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9  
 10 UNITED STATES DISTRICT COURT  
 11 NORTHERN DISTRICT OF CALIFORNIA  
 12 OAKLAND DIVISION

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14 HELIO LLC

15 Plaintiff,

16 vs.

17 PALM, INC.

18 Defendant.

13 CASE NO. C 06 7754 SBA

19  
 20 **OPPOSITION TO PLAINTIFF'S**  
**MOTION FOR A PRELIMINARY**  
**INJUNCTION**

21 **HEARING DATE: April 10, 2007**  
**1:00 p.m.**

22 **JUDGE: Hon. Sandra B. Armstrong**

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 Defendant Palm, Inc. ("Palm") respectfully submits the following opposition to plaintiff Helio's motion for a preliminary injunction.

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**I.  
PRELIMINARY STATEMENT REGARDING HELIO'S  
OBSTRUCTION OF DISCOVERY**

1  
2  
3 As addressed in Palm's separate March 9, 2007 motion to compel (Docket no. 48), Helio  
4 refused to present its key 30(b)(6) witness, Jessica Weeks, to testify for more than 1.5 hours and  
5 walked out of the deposition without prior notice. Helio seeks to rely upon Ms. Weeks'  
6 declaration to support its motion, but deliberately foreclosed full examination of this witness.  
7 Although Palm believes the discovery and consumer surveys conducted to date conclusively show  
8 that Helio's mark has no secondary meaning and that there is no likelihood of confusion, Palm is  
9 submitting this brief without the benefit of complete discovery, and respectfully requests leave  
10 from the Court to submit a supplemental brief following the hearing on Palm's motion to compel.

11  
12 **II.  
INTRODUCTION AND SUMMARY**

13 In this case for trademark infringement, Helio failed to establish the single most important  
14 element of its claim--likelihood of consumer confusion between Palm's and Helio's  
15 advertisements. Despite having had more than three months to do so, Helio declined to present  
16 any surveys to support its claim of consumer confusion. Palm, on the other hand, at great expense,  
17 commissioned two separate studies that conclusively establish the following:

- 18 • There is absolutely no evidence of forward or reverse confusion. Of the more than 800  
19 survey respondents from Palm's and Helio's respective target markets, **not a single person**  
20 associated Palm's products or advertisements with Helio, or associated Helio's products or  
21 advertisements with Palm. This is not a case where Helio has scant evidence to support its  
22 claims of confusion; this is a case where Helio has **no evidence** to support its claim of  
23 confusion.  
24 • Helio's "Don't call it a phone" slogan has **no secondary meaning**, with only a 13%  
25 consumer recognition rate.  
26 • Helio's "Don't call us a phone company" slogan has **no secondary meaning**, with only a  
27 17% consumer recognition rate.

28 Instead of presenting the most basic evidence, such as a consumer survey, Helio opens its  
moving papers with an unsupported attack on one of Palm's witnesses and the misguided  
assumption that this Court's preliminary findings from December's TRO hearing excuse Helio  
from further developing its claims. But Helio can no longer hide behind a claim of urgency when  
failing to meet its burden of proof, especially given that Helio has **completed** all of its discovery.

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1 The evidence developed over the past three months demonstrates that Helio has no case for  
2 trademark infringement, and certainly no basis for injunctive relief.

3 In a case for trademark infringement, the single-most important question for this Court to  
4 resolve is whether consumers are likely to be confused by Palm’s advertisements; fortunately,  
5 Helio itself already answered this question more than one year ago. Through its own admission,  
6 Helio is using the phrase, “Don’t call it a phone,” to convey the message that [REDACTED]  
7 [REDACTED] In December  
8 2005, however -- one year before filing for the TRO against Palm -- both Helio and its advertising  
9 agency became aware of a new tagline, “It’s so much more than a phone,” that was being used by  
10 a Helio competitor, ESPN Mobile -- a company that was selling branded phones and phone  
11 service. Despite the word-for-word similarity of this slogan and Helio’s intended message, Helio  
12 [REDACTED] that its own tagline, “Don’t call it a phone” was [REDACTED] to the ESPN slogan.  
13 During the same time period, Helio *also* became aware of a slogan being used by Verizon  
14 Wireless, “You can do so much more with your phone.” Despite this explicit knowledge of two  
15 virtually identical slogans, Helio [REDACTED] that consumers [REDACTED] and  
16 Helio proceeded to launch its own advertising campaign.

17 In its TRO and preliminary injunction papers, in which Helio is trying to shut down Palm’s  
18 use of its theme line, Helio never disclosed to the Court its knowledge of the ESPN and Verizon  
19 slogans, nor did Helio disclose [REDACTED] that the use of “Don’t call it a phone” was  
20 not likely to confuse consumers. Yet now, Helio comes before this Court and argues that Palm’s  
21 theme line, “Not just a cell phone. A Treo” is likely to confuse the public. This is hypocrisy at its  
22 best.

23 Not only has Helio failed to present any evidence of consumer confusion, Helio’s request  
24 for a preliminary injunction should be denied because it is moot. Palm’s advertising has run its  
25 course. Palm has no intention of relaunching its campaign. Helio has presented no evidence of  
26 lost sales, lost goodwill, or any type of tangible harm to its business, let alone any ongoing or  
27 threatened harm. In short, there is nothing left of Helio’s case that could not be addressed through  
28



1 monetary damages or permanent injunctive relief at the time of trial. On this basis alone, the  
2 Court should deny the motion.

3 This is a case that should never have been brought, and certainly a case that Helio should  
4 have dismissed with prejudice after the evidence overwhelmingly established a lack of consumer  
5 confusion and a lack of any good-faith basis for this litigation to continue.

6 **III.**  
7 **STATEMENT OF FACTS**

8 A. Development of the Palm Campaign

9 Helio’s moving papers would lead the Court to believe that Palm attempted to mimic  
10 Helio’s advertising campaign. This is not so. The development of Palm’s “Not Just a Cell Phone.  
11 A Treo.” campaign (hereinafter the “Campaign”), began over two years ago, in January 2005,  
12 before Helio even existed. (Decl. of Scott Hancock, ¶ 2.) At that time, Palm’s advertising agency,  
13 AKQA, developed the theme line, “Not a Cell Phone. A Treo” and presented it to Palm. (*Id.*)  
14 AKQA created fourteen advertising mockups at that time, each of which contained the theme line  
15 “Not a Cell Phone. A Treo.” (*Id.*, Ex. A.)

16 In early 2006, Palm was completing the development of a new smartphone, the Treo 680,  
17 and AKQA began developing a promotional campaign for the product. (Patterson Decl., ¶ 3; Colt  
18 Depo., Ex. 2 - Hancock Depo., 17:1-5.) As early as April 21, 2006, before Helio launched its  
19 “Don’t call it a phone” campaign, AKQA delivered a creative brief to Palm, identifying “not a cell  
20 phone. A Treo” as the single-most important element of the campaign. (Patterson Decl., ¶ 3, Ex.  
21 A.) Palm considered “Not a Cell Phone. A Treo.” along with other potential campaign lines  
22 through May 2006 and the early summer. (Colt Dec., Ex. 1 - Patterson Depo. 32:7-33:8, 52:5-19,  
23 96:23-97:2.)

24 The Treo 680 does *not* have an external antenna, and Palm was concerned that if it used the  
25 line “Not a cell phone. A Treo.,” some consumers might actually think that the Treo 680 was in  
26 fact not a cell phone. (Colt Dec., Ex. 2 - Hancock Depo., 27:25-28:11; Hancock Decl., ¶ 3.) By  
27 including the word “just” in the theme line, Palm believed that the advertising would convey the  
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1 idea that the Treo 680 was a cell phone that *also* had additional features, which was the intended  
2 goal of the campaign. (Hancock Decl., ¶ 3.)

3 In late July, 2006, after the Treo Campaign had been developed, the Palm team at AKQA  
4 became aware of Helio's "Don't Call it a Phone" campaign. (Patterson Decl., ¶ 4.) In its brief,  
5 Helio mischaracterizes the evidence by arguing that AKQA became aware of the Helio campaign  
6 "as early as October 2005." (Motion, 5:20.) The email referenced by Helio, however, makes no  
7 mention of Helio's "Don't call it a phone" slogan, and as Helio is well aware, it had not even used  
8 the slogan as of that date.

9 Plaintiff alleges that Scott Hancock, Palm's Director of Marketing, misled the court by  
10 stating that Helio's slogan had never been discussed, considered or raised by Palm. (Motion, 5:1.)  
11 Helio has misconstrued the facts. Mr. Hancock stated that "**at no point during the development**  
12 **of the Campaign**" was Helio's slogan considered. (Hancock TRO Decl., ¶ 6.) By the time Palm  
13 learned of Helio's slogan in August 2006, Palm's Campaign had already been developed and was  
14 nearly finalized; at that point, Palm was only considering whether to use the line "Not a cell  
15 phone. A Treo." or the line "Not *just* a cell phone. A Treo." (Davis Decl., Ex. 2 - Hancock Depo.,  
16 58:11-19, 71:18-74:12, 77:21-80:2, 82:24-86:3, 100:10-101:10.) With its concerns about  
17 consumers interpreting "Not a cell phone. A Treo" literally, Palm ultimately decided to include  
18 the term "just" in the Campaign, such that the theme line became "Not Just a Cell Phone. A  
19 Treo." (Hancock Decl., ¶ 3.)

20 Concerned that "Don't Call it a Phone" and "Not a Cell Phone. A Treo." might convey a  
21 similar message -- namely that the product being advertised was *not* a phone -- AKQA notified  
22 Palm of Helio's campaign on August 2, 2006. (Colt Dec., Ex. 1 - Patterson Depo., 42:22-44:10,  
23 53:18-54:16; Patterson Decl., ¶ 4.) Already aware of Palm's concerns over the lack of an external  
24 antenna on the Treo 680, AKQA brought the Helio tagline to Palm's attention, as it appeared that  
25 Helio's tagline was conveying the message that Palm wanted to **avoid**, namely that a particular  
26 device was **not** a phone. (Patterson Decl., ¶ 4.)

27 In September 2006, Palm publicly launched the Campaign, using the phrase "Not just a  
28 mobile. A Treo." in Europe, and on October 12, 2006, Palm publicly launched the U.S. Campaign

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1 at the Digital Life electronics expo in New York City, a significant electronics-industry event.  
 2 (Hancock Decl., ¶ 4.) Palm displayed a large banner over its exhibition booth with the theme line,  
 3 “Not Just a Cell Phone. A Treo.” (*Id.*, Ex. B.) Industry journalists covering the event, such as  
 4 James Miller, acknowledged Palm’s new advertising campaign and wrote publicly about the  
 5 association of the theme line with Palm’s new Treo 680 smartphone. (*Id.*, Ex. C.) Mr. Miller  
 6 wrote in a publicly-available online article dated October 12, 2006 that, “To support the roll out of  
 7 the Treo 680, Palm is going to roll out \$25 million advertising and marketing campaign. The main  
 8 theme line will be ‘Not Just a Cell Phone. A Treo.’” (*Id.*)

9 B. Notice Provided to Palm and Helio’s Alleged First Knowledge of the Campaign

10 Helio provided no notice of its claims until December 19, 2006, when plaintiff’s complaint  
 11 and application for a temporary restraining order were served on Palm’s in-house counsel.

12 (Hancock Decl., ¶ 8.) Helio made no contact with anyone at Palm regarding the Campaign prior  
 13 to that time. (*Id.*) In its moving papers and in repeated representations to the Court, Helio stated  
 14 that it first became aware of Palm’s campaign on December 12, 2006. Yet a recently served  
 15 privilege log reveals that counsel sent an email to Helio on **November 18, 2006, nearly a month**  
 16 **before the date claimed in Helio’s papers**, regarding “Palm/Helio litigation.” (Colt Decl., ¶ 9,  
 17 Ex. 6, p. 24.)

18 C. Conduct of Discovery

19 In its January 8, 2007 order denying Helio’s application for a TRO, this Court permitted  
 20 both parties to take two depositions. Plaintiff noticed the depositions of Scott Hancock and  
 21 AKQA, Palm’s former advertising agency. Palm noticed the deposition of Helio under Rule  
 22 30(b)(6). (*Id.*, ¶ 6, 8.) In response to this notice, Helio designated three individuals to testify on  
 23 its behalf. (*Id.*) Helio designated Michael Zemetra to testify about “financial information,” Jae  
 24 Lee to testify about “products,” and Jessica Weeks to testify about “marketing.” (*Id.*) The  
 25 depositions of Messrs. Zemetra and Lee were taken on the same day and completed in five and a  
 26 half hours total. (*Id.*) The deposition of Ms. Weeks began on March 9, 2007. (*Id.*) After  
 27 approximately one and a half hours of testimony, Helio’s counsel and the witness walked out of  
 28 the deposition, contending that Palm was only entitled to seven hours of deposition time for all

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1 three of Helio’s Rule 30(b)(6) designees. (*Id.*) That same day, Palm filed an Emergency Motion  
2 for to Compel Deposition and Sanctions. (Docket no. 48.)

3 D. Expert Discovery

4 To test Helio’s claims of consumer confusion, Palm commissioned two separate consumer  
5 surveys from Marylander Marketing Research, Inc., a firm with more than 30 years of experience  
6 in the design and analysis of consumer surveys. Palm spent approximately \$80,000 on survey fees  
7 alone. As detailed in the two Marylander declarations, the surveys tested a pool of more than  
8 1,000 respondents and established that there is absolutely no evidence of confusion between Palm  
9 and Helio’s advertisements, nor any evidence of secondary meaning for Helio’s slogans.

10 **IV.**  
11 **ARGUMENT**

12 A. This Motion is Moot Because Palm is No Longer Running the Campaign.

13 Preliminarily, the Court should deny plaintiff’s motion for a preliminary injunction because  
14 it is moot; plaintiff has made no showing of a threat of continuing harm. *Webb v. Missouri Pacific*  
15 *Railroad Co.*, 98 F.3d 1067 (8th Cir. 1996) (quoting *U.S. v. Oregon State Medical Society*, 343  
16 U.S. 326, 333 (1952) (injunctive relief is inappropriate unless there is “a real threat of [a] future  
17 violation [of the law] or a contemporary violation of a nature likely to continue to recur.”) Aside  
18 from two print publications that are already slated for publication at the end of March with cover  
19 dates of April 2007, the Campaign has run its course. Palm has no plans to publish any further  
20 print advertisements. (Hancock Decl., ¶ 9.) There is no outdoor advertising that is still being  
21 displayed at the request of Palm, and Palm has no plans to purchase any additional outdoor  
22 advertising. (*Id.*) While Palm acknowledges that some outdoor advertisements may have  
23 remained on display because the owners of the property did not take them down, all of Palm’s  
24 leases have expired and it is up to the property owners to remove the displays and replace them  
25 with new ads. (*Id.*) There is no online advertising being displayed at Palm’s request, and Palm  
26 has no plans to purchase any additional online advertising. (*Id.*)

27 Not only does Palm have no intention of running any further advertising, the parties and  
28 the Court are in the present position of debating over a campaign that has run its course because of

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1 plaintiff's delay. In its opposition to plaintiff's application for a TRO, Palm proposed a  
 2 preliminary injunction hearing on January 25, 2007. (Opp. to TRO, p. 13.) The Court set the  
 3 hearing date for March 6, 2007. (Docket no. 23.) At Helio's request, Palm stipulated to extending  
 4 the hearing date and the Court set it for April 3, 2007. (Docket no. 29); (Colt Decl., ¶ 10.) The  
 5 hearing date was later extended only one week, to April 10, to accommodate Palm's counsel's trial  
 6 schedule in another matter. (Docket no. 32.) Helio did not object to moving the hearing date, nor  
 7 did Helio ask Palm to stipulate that the continuance was not to Helio's prejudice. Yet now,  
 8 plaintiff asks this Court to enjoin Palm from continuing to run a campaign Palm has no intention  
 9 of running. Without an ongoing or immediate threat of harm, a preliminary injunction is  
 10 unjustified.

11 B. Plaintiff Cannot Meet its High Burden to Establish the Need for a Preliminary Injunction

12 Mootness aside, injunctive relief is an extraordinary remedy that imposes a high burden of  
 13 proof on the moving party. Here, Helio cannot obtain a preliminary injunction because it has not  
 14 established either (1) a combination of probable success on the merits and the possibility of  
 15 irreparable harm, or (2) that serious questions are raised and the balance of hardships tips sharply  
 16 in plaintiff's favor. *Miss World (UK) Ltd. v. Mrs. America Pageants, Inc.*, 856 F.2d 1445, 1448  
 17 (9th Cir. 1988); *Rodeo Collection, Ltd. v. West Seventh*, 812 F.2d 1215, 1217 (9th Cir. 1987).  
 18 Failure to make such a showing warrants denial of a motion for preliminary injunction. *Miss*  
 19 *World*, 856 F.2d at 1448; *Rodeo Collection*, 812 F.2d at 1217.

20 **1. Helio Cannot Obtain Injunctive Relief Because It Has Not Established a**  
 21 **Likelihood of Success on the Merits.**

22 In a trademark infringement case, the moving party cannot establish probable success on  
 23 the merits without establishing the fundamental element of likelihood of consumer confusion.  
 24 *Rodeo Collection*, 812 F.2d at 1220 (affirming denial of motion for preliminary injunction after  
 25 moving party failed to produce evidence of actual confusion and wrongful intent). To analyze the  
 26 likelihood of confusion in a trademark infringement case, courts in the Ninth Circuit employ the  
 27 eight-factor test set forth in *AMF, Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348-49 (9th Cir. 1979).  
 28 While Helio argues that the Court initially stated the issue was "close," the discovery obtained

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1 over the past three months now demonstrates that plaintiff has no likelihood of success on the  
2 merits of its claims.

3 **(a) Factor One: There is No Evidence of Actual Confusion.**

4 First and foremost, despite now having had more than three months to develop and  
5 investigate this case, Helio has provided the Court with absolutely **no evidence** of actual consumer  
6 confusion--not a single survey, not a single email, not a single declaration from one of its  
7 salespeople, not a single expert declaration, and not even a single offhand comment by one of the  
8 more than 200,000 MySpace "friends" who actively post comments on Helio's homepage. As the  
9 *Sleekcraft* court noted, evidence of actual confusion can be persuasive proof of likely future  
10 confusion. *Id.*, 599 F.2d at 352. Instead of presenting this Court with evidence of confusion,  
11 plaintiff instead relies heavily on case law stating that the lack of such evidence--by itself-- is not  
12 dispositive. (*See* Motion, p. 24-25.) But plaintiff fails to note that the Court may weigh this factor  
13 heavily when the circumstances indicate such evidence *should have been available*. *Sleekcraft*,  
14 599 F.2d at 352. This is precisely the case here, as Helio has now had more than three months to  
15 develop its case and, at a bare minimum, conduct a survey to test actual consumer confusion.

16 **(i) Helio Failed to Conduct a Consumer Survey to Demonstrate  
17 Likelihood of Confusion**

18 In a trademark infringement case, it is almost always essential for the plaintiff to introduce  
19 survey evidence to support the allegation of a likelihood of confusion. *Braun, Inc. v. Dynamics  
20 Corp. of America*, 975 F.2d 815, 828 (Fed. Cir. 1992) ("failure to proffer survey evidence,  
21 empirical studies, or disinterested testimony from consumers or members of the trade as to this  
22 issue, suggests that the public is not likely to be confused with respect to source"); *Mattel, Inc. v.  
23 Azrak-Hamway International, Inc.*, 724 F.2d 357, 361 (2d Cir. 1983). Helio certainly could have  
24 conducted a survey in the time since the TRO hearing, and Helio has set forth no justification for  
25 its failure to provide this most basic evidence for the Court to consider.

26 **(ii) Palm Commissioned a Consumer Survey That Demonstrates  
27 That There Is No Consumer Confusion**

28

1 Palm did not sit idle for the past three months, but instead commissioned two separate  
 2 consumer surveys to test Helio's claims of confusion at a cost of nearly \$80,000 in survey fees  
 3 alone. The results are unmistakable and demonstrate that there is no merit to Helio's case. The  
 4 survey results are set forth in detail in the attached Marylander declarations, and reveal the  
 5 following:

- 6 • To test forward and reverse confusion, Palm tested a panel of 800 respondents, who  
 7 viewed one of two Helio print advertisements, or one of two Palm advertisements. The  
 8 panel tested **both** Helio's target market of 18-34 year olds and Palm's target market of 25-  
 9 44 year olds.
- 10 • After viewing each advertisement, respondents were asked "Who do you think puts out or  
 11 offers the product(s) and/or service(s) discussed in this ad?"
- 12 • **Not a single respondent** identified Palm or Treo in connection with the Helio ads, **nor did**  
 13 **a single respondent** identify Helio in connection with the Palm ads.
- 14 • Respondents were **also** asked to identify any *other* brands put out by the same company  
 15 mentioned in the ad, or any other brands that *are connected or affiliated with the company*,  
 16 thus giving them the opportunity to identify **any** type of relationship between Palm and  
 17 Helio.
- 18 • **Not a single respondent** linked Palm and Helio.

19 (Marylander Decl.- Consumer Confusion, ¶ 16-53.) As the Court held in *IDV North America, Inc.*  
 20 *v. S&M Brands, Inc.*, (E.D. Va. 1998), a survey that showed **only a 2.4% confusion rate**, "is  
 21 persuasive evidence that there is very little likelihood of confusion between the marks here at  
 22 issue." Here, there is a **0% confusion rate**, clearly establishing the speculative nature of Helio's  
 23 claim of likelihood of confusion.

24 **(iii) Helio Failed to Present any Other Evidence of Actual Confusion**

25 Given that Palm's Campaign was introduced in the U.S. in October 2006, and plaintiff  
 26 alleges that confusion already exists, one would expect plaintiff to present at least *some* evidence  
 27 of actual confusion from a consumer, marketing expert, salesperson, store manager, phone  
 28 operator, customer service representative, advertising representative, or any other readily available  
 source. Plaintiff, for example, monitors emails received from consumers and comments posted on  
 YouTube (*see e.g.*, Colt Dec., ¶¶ 11-12, Exs. 7 and 8), yet plaintiff cannot point to a single email  
 or comment demonstrating, or even suggesting, confusion. Similarly, plaintiff boasts about the  
 over 200,000 "friends" it has on MySpace.com, but cannot cite to a single one of the over 13,400  
 comments posted on its MySpace page that indicates any type of confusion.

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1 The sole piece of evidence cited by plaintiff in support of the claim of actual confusion is  
 2 an article by William Lozito wherein he states “Palm has launched its Treo smartphone campaign  
 3 under the theme line ‘Not just a cell phone. A Treo.’ I’ve noted that Helio is running a similar  
 4 campaign under the mantra ‘Don’t call us a phone company.’” (Motion, p. 24.) This article,  
 5 demonstrates *lack* of confusion, as Mr. Lozito was clearly able to differentiate between Palm and  
 6 Helio and determine that the two campaigns were different advertisements for different products.  
 7 The fact that Mr. Lozito commented that the campaigns are similar is irrelevant; the issue to be  
 8 tested is whether they are *confusingly* similar. Similar marks that are not likely to cause confusion  
 9 do not infringe. *See e.g., Shen Mfg. Co., Inc. v. Ritz Holte, Ltd.*, 393 F.3d 1238 (Fed. Cir. 2004)  
 10 (finding Ritz bath towels and Putting on the Ritz shower curtains not confusingly similar);  
 11 *Holiday Inns, Inc. v. Holiday Out in America*, 481 F.2d 445 (5th Cir. 1973) (finding Holiday Inn  
 12 motels and campgrounds and Holiday Out trailer marks not confusingly similar); *Claremont*  
 13 *Polychemical Corp. v. Atlantic Powdered Metals, Inc.*, 470 F.2d 636 (C.C.P.A. 1972) (finding  
 14 Duragold bronze pigment and Evergold metal power not confusingly similar).

15 **(b) Factor Two: Helio’s and Palm’s Marks are Not Similar.**

16 The next factor for the Court to consider is the similarity of plaintiff’s mark and Palm’s  
 17 allegedly infringing mark. At the TRO hearing, the Court considered this factor to weigh in favor  
 18 of Helio. Evidence acquired during discovery, however, illustrates precisely how different the  
 19 marks are. Helio repeatedly misstates the facts by claiming that Palm’s theme line is “Not just a  
 20 cell phone.” The **actual** theme line is “Not just a cell phone. A Treo.” The two sentences are  
 21 always presented together in Palm’s Campaign, such that any consumer seeing the theme line  
 22 immediately knows that it refers to the Treo and not to any other product. (Hancock Decl., ¶ 5.)

23 Additionally, Helio mistakenly focuses on the words of the theme lines alone. The marks  
 24 cannot be evaluated in this type of vacuum; the Court must consider “the marks and names in their  
 25 entirety **and as they appear in the marketplace. . . .**” *Alpha Industries, Inc. v. Alpha Steel Tube &*  
 26 *Shapes, Inc.*, 616 F.2d 440, 444 (9th Cir. 1980) (emphasis added). When evaluated as they  
 27 actually appear in the marketplace, the marks are unmistakably different.

28



1 “Similarity of the marks is tested on three levels: sight, sound, and meaning.” *Sleekcraft*,  
 2 599 F.2d at 351. Here, the marks differ significantly on all three levels. First, with respect to  
 3 sight, plaintiff’s marks are always used with the term “Helio,” the distinctive Helio flame, and the  
 4 predominant use of the color blue. (*See e.g.*, Weeks Decl., ¶ 9, Ex. B; Colt Decl., ¶ 13, Ex. 9.) In  
 5 some cases, the Helio flame is blue and is seen on a white background; in other cases the flame is  
 6 white and is seen on a blue background. (Colt Decl., ¶ Ex. 5 - Weeks Depo., 70:13-71:9.) The  
 7 color blue is prevalent in Helio’s advertising, including “Blue Helio” cocktail drinks, “Blue  
 8 Rooms” at events, blue backgrounds in clubs, and blue uniforms for store personnel. (*Id.*, 40:7-22,  
 9 70:3-71:9, Exs. 1018, 1019, 1022 p. 76-81.) Documents produced by Deutsch, the advertising  
 10 agency that developed plaintiff’s campaign [REDACTED]  
 11 [REDACTED] (*Id.*). Additionally,  
 12 plaintiff’s advertisements typically feature a picture of a Helio handset, which bears no  
 13 resemblance to the Treo. (*See e.g.*, Colt Decl., Ex. ¶ 13, Ex. 9.)

14 In contrast, every Palm advertisement contains the line: “Not Just a Cell Phone. *A Treo.*”  
 15 (emphasis added). The advertisements feature a bright orange background as the predominant  
 16 visual element. (Hancock Decl., ¶ 5.) Ms. Weeks, Helio’s 30(b)(6) witness on marketing,  
 17 admitted that Helio has never used the color orange as anything aside from an incidental color in  
 18 its “Don’t call it a phone” “Don’t call us a phone company” campaign. (Colt Decl., Ex. 5 - Weeks  
 19 Depo., 46:13-25.) Palm’s advertisements also include the Palm logo, which is a simple circle  
 20 around the word “Palm,” again featuring the color orange. (Hancock Decl., ¶ 5.) Finally, except  
 21 in certain small uses on the internet where space is limited, Palm’s advertisements contain a  
 22 picture of the Treo itself, which bears no resemblance to Helio’s devices. (*Id.*) A simple side-by-  
 23 side comparison of the advertisements demonstrates the highly distinctive features of each  
 24 campaign and the lack of potential consumer confusion. (Colt Decl., ¶ 14, Ex. 10.)

25 With respect to sound, Helio’s marks are very different from Palm’s. Helio’s campaign  
 26 tries to emulate a fun, party atmosphere, whereas Palm’s advertising is simple and businesslike.  
 27 Helio admits that it is targeting young, style-conscious, hip consumers, and the sound of its  
 28 advertisements reinforces this focus. (*See* Colt Decl., Ex. 5 - Weeks Depo., 24:18-25:10, Exs.

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1 1022, 1016.) For example, Helio drafted scripts for radio DJs to read on the air that clearly appeal  
2 to the teen market and would be largely indecipherable by anyone over the age of 25. (*See e.g.*,  
3 Colt Decl., ¶ 15, Ex. 11) (“They gave me a jankey phone that looks like a butt.”) Helio’s radio  
4 advertisements reinforce the young, hipster style of the Helio campaign:

5 Now let me give you all a little piece of advice. You gotta taste that  
6 milk before you buy the cow. And trust me, you are gonna love the  
sweet cream that flows from this Helio-heiffer

7 (*Id.*, ¶ 16, Ex. 12; *Id.*, ¶ 18, Ex. 14- **CLICK HERE TO LISTEN.**) Another radio ad, entitled  
8 “boy band”, featured the lyrics:

9 Girl you got me all tied down. Now I never get around.....I got  
10 Google Maps in my pants (Helio!) In my pants. In my pants (GPS!)

11 (*Id.*, ¶ 17, Ex. 13; *Id.*, ¶ 18, Ex. 14: **CLICK HERE TO LISTEN.**) Similarly, Helio’s television  
12 ads feature a hip, youth-oriented style that reinforces the idea that a Helio should never be called a  
13 phone. (Weeks Decl., Ex. C). In stark contrast to this marketing style, Palm’s advertisements do  
14 not contain youth jargon, amusing radio spots, or anything aside from a straightforward  
15 presentation of the Treo’s features and capabilities.

16 Nor do the two lines sound similar to the ear. “Don’t call it a phone” and “Not Just a Cell  
17 Phone. A Treo.” do not phonetically sound similar unlike, for example, “Dramamine’ and  
18 “Bonamine.” *See G.D. Searle & Co. v. Chas. Pfizer & Co.*, 265 F.2d 385 (7th Cir. 1959); *see also*  
19 *Grotrian, Helfferich, Schulz Th. Steinweg, Nachf. v. Steinway & Sons*, 523 F.2d 1331 (2d Cir.  
20 1975) (finding Steinway and Steinweg pianos to be confusingly similar phonetically); *cf. Plough,*  
21 *Inc. v. Kreis Laboratories*, 314 F.2d 635 (9th Cir. 1963) (finding Coppertan and Copa Tan were  
22 not phonetically similar to Coca Tan); *Lebow Bros. Co. v. Lebole Euroconf S.p.A.*, 503 F. Supp.  
23 209 (E.D. Pa. 1980) (finding Lebow and Lebole were not phonetically similar). Plaintiff does not  
24 present any testimony from a marketing expert, branding expert, or linguist establishing that these  
25 advertisements look or sound the same.

26 Finally, the parties’ campaigns are different in meaning. Plaintiff’s slogans use the phrases  
27 “Don’t call it a phone” and “Don’t call us a phone company.” The statements are intended to  
28 *disassociate* Helio’s products from phones or phone companies. Consumers are specifically told

1 *not* to call Helio devices phones. Indeed, Helio admits that one of the central themes of its  
 2 advertising and business model is that calling a Helio handset a phone is a **social faux pas**. (Colt  
 3 Dec., Ex. 5 - Weeks Depo., 22:16-24, 28:19-29:24.) Helio reinforces this mantra through a  
 4 number of means, including posting comments on YouTube where it directly tells viewers that  
 5 referring to its devices as phones is a *faux pas*, [REDACTED]  
 6 [REDACTED] and instructing radio DJs not  
 7 to call the devices phones. (*Id.*, 21:25-22:17.) Helio is so concerned about the use of the word  
 8 “phone” in association with its products that it contacted a radio DJ who inadvertently referred to  
 9 his device as a “Helio phone” and specifically instructed him to refer to the unit as a “device.”  
 10 (Colt Dec., ¶ 19, Ex. 15.) Helio's advertising agency then sent a follow-up email to MTV to make  
 11 sure that no one referred to any of the Helio devices as “phones.” (*Id.*)

12 In stark contrast, Palm’s theme line is intended to *associate* the Treo 680 with a cell phone  
 13 and then inform the consumer that the Treo offers additional features. Palm’s campaign  
 14 specifically refers to the Treo as a phone, a statement that would be anathema to Helio. Even if  
 15 Helio had evidence that the parties’ lines convey the same *idea*, namely that their products are  
 16 different from “a phone,” plaintiff would not be entitled to relief because only a mark, not an idea,  
 17 is protectible. *See Dastar Corp. v. Twentieth Century Fox File Corp.*, 539 U.S. 23, 37 (2003)  
 18 (Lanham Act does not protect originality or creativity); *Yurman Design, Inc. v. PAJ, Inc.*, 262 F.3d  
 19 101, 115-16 (2d Cir. 2001).

20 In its brief, plaintiff argues that marks need not be identical in order to create confusion.  
 21 (*See Motion*, p. 17.) While true, the fact remains that the marks must be similar in *sight, sound,*  
 22 *and meaning* for there to be a likelihood of confusion. In each of the cases cited by plaintiff, the  
 23 court found that the terms or phrases at issue were similar in sight, sound, and/or meaning; the  
 24 analysis was *not* whether the marks were in fact identical. Following the same analysis in this  
 25 case, there is no likelihood of consumer confusion.

26 Indeed, plaintiff introduces a red herring by claiming that Palm has “admitted” to the  
 27 similarity of the marks; the allegation that AKQA thought the lines were “similar” is a gross  
 28 misstatement of the evidence. As discussed above, when AKQA learned of Helio’s campaign, it

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1 believed that the Helio slogan conveyed the *idea* that a Helio was **not** a phone, and that the phrase  
 2 “Not a Cell Phone. A Treo.” conveyed the *idea* that the Treo is **not** a phone, which was not a  
 3 message that Palm wanted to communicate, given the concern about the lack of antenna on the  
 4 Treo 680. Palm had been debating the theme line for months, and eventually chose the phrase  
 5 “Not *just* a cell phone. A Treo.” because that theme line accurately conveyed the message that (1)  
 6 a Treo *was* a cell phone and (2) it also had additional features. Helio’s claim of “similarity” is  
 7 meaningless.

8 Indeed, it would appear that Helio is attempting to claim a monopoly over the idea or  
 9 message behind “Don’t call it a phone.”, yet Helio’s own actions illustrate the hypocrisy of this  
 10 position. Helio has repeatedly admitted that the single most important message it intends to  
 11 convey through the use of “Don’t call it a phone.” is that [REDACTED]  
 12 (Colt Decl., Ex. 5 - Weeks Depo., 29:25-30:3, Ex. 1016.) In December 2005, months before  
 13 launching its campaign, Helio became aware of a new slogan being used by ESPN Mobile, “It’s so  
 14 much more than a phone.” (*Id.*, Exs. 1028-1029.) Obviously, this tagline is identical to the  
 15 message Helio is trying to convey. Yet Helio [REDACTED] that its own tagline [REDACTED] from  
 16 the ESPN tagline, [REDACTED]  
 17 [REDACTED] (*Id.*, 116:15-117:18.) Similarly, Ms. Weeks admitted that Helio [REDACTED]  
 18 [REDACTED] that the Helio tagline [REDACTED] to the tagline for Verizon’s VCast, “Your Phone Can  
 19 Do So Much More.” (*Id.*, 118:11-119:21.) Yet now, after concluding that “It’s so much more  
 20 than a phone” and “Your Phone Can Do So Much More” are [REDACTED] “Don’t Call it a  
 21 Phone,” Helio comes before this Court and argues that “Not just a cell phone. A Treo.” is likely to  
 22 confuse consumers. Helio’s hypocrisy should not be rewarded, especially in light of Helio’s utter  
 23 lack of evidence of any consumer confusion and Palm’s conclusive evidence of a *lack* of  
 24 confusion.

25 Finally, plaintiff argues that the Court must evaluate the strength of Palm’s mark so as to  
 26 gauge whether there is reverse confusion. (Motion, p. 18.) Helio suggests that because Palm is a  
 27 larger company than Helio, there is “serious danger” that Helio will be overwhelmed by Palm’s  
 28 advertising. The sheer scope of Helio’s campaign belies this allegation. When Palm launched its

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1 Campaign, it was described as a \$25 million campaign. In actuality, Palm conducted no television  
 2 or radio advertising, and ended up spending only \$10 million on the campaign. (Colt Decl., Ex. 2  
 3 - Hancock Depo., 114:23-115:15.) In contrast, Helio spent [REDACTED]  
 4 [REDACTED] (Colt  
 5 Dec., Ex. 3, Zemetra Depo., 60:9-20.) [REDACTED]  
 6 [REDACTED]  
 7 (Colt Decl., ¶¶ 20-21, Exs. 16-17.) Palm’s holiday campaign could hardly overwhelm Helio’s  
 8 massive advertising bombardment over the last ten months.

9 Helio’s arguments regarding reverse confusion are pure speculation unsupported by any  
 10 evidence and wholly contradicted by the survey evidence obtained by Palm. If Helio wanted to  
 11 make a good-faith claim of reverse confusion, it could have conducted a consumer survey. It did  
 12 not, and the Marylander survey establishes that there is no evidence of reverse confusion. Helio’s  
 13 slogans differ greatly from Palm’s theme line in sight, sound, and meaning, and Helio has  
 14 presented no credible evidence to establish a likelihood of consumer confusion.

15 (c) **Factor Three: There is No Evidence that Palm Intended to Copy**  
 16 **Helio’s Campaign.**

17 Plaintiff has fabricated the story that Palm deliberately chose to use “Not Just a Cell  
 18 Phone. A Treo.” because it was *similar* to plaintiff’s campaign. In actuality, the record is clear  
 19 that, if anything, Palm chose its theme line to make certain that it conveyed a *different* message  
 20 than Helio’s.

21 The evidence plaintiff “uncovered” during discovery establishes that AKQA first  
 22 developed the theme line “Not a Cell Phone. A Treo.” in early 2005, well over a year before  
 23 plaintiff launched its campaign. (Hancock Decl., ¶2, Ex. A.) As early as April 21, 2006, before  
 24 Helio launched its “Don’t call it a phone” campaign, AKQA delivered a creative brief, identifying  
 25 “not a cell phone. A Treo” as the potential theme of the campaign. (Patterson Decl., ¶ 3, Ex. A.)  
 26 Palm considered “Not a Cell Phone. A Treo.” along with other potential campaign lines through  
 27 May 2006 and the early summer. (Colt Decl., Ex. 1 - Patterson Depo. 32:7-33:8, 52:5-19, 96:23-  
 28 97:2.) By June 2006, the campaign had been developed, but Palm was still considering whether to

1 use the line “Not a cell phone. A Treo.” or the line “Not *just* a cell phone. A Treo.” (Colt Decl.,  
2 Ex. 2 - Hancock Depo., 27:25-28:11; Hancock Decl., ¶ 3.) As discussed above, the Treo 680 does  
3 not include an external antenna, and Palm was concerned that if it used the line “Not a cell phone.  
4 A Treo.,” some consumers might actually think that the Treo 680 was in fact not a cell phone.  
5 (Colt Decl., Ex. 2 - Hancock Depo., 27:25-28:11; Hancock Decl., ¶ 3.) By including the word  
6 “just” in the theme line, Palm believed that the advertising would convey the idea that the Treo  
7 680 was a cell phone that *also* had additional features, the intended goal of the campaign. (Colt  
8 Decl., Ex. 2 - Hancock Depo., 27:25-28:11; Hancock Decl., ¶ 3.)

9 The Palm team at AKQA did not become aware of plaintiff’s “Don’t Call it a Phone”  
10 campaign until July 2006. (Patterson Decl., ¶ 4.) Plaintiff cites to several documents produced  
11 during discovery and claims that these documents establish that Ms. Patterson’s testimony that she  
12 learned of Helio’s campaign in July 2006 is incorrect. (Motion, p. 5.) They do not. First, plaintiff  
13 cites to an email dated October 31, 2005 (AKQA 5415). Plaintiff did not launch its “Don’t call it  
14 a phone campaign” until May 2006, and this email obviously did not reference the mark in  
15 question. Plaintiff also cites to emails dated **July 26, 2006**, **August 2006** and **November 2006**, and  
16 an undated email, in which the AKQA team referenced Helio’s retail stores and partnership with  
17 MySpace and received industry news updates featuring articles about Helio. (AKQA 5220; Davis  
18 Decl. Exs. 16-18 and Ex. 23; AKQA 5416.) Yet, plaintiff fails to explain how these constitute  
19 evidence of AKQA’s knowledge of Helio’s campaign *before* July 2006. Next, plaintiff cites to an  
20 email dated June 27, 2006 (AKQA 5419). That AKQA referenced plaintiff in an email just days  
21 before July 2006 does not establish that Ms. Patterson’s testimony was wrong; at most, her  
22 recollection was simply off by a matter of days. Finally, plaintiff cites to industry articles dated  
23 May 2006, April 2006, and June 16, 2006 (Davis Decl., Exs. 19-21), yet fails to show that anyone  
24 at Palm or AKQA read these articles before late June or early July 2006. In short, Helio has  
25 presented no credible evidence that AKQA was aware of Helio’s campaign prior to late June or  
26 early July, 2006.

27 Plaintiff further alleges that AKQA was “so uncomfortable” with Palm’s use of the  
28 “confusingly similar slogan” that it developed other options to the “Not Just a Cell Phone. A

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1 Treo.” theme line. (Motion, p. 22.) This misconstrues the testimony of AKQA. After learning of  
2 plaintiff’s campaign, AKQA notified Palm because it was concerned that Palm’s “Not a Cell  
3 Phone. A Treo.” theme line might convey a similar *message* as plaintiff’s campaign, namely that  
4 that the Treo 680 was *not* a phone. (Colt Decl., Ex. 1 - Patterson Depo., 42:22-44:10, 53:18-  
5 54:16; Patterson Decl., ¶ 4.) Helio presents no evidence of ill-intent by Palm.

6 Plaintiff also implies that Palm selected marketing channels based on Helio’s campaign.  
7 In her declaration supporting plaintiff’s application for a TRO, Ms. Weeks testified that Palm ran  
8 an advertisement featuring “Not Just a Cell Phone. A Treo.” in Entertainment Weekly just one  
9 week after a Helio advertisement appeared in the same magazine. Magazines, however, require  
10 several weeks of lead time to contract to run an advertisement, and it would have been impossible  
11 for Palm to observe a Helio advertisement, enter into a contract with Entertainment Weekly,  
12 provide advertising copy, and somehow manage to have the ads appear in the very next issue.  
13 (Hancock Decl., ¶ 7.) Indeed, Palm placed the order for the ad on September 26, 2006. (*Id.*)

14 As alleged evidence of intent, plaintiff further claims that Palm decided to focus on  
15 partnering with “passion brands” after plaintiff had allegedly made such partnerships a centerpiece  
16 of its campaign. (Motion, p. 22.) The “passion brands” plaintiff references include Yahoo,  
17 Google, Orbitz, Fandango, and eBay. (Colt Decl., Ex. 1 - Patterson Depo., 96:3-11.) These  
18 companies are behemoths of the Internet with tremendous viewership and broad, global appeal.  
19 They are not niche players and they are among the very first outlets any company would consider  
20 for an advertising partnership. The mere fact that both Palm and plaintiff sought marketing  
21 agreements with some of the same leading companies does not establish that Palm intended to  
22 copy plaintiff’s advertising campaign. Moreover, plaintiff’s citation to Ms. Patterson and Mr.  
23 Hancock’s deposition testimony is misleading. At no point did either witness state or imply that  
24 plaintiff’s partnerships had any bearing on Palm’s choice of “passion brands.” (*See* Colt Decl.,  
25 Ex. 1 - Patterson Depo., 34:9-35:24, 95:19-96:22, 110:5-111:20; *id.*, Ex. 2 - Hancock Depo., 60:3-  
26 20, 62:25-63:4, 66:2-66:14.) Plaintiff points to a single document, claiming that it establishes that  
27 AKQA looked at plaintiff’s partnership models for its own partnerships (Motion, p. 22.), but does  
28

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1 not cite to any testimony from AKQA establishing Helio's claimed interpretation of the  
2 document.<sup>1</sup>

3 During the hearing on plaintiff's application for a TRO, the parties repeatedly discussed  
4 Palm's partnership with the Onion. The Court evidently considered the Onion to be a non-  
5 business oriented publication. Palm's market research and "MRI scores," a widely used measure  
6 to profile the characteristics of a particular publication's readership, however, establish that the  
7 Onion is popular with Palm's target audience of 25-44 year-old professionals. (Colt Decl., Ex. 2 -  
8 Hancock Depo., 36:19-37:3.) Additionally, the Onion provides a website that is optimized for  
9 mobile devices, and Palm chose to partner with the Onion for these two reasons.

10 Helio cannot ignore the simple facts. Palm and AKQA first developed the theme line "Not  
11 a phone. A Treo." in January 2005, before Helio's existence. By the time Helio launched its  
12 advertising, Palm had already largely developed its upcoming campaign and had preliminarily  
13 adopted the theme line "Not a cell phone. A Treo." The inclusion of the word "just" was intended  
14 to make sure that consumers did not believe that the Treo 680 was not a cell phone. Simply stated,  
15 Helio has presented no credible evidence that Palm intended to copy Helio's slogan.

16 (d) **Factor Four: Helio's "Don't Call it a Phone" and "Don't Call us a  
17 Phone Company" Marks are Weak.**

18 With regard to the strength of mark factor of the *Sleekcraft* test, plaintiff does not introduce  
19 any new evidence to support its argument that its marks are strong, but instead relies on this  
20 Court's preliminary findings in December that plaintiff's marks have been recognized and  
21 associated with its products. The evidence that Helio presented at that hearing, however, has now  
22 been discredited, and further evidence obtained during discovery establishes that plaintiff's marks  
23 are most likely generic and, at most, descriptive.

24 Descriptive marks "'define a particular characteristic of the product in a way that does not  
25 require any exercise of the imagination.'" *Yellow Cab Co. of Sacramento v. Yellow Cab of Elk*

26 \_\_\_\_\_  
27 <sup>1</sup> Plaintiff cites to Exhibit 18 to the Patterson declaration. No such declaration exists. Plaintiff is likely  
28 referring to the deposition testimony of Ms. Patterson. Yet, Exhibit 18 to Ms. Patterson's deposition does not mention  
looking at plaintiff's partnership models. (Patterson Depo., Ex. 18.)



1 *Grove, Inc.*, 419 F.3d 925, 927 (9th Cir. 2005) (quoting *Survivor Media, Inc. v. Survivor*  
 2 *Productions*, 406 F.3d 625, 632 (9th Cir. 2005)); *Filipino Yellow Pages, Inc. v. Asian Journal*  
 3 *Publications, Inc.*, 198 F.3d 1143, 1147 (9th Cir. 1999). They describe “a product’s features,  
 4 qualities or ingredients in ordinary language or describe[] the use to which a product is put.”  
 5 *Genesee Brewing Company, Inc. v. Stroh Brewing Company*, 124 F.3d 137, 143 (2nd Cir. 1997)  
 6 (internal citations omitted). Descriptive marks will be protected **only** if there is a showing of  
 7 secondary meaning. *Sleekcraft*, 599 F.2d at 349.

8 Although likely generic, plaintiff’s marks are descriptive at best because they say  
 9 something about the product’s characteristics and do not require any exercise of the imagination to  
 10 convey Helio’s central theme. The message plaintiff tried to convey with its “Don’t call it a  
 11 phone” and “Don’t call us a phone company” marks was that [REDACTED]  
 12 [REDACTED] (Colt Dec., Ex. 5 - Weeks Depo., Ex. 1016.) Helio's own brand equity study  
 13 confirms that this is the primary message conveyed to consumers. (Colt Decl., Ex. 5 - Week's  
 14 Depo., Ex. 1023.) In order to qualify for trademark protection, Helio must establish that “a  
 15 substantial part” of the buying audience attributes “Don’t call it a phone.” to a single source. *Levi*  
 16 *Strauss & Co. v. Blue Bell, Inc.*, 778 F.2d 1352, 1354, (9th Cir. 1985). Helio itself has presented  
 17 no evidence of secondary meaning, and Palm’s surveys establish that Helio’s slogans have no  
 18 secondary meaning.

19 **(i) Helio presented no evidence of secondary meaning**

20 Plaintiff cites only a brand equity survey “showing 61% consumer recognition.” (Motion,  
 21 p. 21.) This grossly misrepresents the survey results. Helio's survey revealed that when asked  
 22 “Do you recall ever seeing or hearing any advertising featuring” “Don’t call it a phone,” [REDACTED]  
 23 of *target* consumers in *target* markets answered “yes.” (Colt Decl., Ex. 5 - Weeks Depo., Ex.  
 24 1023, p. 26.) When [REDACTED] were asked which company the slogan is for, 62% correctly  
 25 associated the slogan with plaintiff. (*Id.*) Thus, in reality, [REDACTED] **those surveyed** correctly  
 26 associated “Don’t call it a phone” with Helio, **not** 61%, as plaintiff claims. (Colt Decl., Ex. 5 -  
 27 Weeks Depo., 99:20-100:8.) Plaintiff has had ample time to conduct a customized survey on the  
 28

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1 issue of secondary meaning, but has failed to do so. In contrast, Palm's survey has established that  
 2 Helio's slogans have no secondary meaning in the marketplace.

3 **(ii) Palm's survey establishes that plaintiff's marks have no**  
 4 **secondary meaning.**

5 Palm commissioned a separate survey to test Helio's claim of secondary meaning, as set  
 6 forth in detail in the attached declaration of Howard Marylander with the following conclusions:

- 7 • The survey consisted of a test pool of 649 respondents in Helio's stated target market of  
 8 18-34 year olds.
- 9 • Respondents were shown either the slogan "Don't call it a phone." or "Don't call us a  
 10 phone company." along with two fictitious taglines and the taglines for Verizon Wireless  
 11 ("Can you hear me now?") and Boost Mobile ("Where you at?"). Thus, respondents were  
 12 exposed to five separate slogans as part of the study.
- 13 • After accounting for noise (the percentage of respondents who attributed one of the  
 14 fictitious taglines to a single source, the survey revealed "Don't call it a phone." has a  
 15 **secondary meaning of only 13%** and "Don't call us a phone company." has a **secondary**  
 16 **meaning of only 17%**.
- 17 • In contrast, the Verizon tagline, "Can you hear me now?" has a secondary meaning of  
 18 65%.

19 (Marylander Decl.-Secondary Meaning, ¶¶ 1-42.) As Mr. Marylander concludes, these figures are  
 20 wholly insufficient to establish secondary meaning for either of Helio's slogans. *See e.g.*,  
 21 *Spraying Systems Co. v. Delavan, Inc.* 975 F.2d 387, 394 (7th Cir. 1992) ("While a 50-percent  
 22 figure is regarded as clearly sufficient to establish secondary meaning, a figure in the thirties can  
 23 be considered only marginal"); *Brooks Shoe Mfg. Co., Inc. v. Suave Shoe Corp.*, 533 F. Supp. 75,  
 24 215 (11th Cir. 1983) (2.7% figure considered "de minimus"); *Zippo Mfg. Co. v. Rogers Imports,*  
 25 *Inc.*, 216 F. Supp. 670 (S.D.N.Y. 1963) (25% consumer recognition insufficient to establish  
 26 secondary meaning); *Roselux Chemical Co. v. Parsons Ammonia Co.*, 299 F.2d 855, (C.C.P.A.  
 27 1962) (10% figure insufficient). Without establishing secondary meaning, Helio has not  
 28 established that its marks are entitled to protection. Even if Helio had made this threshold  
 showing, it has still not demonstrated any likelihood of consumer confusion and the preliminary  
 injunction should be denied.

26 **(e) Factor Five: For Plaintiff's Tech-Savvy and Image Conscious Target**  
 27 **Market, The Goods and Services Provided by Plaintiff and Palm are**  
 28 **Not the Same.**

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1 Plaintiff next argues that the goods and services provided by Helio and Palm are "virtually  
2 identical." In reality, there are many important differences between a Treo and a Helio device that  
3 the Court should consider when evaluating whether there is a likelihood of confusion.

4 First, plaintiff incorrectly contends that Palm and Helio target the same market. Plaintiff's  
5 target market is not simply "young people," but three subgroups: the "Feed Me," "See Me," and  
6 "Spoil Me" segments. They are 18-34 years old and are "in-the-know hipsters, influencers, culture  
7 junkies." The "Feed Me" segment are "affluent, young adult lead users and early trend seekers in  
8 technology and cell phones;" the "See Me" segment are "multi-ethnic urban dwellers willing to  
9 spend on technology, trendsetters;" and the "Spoil Me" segment are "students with heavy  
10 entertainment and communication needs; seeking 'cool' image and features." (Colt Decl., Ex. 5 -  
11 Weeks Depo., 24:18-25:10, 32:8-14, 61:3-13, Ex. 1022 pp. 48, 50-52.) These segments do not  
12 reflect typical Palm customers; indeed, Helio's own brand equity survey revealed that **only 1%** of  
13 Helio's target market currently owns a Palm product, as compared to more than 30% who own a  
14 Motorola product, for example. (Colt Decl., Ex. 5 - Weeks Depo., 101:3-12, Ex. 1023 ). Helio  
15 admitted that it is unaware of any information to suggest that more than 1% of its target market  
16 currently owns a Palm product. (*Id.*).

17 The members of each of the groups targeted by Helio are, by definition, knowledgeable  
18 about technology. They are also "in the know" when it comes to fashion and trends. To them, a  
19 Helio is a fashion-badge and an identifier of their own personalities. (*Id.*, 32:8-33:1, Exs. 1016,  
20 1022.) The services and functions provided by Helio are focused on providing entertainment and  
21 keeping members connected with their friends. Unique Helio features include MySpace Mobile  
22 integration, Helio's GPS enabled "Buddy Beacon" (a feature that allows friends to track the  
23 location of other friends, and heavily promoted by Helio for meeting up at clubs and parties),  
24 H.O.T. ("Helio On Top"), a real-time sports and news ticker, stereo sound, a 2 megapixel camera,  
25 over-the-air music downloads, and 3D games. The Palm Treo 680 cannot match these technical  
26 capabilities and the tech-savvy consumers that Helio targets are acutely aware of the unique  
27 features that set Helio apart from others in the marketplace. (*Id.*, 24:18-25:10, Exs. 1016, 1022.)

28

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1 Moreover, the Treo features a QWERTY keyboard--not offered by Helio--and has no physical  
2 resemblance to any of Helio's devices.

3 Not only are Helio devices and Palm phones very different pieces of technology, Helio  
4 exists in an entirely different class, as Helio is actually a cell phone service provider. Palm is not.  
5 (*Id.*, 58:18-20.) Helio's unique features are tightly integrated into Helio's network such that a  
6 Helio device **cannot be used** on any other provider's network, nor can any non-Helio device, such  
7 as Palm Treo, be used on the Helio network. (*Id.*, 58:15-17, 60:13-22.) The features that are  
8 unique to Helio, such as the Buddy Beacon and H.O.T., can only be utilized on the Helio network.

9 Additionally, Helio introduces another misconception by arguing that Helio sold and  
10 supported Treo devices, which may lead to confusion. (Motion, p. 23.) This is a  
11 misrepresentation of fact; Earthlink Wireless, *not* Helio, has sold and supported Treo devices.<sup>2</sup>  
12 (Colt Decl., Ex. 5 - Weeks Depo., 42:17-48:10.) Ms. Weeks admitted that with the exception of a  
13 single email that was sent to Earthlink Wireless subscribers announcing the launch of Helio and  
14 offering them a discount on Helio devices, Earthlink Wireless and Helio have never been  
15 promoted together. (*Id.*) Of course, plaintiff only speculates that this relationship causes  
16 confusion and has produced no evidence of any confusion from Earthlink Wireless subscribers.

17 (f) **Factor Six: There is a High Degree of Consumer Care Associated with**  
18 **the Purchase of Plaintiff's and Palm's Goods, Particularly Among**  
**Plaintiff's Tech-Savvy and Image Conscious Target Market.**

19 This is not a case about dolls, toys, or other insignificant trinkets that consumers purchase  
20 while impulse shopping. The products and services at issue are high-end cellular devices that  
21 come tethered to lengthy and expensive service contracts. Indeed, by Helio's own admission, its  
22 target market is tech-savvy and image conscious. (Colt Decl., Ex. 5 - Weeks Depo., 24:18-25:10,  
23 32:8-14, 60:5-9, Exs. 1016, 1022.) Moreover, Helio itself notes that its target customers are  
24 purchasing Helio devices as fashion accessories that are a badge of personality. (*Id.*)  
25

26 \_\_\_\_\_  
27 <sup>2</sup> On Information and belief, Earthlink Wireless and Helio are owned by the same parent company. A contract  
28 is still in place to permit the sale of Palm devices, but none have been sold, presumably because Palms do not appear  
to Helio's target demographic.

1 The cost of Helio's service further establishes the high level of consumer care in this case;  
 2 the more expensive the product, the higher the degree of care exercised by consumers. *Sleekcraft*,  
 3 599 F.2d at 353; *E. & J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1293 (9<sup>th</sup> Cir. 1992);  
 4 *Chesebrough-Pond's, Inc. v. Fabrege, Inc.*, 666 F.2d 393, 398 (9<sup>th</sup> Cir. 1982). Simply stated,  
 5 Helio's services are expensive. For example, the "all-in" plan with 1000 daytime minutes is \$85  
 6 per month. (See [www.helio.com](http://www.helio.com).) This does not include any content that the user downloads,  
 7 such as music or videos. (Colt Decl., Ex. 4 - Lee Depo., 20:3-21:16.) Indeed, Helio's monthly  
 8 average revenue per user is [REDACTED] (*Id.*, Ex. 5 - Weeks  
 9 Depo., 102:3-9.) In addition, as with most networks, almost all users have to sign a standard two-  
 10 year contract in order to obtain Helio's services.<sup>3</sup> (See <http://www.helio.com/page?p=terms>.) The  
 11 fact that a consumer has to enter into a contract that will potentially cost more than \$2500 over a  
 12 two-year period certainly suggests a high level of consumer care. See e.g., *Pignons S.A. de*  
 13 *Mecanique de Precision v. Polaroid*, 498 F. Supp. 805, 813 (D.C. Mass. 1980) (finding Polaroid  
 14 users exercise a high degree of care because cameras are over \$100 and the users "appreciate  
 15 precision machinery and technology.")

16 Finally, Plaintiff argues that Palm's Campaign creates "initial interest" confusion, citing  
 17 *Starbucks Corp. v. Lundberg*, No. Civ. 02-948, 2005 WL 3183858 (D. Or. 2005). Plaintiff alleges  
 18 that even if consumers eventually distinguish between the two companies, they will show an initial  
 19 interest in Palm because of its "misappropriation of the sight, sound and meaning" of Helio's  
 20 marks. (Motion, p. 24.) Reliance on *Starbucks*, however is misplaced. In that case, the court's  
 21 finding of initial interest was based upon survey evidence showing a percentage of customers who  
 22 were initially attracted to "Sambuck's" due to its similarity to "Starbucks" name. *Id.* at \*6.  
 23 Plaintiff submitted no such evidence to support its claim of initial interest confusion.

24 **(g) Factor Seven: The Marketing Channels Used by Plaintiff and Palm**  
 25 **Differ.**

26 \_\_\_\_\_  
 27 <sup>3</sup> The single known exception is for MySpace users, who can download a coupon permitting them to purchase  
 28 Helio services on a month-by-month basis.

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1 Plaintiff alleges that the marketing channels used by Helio and Palm are “identical.” Once  
2 again, Helio misconstrues the facts. There is some overlap in marketing, but that overlap only  
3 occurs in the mainstream media. Helio’s focus on young, trendy consumers drives the differences  
4 between the two parties’ marketing channels and a closer examination of the two campaigns  
5 reveals the disparity between the marketing channels chosen by Palm and Helio.

6 First and foremost, Palm did not run its campaign on television or radio, whereas these  
7 outlets constituted a major component of Helio's [REDACTED] campaign. (Hancock Decl., ¶ 6.)  
8 Helio ran its commercials on MTV, MTV2, mtvU, Adult Swim, Fuse, Spike, Logo, G4, VH-1,  
9 Comedy Central, BET, E!, ESPN, and ESPN2, all of which are geared to Helio’s target market of  
10 young, hip, tech-savvy consumers. (Colt Decl., Ex. 5 - Weeks Depo., 54:14-16, 55:13-16.)  
11 Similarly, Helio advertised only on alternative and contemporary rock stations. (*Id.*, 38:13-19.)

12 Helio’s print campaign was featured in Rolling Stone, Spin, Details, Entertainment  
13 Weekly, GQ, Blender, Lucky, Res, Nylon, Blackbook, Filter, Soma, Flaunt, Mean, Giant, The  
14 Fader, Out, Swindle, and Wired. (*Id.*, 53:23-25, 55:4-8, Ex. 1021.) As with the television and  
15 radio outlets, these magazines were selected based upon their appeal to Helio’s target audience.  
16 The only overlap cited by plaintiff consists of popular, mainstream magazines such as Rolling  
17 Stone and Entertainment Weekly. (Hancock Decl., ¶ 6.)

18 There is similarly almost no overlap between Helio’s and Palm’s online advertising.  
19 Helio’s advertisements are run on Yahoo, MySpace, AOL, Game Spot, IDG Entertainment, IGN,  
20 Interevco, Heavy, PlanetOut, MSN, Massive, CNET, Wired, PCMag, PC World/MacWorld, SEM,  
21 and Atlas Commission. (Colt Decl., Ex. 5 - Weeks Depo., 54:1-9, Ex. 1021.) The only websites  
22 where the campaigns overlapped were mainstream sites such as Yahoo and other similar mass-  
23 media. (Hancock Decl., ¶ 6.) Both companies ran outdoor advertising, but plaintiff’s outdoor  
24 advertising was aimed at locations [REDACTED]  
25 [REDACTED] (Colt Decl., ¶ 22, Ex. 18.) This is consistent with Helio’s focus on  
26 providing entertainment to its audience, rather than business needs. In contrast, Palm’s outdoor  
27 advertising on highly-trafficked areas. (Hancock Decl., ¶ 6.)  
28

1 Finally, Helio promoted its goods and services in several unique channels not used by  
 2 Palm. For example, Helio sponsored events at nightclubs with celebrities in attendance. (Colt  
 3 Decl., Ex. 5 - Weeks Depo., 38:20-40:6.) Helio sponsored concerts and art shows, including a  
 4 concert by the band “Panic at the Disco.” (*Id.*, 41:2-22.) Helio used college representatives to  
 5 promote their devices on college campuses. (*Id.*, 43:21-23.) And finally, Helio also opened a  
 6 small number of retail stores in locations frequented by young people and designed them like  
 7 lounges, providing patrons with a “hang out.” Palm did not use any of these tactics. Contrary to  
 8 plaintiff’s allegations, there is remarkably little overlap between the parties’ marketing channels.

9 **2. Plaintiff has not demonstrated that it will suffer irreparable injury.**

10 Plaintiff relies heavily on the presumption of irreparable harm that arises if a moving party  
 11 in a trademark infringement case shows a likelihood of confusion. (*See* Motion, p. 13); *Rodeo*  
 12 *Collection*, 812 F.2d at 1220. No such showing has been made here. *Id.* (concluding the  
 13 presumption of irreparable harm was not applicable because the moving party did not establish  
 14 likelihood of confusion). Where the moving party fails to show a likelihood of confusion, it must  
 15 make an *independent* showing of irreparable harm. *Postx Corp. v. docSpace Co., Inc.*, 80 F. Supp.  
 16 2d 1056, 1064 (N.D. Cal. 1999). In doing so, the moving party must establish that it does not have  
 17 an adequate remedy at law. *Northern California Power Agency v. Grace Geothermal Corp.*, 469  
 18 U.S. 1306, 1306 (1984).

19 Here, plaintiff has made no effort, independent of the cited presumption, to show  
 20 irreparable harm. After having three months to develop its case, plaintiff still has not identified a  
 21 single consumer who has been confused by the Campaign, nor identified the loss of a single sale  
 22 as a result of the Campaign. Plaintiff has not provided any expert testimony regarding market  
 23 share, loss of sales, loss of profit, loss of goodwill, or any other showing of threatened or ongoing  
 24 injury. Plaintiff’s claim of harm is nothing more than speculation.

25 **3. Plaintiff has not demonstrated that serious questions are raised and that the**  
 26 **balance of harms weighs in its favor.**

27 Because Helio has not established a likelihood of success on the merits or the threat of  
 28 irreparable harm, it has no choice but to argue that this case raises serious questions *and* that the

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1 balance of harms tip sharply in Helio’s favor. *Miss World*, 856 F.2d at 1448; *Rodeo Collection*,  
 2 812 F.2d at 1217. This high burden has not been met. A “serious question” is one as to which the  
 3 moving party has “a fair chance of success on the merits.” *Sierra On-Line, Inc. v. Phoenix*  
 4 *Software, Inc.*, 739 F.2d 1415, 1421 (9th Cir. 1984). Where, as here, a plaintiff in a trademark  
 5 infringement case does not show a fair chance of success on the merits, i.e. a likelihood of  
 6 confusion, “serious questions” have not been raised. *Postx Corp.*, 80 F. Supp. 2d at 1064.  
 7 Moreover, plaintiff makes no attempt to show that the balance of hardships weighs in favor of  
 8 issuing a preliminary injunction. With over three months to develop its case and gather evidence  
 9 of confusion, plaintiff cannot now rely on speculation in an attempt to justify injunctive relief.

10 **V.**  
 11 **CONCLUSION**

12 For the foregoing reasons, Palm respectfully requests that this Court deny plaintiff’s  
 13 motion for a preliminary injunction.

14 DATED: March 20, 2007

QUINN EMANUEL URQUHART OLIVER &  
 HEDGES, LLP

16 By /s/ Claude M. Stern  
 17 Claude Stern  
 Attorneys for Defendant Palm, Inc.

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