571 (“the ‘571 Registration”).
5 (SUF 7.) The ‘571 Registration is for:

6 Clothing and accessories, namely, bandeau, tank tops, dresses, skirts,
7 tutus, thermal tops, leggings, skirted leggings, pajamas, t-shirts, gloves,
8 beanies, hats, scarves, earmuffs, headbands, arm warmers, leg warmers,
9 boot socks, boot covers, slipper socks, footies and bra straps; underwear,
10 bras, panties, slippers, a-shirts, teddies, lingerie, corsets, girdle, body shapers
11 and undershirts; hosiery, socks, stockings, pantyhose, tights,
12 bodystockings, bodysuits.

13 (SUF 8.) Vida sells ANGELINA-branded hats and beanies that retail for about \$23
14 for a pack of six hats. (SUF 9.)

15 Vida also owns the SWAN mark, U.S. Trademark Reg. No. 2,879,617, for
16 underwear and socks. (SUF 6.) Vida’s SWAN brand socks retail for around \$18 for a
17 12-pack. (SUF 10.)

18 Vida maintains a Facebook page that is oriented toward wholesale buyers. (*See*
19 *Ex. H* at 26 (“Vida Facebook Page”) (indicating that “[w]e supply to wholesalers and
20 retail/chain stores” and encouraging such persons to “[g]et your exclusive VIDA
21 online wholesale buyer’s account today”).) Additionally, Vida sells ANGELINA-
22 branded clothing (and only ANGELINA-branded clothing) directly to consumers
23 through its website, *angelina.shop*.¹ (*Opp’n* 12, ECF No. 34.) To market its
24 ANGELINA-branded clothing, Vida maintains an Instagram presence under the

25 _____
26 ¹ The evidence on this point comes from Exhibit H and is unconvincing for reasons discussed later in
27 this Order. To the extent necessary to rule on this Motion, the Court takes judicial notice of the
28 existence of *angelina.shop*, an online store that sells ANGELINA-branded clothing directly to site
visitors. *Cf. Spy Optic, Inc. v. Alibaba.Com, Inc.*, 163 F. Supp. 3d 755, 762 (C.D. Cal. Sept. 28,
2015) (“Courts may take judicial notice of the fact that an internet article is available to the public,
but it may not take judicial notice of the truth of the matters asserted in the article.”).

1 handle @follow.angelina and a Pinterest page under the handle @angelina.shop. (See
2 Ex. H at 26–27.)²

3 **B. ASC**

4 ASC makes and sells only one type of product: the gele. (SUF 1.) Gele is a
5 Yoruba (Nigerian) word for “head wrap” or “head tie.” (SUF 2.) An example of a
6 gele sold by ASC is pictured here:



16 (Mot. 5.) ASC sells geles under the ANGELINA SWANN mark at a price of \$140 to
17 \$520 each. (SUF 3–4.) (ASC’s trademark contains two Ns in “SWANN” even
18 though the name of the corporation itself contains only one N in “Swan”.) ASC sells
19 its products on its own website only, and it further markets its products by maintaining
20 a presence on Facebook under the @AngelinaSwannUS handle. (Opp’n 12; SUF 1;
21 Decl. Alan C. Chen ISO Opp’n (“Chen Decl.”) ¶ 1, Ex. A (“Angelina Swann
22 Facebook Page”), ECF No. 35-2.) According to the Angelina Swann Facebook Page,
23 the brand also maintains a social media presence on Instagram, Pinterest, TikTok, and
24 Twitter. (*Id.*) ASC does not sell its products in brick-and-mortar stores or on Amazon
25 or similar outlets. (SUF 1.)

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28 ² To the extent necessary to rule on the Motion, the Court takes judicial notice of the existence of
these two social media accounts. *See supra* n.1.

1 **C. Trademark Dispute**

2 At some point in the past, ASC filed a trademark application with the United
3 States Patent & Trademark Office (“USPTO”) for the ANGELINA SWANN
4 wordmark and design for “women’s hats and hoods.” (Mot. 8; Decl. Gordon E. Gray
5 ISO Mot. (“Gray Decl.”) ¶ 4 Ex. 3 (“Notice of Opp’n”), ECF No. 34-1.) On
6 February 9, 2022, Vida filed an opposition to ASC’s mark with the USPTO. (*See id.*)
7 That same day, Vida filed the Complaint in the present matter, setting forth claims
8 against ASC for (1) federal trademark infringement (15 U.S.C. § 1114); (2) false
9 designation of origin (15 U.S.C. § 1125); (3) common law trademark infringement;
10 and (4) unfair competition (Cal. Bus. & Prof. Code § 17200). ASC answered, and the
11 Court set a jury trial for May 23, 2023. (Scheduling & Case Management Order 24,
12 ECF No. 22.) The USPTO proceedings have been suspended pending the outcome of
13 this case. (Gray Decl. ¶ 7 Ex. 6 (“Suspend Order”), ECF No. 34-1.)

14 On February 6, 2023, ASC moved for summary judgment on the grounds that it
15 is beyond genuine dispute that there is no likelihood that consumers will be confused
16 about the origin of its geles. (Mot. 7, 12.) The Motion is fully briefed. (Opp’n;
17 Reply, ECF No. 46.)

18 **III. LEGAL STANDARD**

19 A court “shall grant summary judgment if the movant shows that there is no
20 genuine dispute as to any material fact and the movant is entitled to judgment as a
21 matter of law.” Fed. R. Civ. P. 56(a). A disputed fact is “material” where the
22 resolution of that fact “might affect the outcome of the suit under the governing law,”
23 and the dispute is “genuine” where “the evidence is such that a reasonable jury could
24 return a verdict for the nonmoving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S.
25 242, 248 (1986). The burden of establishing the absence of a genuine issue of
26 material fact lies with the moving party, and the moving party may meet this burden
27 with arguments or evidence or both. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323
28 (1986).

1 Once the moving party satisfies its burden, the nonmoving party cannot simply
2 rest on the pleadings or argue that any disagreement or “metaphysical doubt” about a
3 material issue of fact precludes summary judgment. *Matsushita Elec. Indus. Co. v.*
4 *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986); *Cal. Architectural Bldg. Prods., Inc. v.*
5 *Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987). The non-moving
6 party must show that there are “genuine factual issues that . . . may reasonably be
7 resolved in favor of either party.” *Franciscan Ceramics*, 818 F.2d at 1468 (quoting
8 *Anderson*, 477 U.S. at 250) (emphasis omitted). Provided the moving party has
9 satisfied its burden, the court should grant summary judgment against a party who
10 fails to present evidence establishing an essential element of its claim or defense when
11 that party will ultimately bear the burden of proof on that claim or defense at trial. *See*
12 *Celotex*, 477 U.S. at 322.

13 In ruling on summary judgment motions, courts draw all reasonable inferences
14 in the light most favorable to the nonmoving party, refraining from making credibility
15 determinations or weighing conflicting evidence. *Scott v. Harris*, 550 U.S. 372, 378
16 (2007); *Hous. Rts. Ctr. v. Sterling*, 404 F. Supp. 2d 1179, 1183 (C.D. Cal. 2004).
17 However, “uncorroborated and self-serving” testimony will not create a genuine issue
18 of material fact. *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1061 (9th Cir.
19 2002) (quoting *Kennedy v. Applause, Inc.*, 90 F.3d 1477, 1481 (9th Cir. 1996)).
20 “Conclusory” or “speculative” testimony is likewise “insufficient to raise genuine
21 issues of fact and defeat summary judgment.” *See Sterling*, 404 F. Supp. 2d at 1183.
22 The nonmoving party must provide more than a “scintilla” of contradictory evidence
23 to avoid summary judgment. *Anderson*, 477 U.S. at 251–52; *Addisu v. Fred Meyer,*
24 *Inc.*, 198 F.3d 1130, 1134 (9th Cir. 2000).

25 IV. EVIDENTIARY MATTERS

26 There are two preliminary evidentiary matters to address: ASC’s evidentiary
27 objections and Vida’s Exhibit H.

1 **A. ASC’s Evidentiary Objections**

2 ASC objects to the introduction of eleven exhibits Vida offers in support of its
3 opposition to ASC’s Motion: Exhibits A–C, G, I, J, K, and O–R. (Objs., ECF
4 No. 47.)

5 Exhibit R is a sealed document containing some of Vida’s sales data. (Chen
6 Decl. Ex. R (“Vida Sales Data”), ECF No 37-1 (sealed).) ASC objects to Exhibit R
7 on the grounds that, among other things, the Exhibit is unauthenticated. (Objs. 3.)

8 “To satisfy the requirement of authenticating or identifying an item of evidence,
9 the proponent must produce evidence sufficient to support a finding that the item is
10 what the proponent claims it is.” Fed. R. Civ. P. 901(a). Under this standard, where
11 counsel does not have personal knowledge of the authenticity of the document, a
12 declaration of counsel cannot serve to authenticate the document. *ART*
13 *Microelectronics Corp., v. Diamond Antenna & Microwave Corp.*, No. 2:22-cv-
14 08731-VAP (GJSx), 2020 WL 10432456, at *2 (C.D. Cal. Nov. 18, 2020); *see*
15 *Latman v. Burdette*, 366 F.3d 774, 786–87 (9th Cir. 2004), *abrogated on other*
16 *grounds by Law v. Siegel*, 571 U.S. 415 (2014) (holding that it was error to admit
17 bank account records attached to an attorney declaration because the attorney had no
18 personal knowledge regarding the authenticity of the records and relied on third party
19 information).

20 Here, Vida fails to authenticate Exhibit R because the only authenticating
21 evidence for Exhibit R is a declaration of counsel stating that it is a “true and correct
22 copy of Vida’s Financials.” (Chen Decl. ¶ 18, ECF No. 35-1.) Without more, the
23 Court cannot conclude that Vida’s counsel has sufficient knowledge of Vida’s own
24 business records to verify that Exhibit R accurately reflects Vida’s business data.
25 Moreover, Vida makes no suggestion anywhere in its Opposition that a principal or
26 employee of Vida will be available at trial to testify about any subject, including
27 authentication of Vida’s records. In addition to this deficiency, the authentication
28 statement is conclusory, lacks detail, and would likely fail to authenticate Exhibit R

1 even if the declarant were Vida’s custodian of records. The Court **SUSTAINS** ASC’s
2 objection to Exhibit R for lack of authentication.

3 The Court **OVERRULES** ASC’s remaining objections, finding them to be
4 without merit. In particular, and without limitation, where ASC objects on the basis
5 that Vida did not timely disclose evidence, ASC does not demonstrate that Vida’s
6 failure to produce such evidence caused it prejudice or harm.

7 **B. Vida’s Exhibit H**

8 As another preliminary matter, much of Vida’s opposition to this motion,
9 including its dispute of several of ASC’s purportedly undisputed facts, rests on
10 Exhibit H to the Declaration of Alan C. Chen. According to Chen, counsel of record
11 for Vida, Exhibit H is “a true and correct copy of the marketing materials used by Vida
12 to show its use of the ANGELINA and SWAN marks in commerce, including use on
13 annual print catalogs, brochures, newspapers, events, television, Amazon.com and
14 Vida’s own website at www.angelina.shop.” (Chen Decl. ¶ 8.)

15 Exhibit H evades easy description. The seventy-seven pages of the Exhibit are
16 unnumbered, and the CM/ECF ribbon at the top of the courtesy copy restarts its
17 pagination several times, rendering it useless for checking Vida’s pinpoint citations.
18 The digital version of the filing provides no further assistance; on CM/ECF, Exhibit H
19 is parsed out into eight further subparts, each of which has its own ECF number (ECF
20 Nos. 35-9 through 35-16). These individual subparts lack pagination, leaving the
21 Court to continue to guess at how to match the page numbers in Vida’s Opposition and
22 Statement of Genuine Disputes to the appropriate pages in Exhibit H.

23 Regarding the content of Exhibit H, the first dozen or so pages appear to be
24 flyers advertising Vida’s brick-and-mortar location in Los Angeles. The next several
25 pages appear to be clippings from one or more of Vida’s catalogs. There is also a
26 photograph of a group of people in a store, a snapshot of a print newspaper article, and
27 several dozen pages of printouts from Vida’s own website and Amazon.com. The
28 exhibit lacks any sort of index describing the nature of each document, nor is there

1 any additional declaration providing further authentication for each item. To top it off,
2 Vida cites to the *entirety* of Exhibit H no less than seven times—five times in the
3 Opposition, (Opp’n 1, 4, 9, 12, 17), and twice in the SGD, (SGD 5, 15)—leaving the
4 Court to guess at exactly which of the exhibit’s seventy-seven pages supports the
5 proffered fact.

6 This is not the way to present evidence to the Court. Vida’s Exhibit H is utterly
7 unauthenticated, unorganized, and unusable. For these reasons, the Court can
8 properly, and does, disregard Exhibit H. *See Premier Constr. & Remode, Inc. v. Mesa*
9 *Underwriters Special Ins. Co.*, No. 5:18-cv-02852-JGB (KKx), 2020 WL 5498072,
10 at *2 (C.D. Cal. July 8, 2020) (striking exhibits and other documents, noting
11 “Plaintiffs dump this heaping mess outside of chambers and leave the Court to muddle
12 through their briefs’ dreamlike associations, which also fail to reference the relevant
13 charts or the record”).

14 With Exhibit H disregarded, many of Vida’s arguments regarding trademark
15 infringement lack basis in the record, further weakening its opposition to the Motion.
16 Even so, the Court analyzes the Motion in the alternative by considering Exhibit H to
17 the best of its ability. Under this approach, ASC remains entitled to summary
18 judgment.

19 V. DISCUSSION

20 ASC moves for summary judgment on all four of Vida’s claims on the ground
21 that it is beyond genuine dispute that there is no likelihood of consumer confusion.

22 A. Claims for Trademark Infringement under Federal and State Law

23 To succeed on a trademark infringement claim, a plaintiff “must prove: (1) that
24 it has a protectable ownership interest in the mark; and (2) that the defendant’s use of
25 the mark is likely to cause consumer confusion.” *Network Automation, Inc. v.*
26 *Advanced Sys. Concepts, Inc.*, 638 F.3d 1137, 1144 (9th Cir. 2011); *see* 15 U.S.C.
27 § 1114; *see also Jada Toys, Inc. v. Mattel, Inc.*, 518 F.3d 628, 632 (9th Cir. 2008)
28 (stating test for whether a trademark has been infringed is “whether an alleged

1 trademark infringer’s use of a mark creates a likelihood that the consuming public will
2 be confused as to who makes what product”).

3 The Ninth Circuit has acknowledged that claims for federal trademark
4 infringement under the Lanham Act, state law trademark infringement, and unfair
5 competition under California law based on trademark infringement are all “subject to
6 the same legal standards.” *Rearden LLC v. Rearden Com., Inc.*, 683 F.3d 1190, 1221
7 (9th Cir. 2012). The same is true of claims for false designation of origin. *JUUL*
8 *Labs, Inc. v. Chou*, 557 F. Supp. 3d 1041, 1053 (C.D. Cal. 2021) “The ultimate test
9 for all these claims is exactly the same as for trademark infringement: whether the
10 public is likely to be deceived or confused by the similarity of the marks.” *Id.*
11 (quoting *Century 21 Real Estate Corp. v. Sandlin*, 846 F.2d 1175, 1178 (9th Cir.
12 1988)) (cleaned up).

13 In making their respective arguments, neither party makes any meaningful
14 distinction among Vida’s four claims, which is consistent with the foregoing case law.
15 Both sides argue primarily about the issue of likelihood of consumer confusion,
16 apparently agreeing that all of Vida’s claims rise or fall together with the resolution of
17 this issue. The Court therefore analyzes ASC’s federal trademark infringement,
18 federal false designation of origin, state common law trademark infringement, and
19 state law unfair competition claims together, focusing primarily on whether the
20 likelihood of consumer confusion is in genuine dispute.

21 **B. *Sleekcraft* Factors**

22 The Ninth Circuit “developed eight factors, the so-called *Sleekcraft* factors, to
23 guide the determination of a likelihood of confusion.” *GoTo.Com, Inc. v. Walt Disney*
24 *Co.*, 202 F.3d 1199, 1205 (9th Cir. 2000). These factors are (1) strength of the mark;
25 (2) proximity of the goods; (3) similarity of the marks; (4) evidence of actual
26 confusion; (5) marketing channels used; (6) the type of goods and the degree of care
27 likely to be exercised by the purchaser; (7) defendant’s intent in selecting the mark;

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1 and (8) likelihood of expansion of the product lines. *AMF Inc. v. Sleekcraft Boats*,
2 599 F.2d 341, 348–49 (9th Cir. 1979).

3 Courts apply the *Sleekcraft* factors flexibly; the “factors are intended as an
4 adaptable proxy for consumer confusion, not a rote checklist.” *Network Automation*,
5 638 F.3d at 1145 (collecting cases). “In the context of the Web in particular, the three
6 most important *Sleekcraft* factors are (1) the similarity of the marks, (2) the
7 relatedness of the goods or services, and (3) the simultaneous use of the Web as a
8 marketing channel.” *GoTo.Com*, 202 F.3d at 1205. “When this controlling troika or
9 internet trinity . . . does not clearly indicate a likelihood of consumer confusion, a
10 district court can conclude the infringement analysis only by balancing all the
11 *Sleekcraft* factors within the unique context of each case.” *Interstellar Starship*
12 *Servs., Ltd. v. Epix, Inc.*, 304 F.3d 936, 942 (9th Cir. 2002) (citation and internal
13 quotation marks omitted).

14 The Court addresses each *Sleekcraft* factor below, but before it does, it is
15 helpful to articulate with case-specific language Vida’s central contention with regard
16 to consumer confusion. To win its suit, Vida must ultimately prove that a customer
17 purchasing an ANGELINA SWANN-branded gele for over \$140 from ASC’s own
18 website is likely to think that the gele they are purchasing is actually sold by Vida.
19 The question on this Motion is whether Vida has demonstrated that it will have
20 sufficient evidence to allow a reasonable jury to find a likelihood of consumer
21 confusion on these facts.

22 In this case, stating the issue is almost tantamount to resolving it in ASC’s
23 favor. It does not take a terribly detailed legal analysis to conclude that there is
24 simply no appreciable chance that a customer buying an ANGELINA SWANN gele
25 directly from ASC for hundreds of dollars might, at the time of the purchase,
26 mistakenly think they are purchasing the gele from the same company that sells hats
27 and scarves under the ANGELINA mark and underwear and socks under the SWAN
28 mark in big-box retail stores and on Amazon.com for a few dollars apiece. The

1 following analysis is guided by the eight *Sleekcraft* factors and gives additional
2 nuance to this rather obvious conclusion.

3 *I. Strength of Mark*

4 First, the Court considers the strength of Vida’s mark. “The stronger a mark—
5 meaning the more likely it is to be remembered and associated in the public mind with
6 the mark’s owner—the greater the protection it is accorded by the trademark laws.”
7 *Network Automation*, 638 F.3d at 1149 (quoting *Brookfield Commcn’s, Inc. v. W.*
8 *Coast Ent. Corp.*, 174 F.3d 1036, 1058 (9th Cir. 1999)). The strength of a mark
9 depends on two considerations: its conceptual strength and its commercial strength.
10 *Lahoti v. Verichcek, Inc.*, 636 F.3d 501, 508 (9th Cir. 2011).

11 “A mark’s conceptual strength depends largely on the obviousness of its
12 connection to the good or service to which it refers.” *Network Automation*, 638 F.3d
13 at 1149 (quoting *Fortune Dynamic, Inc. v. Victoria’s Secret Stores Brand Mgmt., Inc.*,
14 618 F.3d 1025, 1032–33 (9th Cir. 2010)). “Conceptual strength involves
15 classification of a mark ‘along a spectrum of generally increasing inherent
16 distinctiveness as generic, descriptive, suggestive, arbitrary, or fanciful.’” *Id.* (quoting
17 *Brookfield*, 174 F.3d at 1058). An “arbitrary” word mark neither describes nor
18 suggests anything about the goods sold under the mark. 2 J. Thomas McCarthy,
19 *McCarthy on Trademarks and Unfair Competition* § 11:11 (5th ed. Mar. 2023
20 update).

21 Here, each of Vida’s individual marks—ANGELINA and SWAN—qualifies as
22 arbitrary. The word or name “Angelina” does not in any way suggest, refer to, or
23 describe the nature of hats, beanies, or other clothing items. Similarly, the word
24 “swan” does not suggest, refer to, or describe the nature of socks and underwear. That
25 a mark is arbitrary generally suggests it is strong, but courts must also consider the
26 commercial strength of the mark. *See SLY Mag., LLC v. Weider Publ’ns L.L.C.*,
27 529 F. Supp. 2d 425, 437 (S.D.N.Y. 2007) (“A mark may be categorized as arbitrary
28

1 or fanciful, but may nonetheless lack commercial strength in the marketplace and
2 therefore ultimately be deemed weak.”), *aff’d*, 346 F. App’x 721 (2d Cir. 2009).

3 Commercial strength refers to “the marketplace recognition value of the mark.”
4 *Lahoti*, 636 F.3d at 508. “Commercial strength is based on ‘actual marketplace
5 recognition,’ and thus ‘advertising expenditures can transform a suggestive mark into
6 a strong mark.’” *Network Automation*, 638 F.3d at 1149 (quoting *Brookfield*,
7 174 F.3d at 1058). To show that its marks are commercially strong, Vida argues that,
8 from 2015 to 2020, it incurred over \$2 million “for marketing expenses related to
9 trade shows, advertisements, [and] e-commerce, among others” and that it sold over
10 \$400,000 in ANGELINA- or SWAN-branded beanie products in that same time
11 period. (Opp’n 8.)

12 In the first place, the Court is excluding the evidence on which this argument is
13 based for lack of authentication. (*See supra* Part IV.A.) In the second place, even if
14 accepted as true, the mere fact that a party spent money on marketing does not mean
15 that its mark has gained commercial strength as a result. It is true that “advertising
16 expenditures *can* transform a suggestive mark into a strong mark,” *Brookfield*,
17 174 F.3d at 1058 (emphasis added), but something more is required, such as a
18 showing that the “mark has achieved actual marketplace recognition,” *id.* (citing
19 *Streetwise Maps, Inc. v. Vandam, Inc.*, 159 F.3d 739, 743–44 (2d Cir. 1998)). Here,
20 as in *Brookfield*, Vida provides only raw marketing expenditures without proffering
21 any further evidence or argument to show that those marketing expenditures resulted
22 in actual marketplace recognition. A big marketing budget does not automatically
23 lead to marketplace recognition; the party claiming commercial strength must
24 demonstrate this causal connection with evidence. Here, Vida has “has not come forth
25 with substantial evidence establishing the widespread recognition of its mark.”
26 *Brookfield*, 174 F.3d at 1058. Thus, there is no evidence of commercial strength.

27 In all, Vida’s marks “fall[] within the weak side of the strength spectrum.” *Id.*
28 The first *Sleekcraft* factor weighs against a finding that consumer confusion is likely.

1 2. *Proximity of Goods*

2 Second, the Court considers the proximity—that is, the similarity or
3 relatedness—of the goods. “Related goods are generally more likely than unrelated
4 goods to confuse the public as to the producers of the goods.” *Network Automation*,
5 638 F.3d at 1150 (quoting *Brookfield*, 174 F.3d at 1055). “[T]he danger presented is
6 that the public will mistakenly assume there is an association between the producers
7 of the related goods, though no such association exists.” *Id.* (quoting *Sleekcraft*,
8 599 F.2d at 350). “The proximity of goods is measured by whether the products are:
9 (1) complementary; (2) sold to the same class of purchasers; and (3) similar in use and
10 function.” *Id.*

11 Here, Vida sells a wide variety of ANGELINA-branded clothing products—
12 including many of the thirty-nine types of clothing products listed in the ‘571
13 Registration. (*See* SUF 8.) Five of those types of clothing products—beanies, hats,
14 scarves, headbands, and earmuffs—could fairly be characterized as headwear. There
15 is some relation between these products and ASC’s geles in that all these products are
16 worn on the head. But the similarity ends there. Geles are a very specific type of
17 headwrap. Vida may sell beanies, hats, scarves, headbands, and earmuffs, but it
18 proffers no evidence suggesting that any of the headwear it sells bears any similarity
19 to geles beyond the bare fact that they are all worn on the head.

20 The relation between ASC’s geles, on one hand, and the underwear and socks
21 Vida sells under its SWAN label, on the other hand is even weaker. The only
22 similarity is that both sets of products are clothing items.

23 Moreover, ANGELINA- and SWAN-branded clothing items are low-priced
24 everyday wearables, and ANGELINA SWANN-branded geles are expensive specialty
25 headwear with unique designs. (SUF 2–3, 5, 9–10.) Thus, Vida’s and ASC’s goods
26 are not sold to the same class of consumers and are somewhat dissimilar in use and
27 function. This further decreases the proximity of the goods.

28

1 In opposition, Vida argues that the design of ASC’s geles is not unique and that
2 *other vendors* sell products that are similar to ASC’s geles. (Opp’n 9–10.) This
3 argument is not well taken. The relevant question is whether ASC’s geles are similar
4 to *Vida’s* products. If they are, there may be a possibility that a consumer would be
5 confused thinking that one of ASC’s products is in fact Vida’s product. This inquiry
6 simply has nothing to do with whether ASC’s geles are similar to other products sold
7 by unrelated, nonparty vendors.

8 The discount clothing items Vida sells and the specific type of headwear ASC
9 sells are related only in the barest conceptual way. The goods do not complement one
10 another, are not sold to the same class of customers, and, beyond their facial similarity
11 as clothing products, are dissimilar in use and function. The second *Sleekcraft* factor
12 weighs strongly against a finding that consumer confusion is likely.

13 3. *Similarity of Marks*

14 Next, the Court considers how similar ASC’s mark is to Vida’s marks. At the
15 outset, the Court notes that the present case “involves a twist on the comparison of
16 marks factor in the likelihood of confusion analysis.” *Schering-Plough Healthcare*
17 *Prods., Inc. v. Ing-Jing Huang*, 84 U.S.P.Q.2d 1323, 2007 WL 1751193, at *3
18 (T.T.A.B. 2007). In particular, Vida’s marks are two separate, distinct marks
19 (ANGELINA and SWAN), whereas ASC’s mark is a single two-word mark
20 (ANGELINA SWANN). ASC points this out and argues that as a result there is little
21 to no similarity between ASC’s mark, on one hand, and Vida’s marks, on the other
22 hand. (Reply 5–6.)

23 This raises the issue of whether Vida’s two marks are “conjoint.” *Schering-*
24 *Plough*, 2007 WL 1751193, at *3. If they are, then Vida has a stronger argument that
25 ASC’s mark is similar to its own. As the Trademark Trial and Appeal Board explains:

26 In order that opposer’s marks may be considered together, two elements
27 must be satisfied before traditional likelihood of confusion analysis can
28 proceed. First, it must be established that the marks have been and are
being used together on a single product or in marketing. *See H.D.*

1 *Hudson Manufacturing Co. v. Food Machinery and Chemical Corp.*,
2 230 F.2d 445, 109 USPQ 48 (CCPA 1956); and *Simoniz Company v.*
3 *Hysan Products Company*, 142 USPQ 377 (TTAB 1964). Further, it
4 must be established that opposer's marks are used in such a fashion that it
5 would be proper to combine them for purposes of comparison, that is,
6 that they have been used and/or advertised conjointly in such a manner
7 and to such an extent in connection with a single product that they have
8 come to be associated together, in the mind of the purchasing public, as
9 indications of origin for opposer's product. *The Western Union*
10 *Telegraph Company v. Graphnet Systems, Inc.*, 204 USPQ 971 (TTAB
11 1979) [FAX and GRAM marks v. FAX GRAM]; and *Mallinckrodt, Inc. v.*
12 *CIBA-GEIGY Corp.*, 195 USPQ 665 (TTAB 1977) [KOBAN, TOBAZ
13 and PO-SAN marks v. TOLBAN].

14 *Id.* at *4. For example, in *Schering-Plough*, the Trademark Trial and Appeal Board
15 found conjoint use of a brand name (DR. SCHOLL'S) and a product name
16 (AIR-PILLO) where the two marks appeared extensively on the same product
17 packaging, often adjacently, and in promotional contexts. *Id.* at *5.

18 Applying this framework here, Vida's showing that its marks are conjoint is
19 very weak. Vida does not argue that it ever used the ANGELINA and SWAN marks
20 on the same product. Instead, Vida cites its Exhibit H to point to instances where it
21 used its ANGELINA and SWAN marks together in marketing. But, as discussed, the
22 Court disregards Exhibit H, and accordingly disregards Vida's argument based on
23 Exhibit H.

24 Were the Court to attempt to consider Exhibit H as evidence of conjoint use, it
25 would encounter the same issues that support disregarding Exhibit H altogether. The
26 only places the Court could locate the two logos adjacent to one another are as
27 follows:

- 28 • On the wall in the background of the photo mentioned above, which appears to
 be a photo of a group of people in a clothing store. The photo is undated and
 was taken at an unknown location. In that photo, five of Vida's logos are

1 displayed on the upper part of a wall, all in a row. The SWAN logo appears on
2 the left and the ANGELINA logo appears on the right. (See Ex. H at 23.)

- 3 • On a few of the undated pages that appear to be catalog pages, like so:



4
5
6
7
8
9 (Ex. H at 19.) Other of these catalog-type pages contain similar groups of logos
10 in which the ANGELINA and SWAN logos are not adjacent to one another.
11 (See, e.g., Ex. H at 7.) Further, the only pages on which the ANGELINA and
12 SWAN marks appear together are undated. (See, e.g., Ex. H at 1.) Surrounding
13 pages are variously dated 2011, 2012, and 2015; these pages do not display both
14 marks together. (See, e.g., Ex. H at 4.)

15 Based on these observations, Vida makes no meaningful showing that it used its
16 two marks together at any particular time, whether in the past seven years or earlier.
17 Moreover, it is not at all clear *what* the catalog-type pages that contain the two marks
18 together are—flyers, catalog pages, website printouts, or otherwise. Thus, there is no
19 meaningful showing that *the public* ever saw these materials. If the public never saw
20 these materials, then Vida has no meaningful argument that the marks are conjointly
21 used.

22 Even in the photo with the store wall, the order of the two marks is reversed.
23 And again, the lack of authentication for this photo renders it nearly worthless from an
24 evidentiary perspective. The Court has no indication of how long these two logos
25 were displayed together in the interior of some unspecified building, and the Court has
26 no indication that any member of the public ever stepped inside the building.

27 For all these reasons, the Court concludes that Vida presents only a “scintilla”
28 of evidence regarding conjoint use of its two marks. *Anderson*, 477 U.S. at 252. That

1 being the case, there is no similarity as a matter of law based on Vida's conjoint use of
2 its ANGELINA and SWAN marks.

3 The remaining issue is whether there is similarity between Vida's two separate
4 marks, on one hand, and ASC's single mark, on the other hand. Vida's two marks are
5 separate marks, and there is no evidence that the two marks have ever been used in
6 connection with the sale of the *same* article of clothing. By contrast, ASC's mark has
7 always been used as a single, two-word mark. Additionally, Vida's SWAN mark
8 contains one N in the word SWAN, whereas ASC's ANGELINA SWANN mark
9 contains two Ns in the word SWANN. Thus, as a matter of law, the two sides' marks
10 are not similar. If it does not altogether resolve the consumer confusion issue in
11 ASC's favor, the third *Sleekcraft* factor weighs strongly against a finding that
12 consumer confusion is likely.

13 4. Evidence of Actual Confusion

14 The next issue is whether there is evidence of actual confusion. When
15 trademarks on goods are at issue, evidence of actual confusion can come in the form
16 of consumer surveys, *see Clicks Billiards, Inc. v. Sixshooters, Inc.*, 251 F.3d 1252,
17 1264–65 (9th Cir. 2001), consumer testimony, *see id.*, or evidence that customers
18 bought one seller's product thinking they were buying that of another seller, or that
19 the customer contacted the wrong company, *see, e.g., Comphy Co., Inc. v. Comfy*
20 *Sheet*, No. 2:20-cv-03029-ODW (Ex), 2021 WL 5051929, at *5 (C.D. Cal. Nov. 1,
21 2021).

22 Vida does not dispute that it has no evidence of actual confusion about the
23 marks at issue. (SUF 16.) Vida argues that the reason there is no evidence of actual
24 confusion is because ASC is a relatively new business with a short history of
25 operation. (Opp'n 11.) But Vida concedes that ASC was using the ANGELINA
26 SWANN mark on the internet by no later than early 2022. (*Id.*) Vida filed its
27 opposition to ASC's Motion in late February 2023. A year is ample time for
28 consumer confusion to arise if such confusion is likely. If there is no evidence of

1 confusion after a year, this observation itself weighs against there being a likelihood
2 of consumer confusion.

3 Overall, the absence of evidence of actual confusion in this case weighs against
4 a finding that consumer confusion is likely.

5 5. *Marketing Channels Used*

6 The next consideration is the similarity of the parties' marketing channels.
7 "Convergent marketing channels increase the likelihood of confusion." *Sleekcraft*,
8 599 F.2d at 353. "If the plaintiff's and defendant's [goods] are likely to be sold in the
9 same or similar stores or outlets, or advertised in similar media, this may increase the
10 likelihood of confusion." Ninth Circuit Model Civil Jury Instruction No. 15.18(6).

11 Here, ASC markets and sells its geles through its own website
12 (angelinaswann.us and angelinaswann.com) and it further markets its products on
13 social media platforms, including Facebook and ostensibly others, using
14 @AngelinaSwannUS and similar handles. (SUF 1; Angelina Swann Facebook Page.)

15 Vida, for its part, markets and sells its ANGELINA branded clothing products
16 through its own website (angelina.shop) and it further markets those products on its
17 Instagram and Pinterest pages under the handles @follow.angelina and
18 @angelinaonline.shop, respectively. (Opp'n 12; Ex. H at 26–27.) Vida has its own
19 corporate Facebook page, which is apparently oriented toward wholesale buyers. (*See*
20 *Vida Facebook Page*.)

21 In light of these observations, the only senses in which the parties' marketing
22 channels might overlap are that (1) the parties each sell their own products directly to
23 consumers on their own websites; (2) Vida has an Instagram page for its ANGELINA-
24 branded clothing, and ASC has an Instagram page for its ANGELINA SWANN-
25 branded geles; and (3) Vida has a corporate Facebook page for wholesale purchasers
26 and ASC has a Facebook page for its ANGELINA SWANN-branded geles.

27 To the extent these marketing channels overlap, the overlap is minimal, such
28 that any overlap is unlikely to cause consumer confusion. First, a substantial

1 percentage of providers of goods maintain their own websites where they sell those
2 goods to customers. Thus, the mere fact that two sellers each use their own webpages
3 to sell their goods or services does not, without more, suggest consumer confusion.
4 Second, Vida has not explained how the fact that two companies each have their own
5 Instagram page is apt to create confusion in consumers. And third, the fact that Vida
6 has a Facebook page oriented toward wholesale buyers (ostensibly for all its brands,
7 not just ANGELINA and SWAN) while ASC has a Facebook page oriented toward
8 retail customers seeking to buy ANGELINA SWANN-branded geles engenders no
9 colorable likelihood of confusion. The audience each page serves and the products
10 each page offers are too dissimilar.

11 Moreover, Vida distributes its products on Amazon.com and in big-box stores
12 such as Walmart, whereas ASC does not make its geles available for sale in any
13 physical stores.

14 In all, it appears that the parties' respective marketing channels are substantially
15 *divergent*, not convergent. Thus, the fifth *Sleekcraft* factor weighs strongly against a
16 finding that consumer confusion is likely.

17 6. *Likely Degree of Care Exercised by Purchaser*

18 The Court next considers the degree of care a potentially confused purchaser is
19 likely to exercise. In this case, the Court is considering the degree of care likely to be
20 exercised by a purchaser of ASC's geles.

21 "In assessing the likelihood of confusion to the public, the standard used by the
22 courts is the typical buyer exercising ordinary caution." *Network Automation*,
23 638 F.3d at 1152. "[W]hen the goods are expensive, the buyer can be expected to
24 exercise greater care in [their] purchases." *Sleekcraft*, 599 F.2d at 353; *see also* Ninth
25 Circuit Model Civil Jury Instruction No. 15.18(7) ("The more sophisticated the
26 potential buyers of the goods or the more costly the goods, the more careful and
27 discriminating the reasonably prudent purchaser exercising ordinary caution may
28

1 be.”). “Low consumer care . . . increases the likelihood of confusion.” *Network*
2 *Automation*, 638 F.3d at 1152.

3 Here, ANGELINA SWANN-branded geles are expensive, so the purchaser of
4 can be expected to exercise greater care. Such a purchaser can be expected to do
5 substantial due diligence before purchasing, including, at minimum, by verifying that
6 the product they are purchasing is from their intended source. Thus, the degree of
7 consumer care is high.

8 Pushing back, Vida again cites to third-party products and pricing. (Opp’n 16–
9 17.) But the reasonable consumer at issue is not one seeking to purchase third-party
10 geles sold at discount prices. Instead, it is one seeking to purchase ASC’s geles. Such
11 a consumer is likely to exercise a high degree of care due the prices ASC charges.
12 Accordingly, the sixth *Sleekcraft* factor weighs strongly against a finding that
13 consumer confusion is likely.

14 7. *Defendant’s Intent in Selecting Mark*

15 The Court next considers whether ASC had a culpable intent in selecting its
16 ANGELINA SWANN mark. “Adopting a designation with knowledge of its
17 trademark status permits a presumption of intent to deceive.” *Interstellar Starship*
18 *Servs., Ltd. v. Epix Inc.*, 184 F.3d 1107, 1111 (9th Cir. 1999). “In turn, intent to
19 deceive is strong evidence of a likelihood of confusion.” *Id.*

20 In satisfaction of its initial burden, ASC points out that Vida has no evidence
21 that ASC intended to trade on the goodwill of Vida’s ANGELINA or SWAN
22 trademarks. (Mot. 12; SUF 17.)

23 Vida makes a smattering of points on the issue of ASC’s intent, but none of
24 those points go to whether ASC knew of Vida’s marks when it selected its own mark.
25 Vida first points to the allegations in its Complaint, which are, of course, not
26 evidence. (Opp’n 14.) Vida then sets forth a timeline of events relating to ASC’s
27 registration of its trademark and its websites. (*Id.* at 15.) From there, Vida leaps to
28 the suggestion that ASC’s timeline constitutes “curious conduct and [a] roundabout

1 way of registering for a business,” which it argues “can only be interpreted as [ASC’s]
2 acute awareness of the risk of confusion inherent in use of ANGELINA SWAN as the
3 company’s official trademark.” (*Id.*) Both these leaps are factually unsupported and
4 logically untenable. Moreover, the question is not whether ASC was aware of the
5 “risk of confusion” in a general sense when it selected its ANGELINA SWANN
6 mark. The question is whether ASC was aware of Vida’s marks. Vida makes no
7 showing of the latter. Accordingly, in balancing the *Sleekcraft* factors, the seventh
8 factor is neutral.

9 8. *Likelihood of Expansion of Product Lines*

10 Finally, the Court considers the likelihood of an expansion of either party’s
11 product lines. “[I]nasmuch as a trademark owner is afforded greater protection
12 against competing goods, a ‘strong possibility’ that either party may expand [their]
13 business to compete with the other will weigh in favor of finding that the present use
14 is infringing.” *Sleekcraft*, 599 F.2d at 354. Here, the question is whether there is any
15 evidence that Vida might expand into the high-end gele market or that ASC might
16 expand into the market for the sort of everyday discount men’s and women’s clothing
17 Vida sells.

18 ASC points out that Vida has no evidence that it intends to sell geles.
19 (Mot. 12.) In response, Vida suggests that geles “may fall into Vida’s natural zone of
20 expansion,” and cites a financial record showing recent sales totals for SWAN-
21 branded hats and beanies. (SGD 18.) Again setting aside the fact that the Court is
22 excluding the financial record, (*see supra* Part IV.B), the financial record nevertheless
23 falls far short of evidence that Vida is likely to expand into selling geles. A single
24 financial summary regarding past sales of hats and beanies says nothing about whether
25 Vida is likely to start selling geles at some point in the future.

26 Moreover, if any director, officer, or employee of Vida is contemplating selling
27 geles in the future, Vida would be able to produce a declaration indicating as much.
28 But the only declaration Vida submits with its opposition is that of its attorney, and

1 the attorney declaration does not say anything about this issue. (*See generally* Chen
2 Decl.) Vida neither points to nor suggests any other meaningful evidence it might
3 introduce to make a showing of likelihood of expansion at trial.

4 Additionally, no party suggests it is possible that ASC, which specializes in
5 geles, will expand its product line to anything beyond geles.

6 Given that no evidence suggests a likelihood that one side will expand into the
7 product lines of the other, the eighth and final *Sleekcraft* factor weighs against a
8 finding that consumer confusion is likely.

9 **C. Summary**

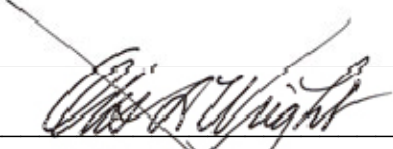
10 In summary, of all the *Sleekcraft* factors, the only one that may weigh in favor
11 of confusion is the conceptual strength of Vida’s marks. But this showing, without
12 more, does not demonstrate a likelihood of confusion. This is especially so when, as
13 here, six of the seven remaining factors indicate no likelihood of confusion, often
14 strongly. In these circumstances, the *Sleekcraft* factors, on the whole, weigh so
15 strongly in ASC’s favor that the Court concludes that no reasonable jury could find
16 for Vida on the consumer confusion issue. Because all four of Vida’s claims rise or
17 fall with this issue, ASC is entitled to judgment in its favor as a matter of law.

18 **VI. CONCLUSION**

19 For the reasons discussed above, the Court **GRANTS** Defendant’s Motion for
20 Summary Judgment and **DISMISSES** Vida’s Complaint **WITH PREJUDICE**. (ECF
21 No. 34.) The Court will issue Judgment.

22
23 **IT IS SO ORDERED.**

24
25 April 11, 2023

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27
28 
OTIS D. WRIGHT, II
UNITED STATES DISTRICT JUDGE