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

13 CASE NO. C 06 7754 SBA

14 HELIO LLC

15 Plaintiff,

16 vs.

17 PALM, INC.

18 Defendant.

**[PROPOSED] ORDER DENYING
PLAINTIFF'S MOTION FOR A
PRELIMINARY INJUNCTION**

19
20 1. On March 6, 2007, plaintiff Helio filed a motion for a preliminary injunction. Its
21 motion was supported by the declarations of Harold Davis, Jr. and Kathryn Wheble, as well as the
22 exhibits thereto.

23 2. On March 20, 2007, defendant Palm filed an opposition to plaintiff's motion. Its
24 opposition was supported by the declarations of Doug Colt, Scott Hancock, Howard Marylander,
25 and Julie Patterson, as well as exhibits thereto.

26 3. The Court heard oral argument on plaintiff's motion on April 10, 2007.
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1 4. Having considered the papers and evidence in support of and in opposition to
2 plaintiff's motion, the relevant authorities, and the respective arguments of counsel, the Court
3 denies plaintiff's motion and now rules as follows:

4 5. In this action, Helio asserts ownership and use of the marks "Don't Call it a Phone"
5 and "Don't Call Us a Phone Company."

6 6. Palm asserts that it makes and sells mobile communications devices including the
7 Treos. Palm's advertising for the Treo 680 device includes use of the theme line "Not Just a Cell
8 Phone. A Treo." Palm used this theme line in outdoor advertising, print advertising, and online
9 advertising.

10 7. Pursuant to its motion, plaintiff seeks an order enjoining Palm from continuing to
11 use the theme line "Not Just a Cell Phone. A Treo."

12 8. Palm asserts that its theme line is separate and apart from Helio's marks, that there
13 is no threat of continuing harm because it no longer uses the "Not Just a Cell Phone. A Treo."
14 theme line, that Helio's marks are, at most, descriptive, and that there is no likelihood of
15 confusion.

16 9. An analysis of Helio's claim of trademark infringement requires analysis of the
17 eight factors articulated in *AMF, Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348-49 (9th Cir. 1979):

- 18 a. The strength of the allegedly infringed mark;
- 19 b. The similarity of goods and services;
- 20 c. The similarity of marks;
- 21 d. The similarity of marketing channels;
- 22 e. Palm's intent on selecting its mark;
- 23 f. Evidence of actual confusion;
- 24 g. The degree of care likely to be exercised by consumers, and
- 25 h. The degree of expansion into other markets.

26 10. Having analyzed these factors both individually and collectively, the Court
27 concludes that, on balance, they weigh in favor of a finding of no likelihood of confusion.
28

1 11. With regard to the strength of the allegedly infringed mark, the Court finds that
2 plaintiff has not produced evidence of secondary meaning. The evidence presented by defendant
3 convincingly shows that there is no secondary meaning.

4 12. With regard to the similarity of goods and services, the Court finds that they are
5 different. Plaintiff did not produce evidence to show similarity. The evidence presented by
6 defendant shows that the functions available on plaintiff's devices are entertainment- and youth-
7 oriented and are not available on the Treo 680. The evidence further establishes that plaintiff is a
8 network service provider and defendant is not.

9 13. With regard to similarity of marks, the Court finds that they are different. Plaintiff
10 did not present evidence to show similarity. The evidence presented by defendant shows that the
11 marks are different in sight, sound, and meaning.

12 14. With regard to similarity of marketing channels, the Court finds that they are
13 different. Plaintiff did not produce evidence to show similarity.

14 15. With regard to defendant's intent on selecting its mark, the Court finds that plaintiff
15 did not produce evidence sufficient to establish that defendant intentionally selected its mark due
16 to its alleged similarity to plaintiff's marks. The evidence presented by defendant shows that
17 defendant selected its mark independent of plaintiff.

18 16. With regard to actual confusion, the Court finds that plaintiff did not produce any
19 evidence of confusion. The evidence presented by defendant convincingly establishes that there is
20 no actual confusion and no likelihood of confusion.

21 17. With regard to the degree of care likely to be exercised by consumers, the Court
22 finds that plaintiff did not produce evidence to show that consumers exercise a low degree of care.
23 The evidence presented by defendant shows that cellular phone devices are expensive and
24 plaintiff's market is tech-savvy, suggesting a high degree of care.

25 18. The parties agreed that the degree of expansion in other markets is not relevant in
26 this case.

27 19. On balance, the above factors suggest that plaintiff is not likely to succeed on the
28 merits of its trademark infringement claim.

1 20. The Court additionally finds that plaintiff did not make a showing of a threat of
2 continuing harm.

3 21. The Court finds that plaintiff did not demonstrate that it will suffer irreparable harm
4 if injunctive relief is not granted.

5 22. The Court finds that plaintiff did not demonstrate that "serious questions" are raised
6 because plaintiff's claim of trademark infringement is not one as to which it has "a fair chance of
7 success on the merits." *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1421 (9th
8 Cir. 1984).

9 23. The Court finds that plaintiff did not demonstrate that the balance of hardships tips
10 in its favor.

11 24. Having analyzed the above factors, the Court concludes that plaintiff has not met
12 its burden for receiving injunctive relief. Plaintiff's motion for a preliminary injunction is
13 therefore denied.

14 So ordered.

15 Dated: April ___, 2007

Saundra B. Armstrong
United States District Judge