

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

OBAMA FOR AMERICA

Plaintiff,

v.

DEMSTORE.COM and WASHINGTON  
PROMOTIONS & PRINTING, INC.,

Defendants.

Civil Action No. 1:12-cv-00889 EGS

Jury Trial Demanded

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**STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF  
OBAMA FOR AMERICA'S APPLICATION FOR PRELIMINARY INJUNCTION**

In support of its Application under LCvR 65.1(c) and (d) for an order enjoining Defendants Demstore.com and Washington Promotions & Printing, Inc. ("Defendants") from using or displaying Plaintiff Obama for America's ("OFA") trademarks in connection with the sale of campaign merchandise or otherwise, filed concurrently herewith, OFA states as follows:

**I. INTRODUCTION**

Since 2007, and 2011, respectively, the Rising Sun Trademarks (depicted below) have been closely associated with the election efforts of President Barack Obama and his authorized campaign committee, OFA, and OFA has put significant resources into building the goodwill that is associated with the campaign through the trademarked logos.



OFA has used the Rising Sun Trademarks in connection with its campaign activities on or in millions of bumper stickers, t-shirts, yard signs, posters, and campaign mailings, among other goods bearing the Rising Sun Trademarks. Tens of millions of voters have seen the Rising Sun Trademarks in connection with campaign television commercials, and millions of Internet users have seen the Rising Sun Trademarks in connection with OFA's extensive online presence. Notwithstanding the strength of the Rising Sun Trademarks as unique identifiers of OFA and its campaign activities, Defendants are using trademarks identical to the Rising Sun Trademarks owned by OFA to sell directly competitive campaign merchandise to the same consumers, through overlapping marketing channels.

Defendants' unauthorized use of OFA's trademarks is highly likely to result in consumer confusion and threatens irreparable injury to OFA and its trademark rights. Indeed, supporters of the Obama campaign have likely already been deceived into thinking they are supporting OFA by purchasing merchandise from Defendants, when in fact such purchases do not provide financial support of any kind to OFA. Every consumer purchase from Defendants' website made by a person who could lawfully give a political contribution to OFA by purchasing similar merchandise from OFA instead deprives OFA of a political contribution from that donor. And each consumer purchase from Defendants' website deprives OFA of the opportunity to communicate with that individual both in the purchasing and merchandise delivery contexts and in follow-up communications. Defendants' have continued to infringe OFA's trademarks with the knowledge that they were and are not authorized to use the marks, and will likely continue to engage in their illicit conduct unless immediately enjoined.

## II. FACTUAL BACKGROUND

### A. Obama for America

OFA was the principal campaign committee of Barack Obama in 2008 and is currently the principal campaign committee of President Barack Obama as he seeks re-election in 2012 (the "Campaign"). OFA relies entirely on contributions from supporters to run its operations. These contributions are subject to legal restrictions on both the source of income and the amount that each donor can give. For example, OFA cannot receive any contributions from incorporated entities, and contributions from individuals are limited to \$2,500 per election from a single individual in the 2012 cycle. Declaration of Meaghan Burdick ("Burdick Decl.") ¶ 3. The entire purchase price of any item of OFA merchandise is treated as a contribution subject to these limits.<sup>1</sup> Thus, the sale of merchandise featuring the Rising Sun Trademarks makes up a significant portion of OFA's available funds. Indeed, OFA expects to obtain approximately 2.5% of total contributions made by individuals to the Campaign through the sale of campaign merchandise bearing the Rising Sun Trademarks. Burdick Decl. ¶ 5.

More importantly, OFA's campaign strategy relies heavily on attracting and retaining large numbers of donors who contribute relatively small dollar amounts to the Campaign. Burdick Decl. ¶ 6. The sale of Campaign merchandise at the <https://store.barackobama.com> website is a crucial part of this strategy, and is one of the many important ways that OFA interacts with voters and potential supporters. Burdick Decl. ¶ 7. Each time a supporter makes a relatively small purchase on the website, OFA obtains that individual's contact information,

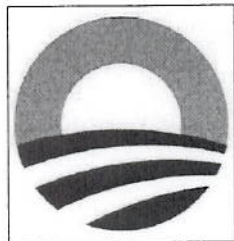
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<sup>1</sup> Revenue from merchandise purchases is treated as a contribution to Obama Victory Fund 2012 ("OVF"), a joint fundraising committee on behalf of OFA, the Democratic National Committee, and several state parties. Contributions to OVF are first allocated to OFA, up to an individual's contribution limit, and any remaining proceeds are split between the other participating committees subject to those entities' own limits. Because very few donors exceed their contribution limits to OFA, over 97% of revenue from merchandise sales goes directly to OFA. Burdick Decl. ¶ 4.



which OFA can then use to reach out to that individual repeatedly to seek further donations and further opportunities to promote the Campaign and President Obama. Burdick Decl. ¶ 8. In this way, the Campaign is able to use small donations through Campaign merchandise purchases to build a database of supporters and potential supporters, from whom it can then seek continued support for and involvement in the Campaign. Thus, controlling the context in which merchandise bearing the Rising Sun Trademarks is sold is of vital importance to OFA because it allows OFA to interact with voters beyond a simple one-time contribution. Any diminution of OFA's ability to interact with voters through these means severely and irreparably injures OFA.

As part of its campaign efforts, OFA has designed logos, including the distinctive and famous Rising Sun and 2012 Rising Sun logos (together, the "Rising Sun Trademarks"), which are and have been used to symbolize the Campaign on signs, posters, merchandise, and a variety of other promotional items. These Trademarks, depicted below, are recognized around the world and are closely associated with the Campaign.



As part of its campaign operations and management, OFA has designed, marketed, and sold, and designs, markets, and sells, a broad range of products using the Rising Sun Trademarks. Among the products OFA currently offers using the Rising Sun Trademarks are clothing, signs, posters, buttons, and other merchandise related to the re-election effort. Burdick Decl. ¶ 9. OFA has been using the Rising Sun mark since 2007, and the 2012 Rising Sun mark since 2011. Burdick Decl. ¶ 10. OFA sells its campaign merchandise on its website,

<https://store.barackobama.com>. OFA's campaign merchandise and other campaign materials prominently feature the Rising Sun Trademarks.

OFA has spent significant resources promoting its merchandise bearing the Rising Sun marks, and the popularity of the Rising Sun marks has contributed greatly to OFA's campaign efforts, including its voter contact and fundraising activities. As stated above, the sale of merchandise is a crucial step in OFA's efforts to build a network of supporters and potential supporters. In the 2008 election, the sale of merchandise bearing the 2008 Rising Sun Trademark raised approximately \$37 million for the Campaign. Burdick Decl. ¶ 11. More than 65% of this money was raised in the final six months preceding the election, and over 50% was raised in the final three months preceding the election. Burdick Decl. ¶ 12. Such timing for fundraising is customary for presidential elections, and OFA expects similar timing of fundraising in the current election cycle. Burdick Decl. ¶ 13. Thus, OFA expects to make over 65% of its merchandise sales between now and the November 2012 election. Burdick Decl. ¶ 14.

#### **B. OFA's Intellectual Property Rights in the Rising Sun Trademarks**

Due to OFA's long and continuous use of the Rising Sun Trademarks in connection with the 2008 and 2012 campaigns and related activities and merchandise, the Rising Sun Trademarks are widely recognized by the public as indicators of the source of OFA's merchandise. As a result of OFA's extensive use of its Rising Sun Trademarks, OFA has built and now owns enormously valuable goodwill symbolized by the Rising Sun Trademarks. OFA has developed common law rights in the Rising Sun Trademarks through its extensive use thereof. OFA has also secured a federal trademark registration and filed a pending trademark application with the U.S. Patent & Trademark Office ("USPTO") to protect the Rising Sun Trademarks. OFA owns

federal trademark Registration No. 3,541,038 issued by the USPTO on December 2, 2008, for the Rising Sun logo. OFA is the owner of federal trademark application No. 85/302,710 for the 2012 logo incorporating the Rising Sun logo, filed in the USPTO on April 22, 2011. True and correct copies of the registration and application for the Rising Sun Trademarks are attached as Exhibit 1. These trademarks are referred to collectively as The Rising Sun Trademarks. The noted registration and pending application are valid, subsisting, and in full force and effect.

### **C. Defendants' Use of the Rising Sun Trademarks**

In an effort to trade on the enormous popularity of the Rising Sun Trademarks, Defendants offer for sale and sell merchandise bearing the Rising Sun Trademarks through their website, Demstore.com. In so doing, Defendants are willfully violating OFA's intellectual property rights in a deliberate effort to trade on OFA's hard-earned reputation and goodwill. Defendants' actions are thus creating consumer confusion, competing unfairly with OFA, and infringing OFA's trademark rights.

Upon information and belief, Defendants have operated their business since 1985, and, since 2004, Defendants have operated their website located at [www.demstore.com](http://www.demstore.com), at which they sell election and campaign merchandise. Through Demstore.com Defendants sell and have sold merchandise bearing the Rising Sun Trademarks. Declaration of Jeremy Buxbaum ("Buxbaum Decl.") ¶ 4. Specifically, Defendants sell and have sold bumper stickers, pins, yard signs, and t-shirts, among other items, bearing the Rising Sun Trademarks. Buxbaum Decl. ¶ 5; *see* Exhibit 2. Defendants effectively market and sell exact, or extremely similar, copies of the campaign merchandise that OFA sells at its website. Buxbaum Decl. ¶ 6; *see* Exhibit 2. The vast majority of merchandise promoted on Demstore.com bears the Rising Sun Trademarks. Buxbaum Decl. ¶ 7. Furthermore, Defendants market and sell products bearing the Rising Sun Trademarks on a



webpage that advertises: "President Obama Store – All you need to show your support!". See Exhibit 2. Demstore.com also features an "Obama 2012 Store." *Id.*

On or around April 22, 2011, counsel for OFA sent a demand letter to Defendants, requesting *inter alia* that they "immediately cease and desist from any further commercial use of the Rising Sun Trademarks in connection with advertising, promotion, offer or sale of any goods or services." Buxbaum Decl. ¶ 8. After communicating by telephone and email with representatives and counsel for Demstore, OFA sent a follow up demand letter to Defendants, renewing OFA's cease and desist request, on or around July 29, 2011. Buxbaum Decl. ¶ 9. On October 26, 2011, OFA filed a complaint against Defendants in the United States District Court for the Northern District of Illinois, case number 1:11-cv-07646, alleging trademark infringement, false designation of origin, unfair competition, and other related claims. Buxbaum Decl. ¶ 10. On December 30, 2012, Defendants filed a Motion to Dismiss for lack of personal jurisdiction. Buxbaum Decl. ¶ 11. In order to avoid costs associated with disputing issues unrelated to the merits of the case, OFA voluntarily dismissed the Northern District of Illinois action on January 27, 2012. Buxbaum Decl. ¶ 12.

To date, Defendants have not complied with or indicated a willingness to comply with OFA's demands to cease infringement. Buxbaum Decl. ¶ 13. Defendants continue to promote, distribute, offer for sale, and sell merchandise bearing the Rising Sun Trademarks even after they were put on actual notice, and consequently, continue to engage in trademark infringement and unfair competition. Buxbaum Decl. ¶ 14.

Upon information and belief, Defendants are using the Rising Sun Trademarks on merchandise in a deliberate and willful attempt to draw on the goodwill and commercial magnetism of the Rising Sun Trademarks and the Campaign. Buxbaum Decl. ¶ 15. Defendants'

use of the Rising Sun Trademarks on merchandise is likely to create confusion as to the source of merchandise bearing the Rising Sun Trademarks. Consumers are likely to believe that Defendants' Demstore.com website and products are associated with OFA, when in fact they are not. Further, by purchasing merchandise from Defendants, consumers are likely to believe they are supporting OFA, when in fact they are not. Defendants' aforesaid conduct is causing immediate and irreparable injury to OFA and to its goodwill, reputation, and ability to perform campaign functions, and will continue both to damage OFA and deceive the public unless enjoined by this Court.

### **III. THE COURT SHOULD ENJOIN DEFENDANTS' TRADEMARK INFRINGEMENT**

Defendants are currently marketing and selling products that incorporate and prominently display trademarks identical to the Rising Sun Trademarks owned and used by OFA. Moreover, Defendants' and OFA's efforts to market and sell campaign merchandise are closely related and marketed to consumers through the same or similar marketing channels. Defendants' use of the Rising Sun Trademarks is likely to cause consumer confusion and result in irreparable injury to OFA. The Court should therefore enjoin Defendants' distribution, marketing, and sale of products that trade on OFA's Rising Sun Trademarks.

A plaintiff is entitled to a preliminary injunction in a trademark case when it demonstrates that (1) it is likely to succeed on the merits of its claims, (2) it is likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in its favor, and (4) an injunction is in the public interest. *Air Transp. Ass'n. Of Am., Inc. v. Export-Import Bank of the U. S.*, \_\_F.Supp.2d\_\_, No. 11-2024, 2012 WL 119557, at \*5 (D.D.C. Jan. 13, 2012). OFA is likely to succeed on the merits of its claims, is likely to suffer irreparable harm, the



balance of equities weigh in favor of granting a preliminary injunction, and an injunction against Defendants' illicit use of OFA's intellectual property is in the public interest.

**A. OFA is Likely to Succeed on Its Trademark Infringement and Unfair Competition Claims**

In order to succeed on claims for trademark infringement and unfair competition, under both federal and common law, a plaintiff must show that (1) it owns a valid trademark, (2) its trademark is distinctive or has acquired a secondary meaning, and (3) there is a substantial likelihood of confusion between the plaintiff's mark and the alleged infringer's mark. *Breaking the Chain Found., Inc. v. Capitol Educ. Support, Inc.*, 589 F.Supp.2d 25, 29 (D.D.C. 2008). A claim for trademark infringement under the Lanham Act, 15 U.S.C. § 1114(1) requires registration of the mark at issue, while a claim under 15 U.S.C. § 1125(a) does not require a registration. *Id.* OFA owns valid trademarks, including a federal registration for the Rising Sun logo; its trademarks are distinctive; and Defendants' use of the Rising Sun Trademarks is likely to cause confusion among consumers as to the source or origin of the campaign merchandise being marketed and sold by Defendants. "Where the marks are identical and the record contains evidence showing the businesses are so related that [consumers] are likely to be confused or have actually been confused, then success on the merits is likely." *Crime Control, Inc. v. Crime Control, Inc.*, 624 F. Supp. 579, 581 (D.D.C. 1984).

**1. OFA Owns Valid and Distinctive Trademarks in the Rising Sun Logos**

A federal trademark registration constitutes prima facie evidence of the validity of a trademark, the registrant's ownership of the mark, the registrant's exclusive right to use the mark in connection with the specified goods or services, and the distinctiveness of the trademark. 15 U.S.C. § 1057(b); *Malarkey-Taylor Assoc., Inc. v. Cellular Telecomms. Ind. Ass'n*, 929 F.Supp. 473, 476 (D.D.C. 1996). OFA owns federal trademark Registration No. 3,541,038 for the Rising

Sun logo. *See* Exhibit 1. OFA also owns common law rights in the 2008 Rising Sun mark, which it has been using systematically and continuously in the United States since as early as 2007.

OFA is also the owner of federal trademark application No. 85/302,710 for the 2012 mark incorporating the 2008 Rising Sun logo. OFA was the first to use the 2012 Rising Sun Trademark, and has continuously used it since 2011. The 2012 mark is distinctive because it is an arbitrary and fanciful design that consumers associate with the Campaign. No other person or entity is authorized to use the Rising Sun Trademarks in connection with a political campaign, or any other product or service, for that matter, without the express permission of OFA. OFA is therefore likely succeed on the first two elements of its trademark infringement claims.

## **2. Defendants' Use of the Rising Sun Trademarks Is Likely to Cause Confusion**

Courts in this District consider the following factors to determine likelihood of confusion: (1) the strength of the plaintiff's mark; (2) the degree of similarity between the plaintiff's and defendant's marks; (3) the proximity of the products being sold; (4) the likelihood that the plaintiff will "bridge the gap" between the products being sold; (5) the evidence of actual confusion; (6) defendant's good faith in using the mark; (7) the quality of defendant's products; and (8) the sophistication of the relevant consumer market. *Whitehead v. CBS/Viacom*, 315 F. Supp.2d 1, 14 (D.D.C. 2004). Courts have recognized that, where both parties make significant use of the Internet, as is the case here, some of the factors may be more relevant than others. In particular, in the Internet context, courts tend to focus on the similarity between the marks and the proximity of the products sold and marketing channels used. *See Brookfield Commc'ns, Inc., v. W. Coast Entm't Corp.*, 174 F.3d 1036, 1054-55 (9th Cir. 1999); *see also Network Automation, Inc. v. Advanced Sys. Concepts, Inc.*, 638 F.3d 1137 (N.D. Cal. 2011) (finding that

courts should take a flexible approach when considering likelihood of confusion in the Internet context and that some factors may be more important than others). When identical marks are used in the same geographic area for the same class of goods or services, likelihood of confusion is presumed. *See Opticians Ass'n of Am. v. Indep. Opticians of Am.*, 920 F.2d 187, 195 (3rd Cir. 1990). These factors, taken together, weigh heavily in favor of a finding of likelihood of confusion.

**a. The Rising Sun Trademarks are Strong**

“The strength of a mark refers to its distinctiveness or tendency to identify the goods sold under the mark as emanating from a certain source.” *Russian Acad. of Sciences v. Am. Geophysical Union*, No. 982165, 1998 WL 34333239, at \*8 (D.D.C. Dec. 17, 1998). “The strength of a mark encompasses both the mark’s inherent distinctiveness, or its arbitrariness in relation to the product for which it is used, and its acquired distinctiveness, or the extent to which prominent use of the mark in commerce has resulted in a high degree of consumer recognition.” *Globalaw Ltd. v. Carmon & Carmon Law Office*, 452 F. Supp.2d 1, 46 (D.D.C. 2006) (internal quotations and citation omitted).

The Rising Sun Trademarks are extremely strong on both fronts. The federal registration for the Rising Sun mark is prima facie evidence of its distinctiveness. *Malarkey-Taylor*, 929 F.Supp. at 476. Further, the Rising Sun Trademarks are highly distinctive designs – they are arbitrary and fanciful logos that in their entirety have no descriptive or informational relationship to the goods and services offered by OFA under these marks. Moreover, the Rising Sun Trademarks are closely associated with Barack Obama’s presidential campaigns. No other person or entity is authorized to use the Rising Sun Trademarks in association with a political campaign, or any other product or service, without the express permission of OFA. Indeed, the



Rising Sun Trademarks are some of the most widely recognized political logos ever used. Approximately 2 million items bearing the Rising Sun Trademarks were sold on the OFA website over the 2008 election cycle. Burdick Decl. ¶ 15. For all of these reasons, this factor weighs heavily in favor of a likelihood of confusion finding.

**b. Defendants Are Using Trademarks Identical to OFA's Rising Sun Trademarks**

Under the second factor, "the focus is on whether a similarity exists that is likely to cause confusion." *Malarkey-Taylor*, 929 F.Supp. at 477. In assessing the similarity of the marks, "courts look to the overall impression created by the logos and the context in which they are found." *Federation Internationalie De Football Ass'n v. Nike, Inc.*, 285 F. Supp.2d 64, 72 (D.D.C. 2003) (internal quotations and citations omitted). Here, there can be no question as to the similarity of the parties' marks, because Defendants are using marks identical to the Rising Sun Trademarks. *See* Exhibit 2. Indeed, Defendants are using the Rising Sun Trademarks *because* they are the well-recognized symbols of the Campaign. When identical marks are used in the same geographic area for the same class of goods or services, likelihood of confusion is presumed. *Opticians Ass'n of Am*, 920 F.2d at 195. Because Defendants are marketing and selling campaign merchandise bearing marks identical to the Rising Sun Trademarks, consumers are likely to be confused as to the source or origin of that merchandise, and may well believe they are contributing to OFA when in fact they are supporting Defendants, who have no relation to OFA. There can be no question as to the similarity of the marks. Consequently, this factor weighs heavily in favor of a finding of likelihood of confusion.

**c. The Parties' Products Are Closely Related**

The third factor considers whether the market for and content of the products bearing the trademarks at issue are competitive such that it is likely consumers will confuse the source of the

respective products. *Russian Acad. of Sciences*, 1998 WL 34333239, at \*8. Here, OFA's and Defendants' online stores are direct competitors (at least for the limited purpose of selling OFA-branded merchandise; as explained herein, OFA's purposes in selling such merchandise are broader). OFA, through its online store, markets and sells campaign merchandise bearing the Rising Sun Trademarks in order to obtain revenue to be used by the Campaign in its reelection efforts, and to obtain contact information of supporters and potential supporters. Burdick Decl. ¶ 16. OFA offers a variety of merchandise bearing the Rising Sun Trademarks, including, but not limited to, signs, buttons, posters and clothing. Burdick Decl. ¶ 9. Defendants, through Demstore.com, offer the same type of merchandise, also bearing the Rising Sun Trademarks. See Exhibit 2. Both parties, then, market and sell products consisting of political campaign merchandise bearing the Rising Sun Trademarks, and both parties target Obama supporters. Further, both parties sell nothing other than campaign merchandise. While the <https://store.barackobama.com> website at which OFA sells its products offers more than an online store for campaign merchandise, the online store component is a central part of the site and the best way for supporters to purchase campaign merchandise. Burdick Decl. ¶ 17. Because the parties' products and marketing channels substantially overlap, there is no issue as to whether it is likely that OFA will "bridge the gap" between the products being sold – there simply is no gap to be bridged. These factors, then, weigh strongly in favor of a likelihood of confusion finding.

**d. Evidence of Actual Confusion**

While evidence of actual confusion may provide substantial proof of the existence of likelihood of confusion, evidence of actual confusion is not necessary to prove likelihood of confusion. *Malarkey-Taylor*, 929 F.Supp. at 477. In the absence of evidence of actual

confusion, courts can assess the likelihood of confusion by looking at the other factors. *Appleseed Found. Inc. v. Appleseed Inst., Inc.*, 981 F. Supp. 672, 675 (D.D.C. 1997). Here, it is difficult to believe that there are not already consumers who purchased campaign merchandise from the Demstore.com mistakenly believing that Demstore.com was associated with the Campaign and that a purchase on Demstore.com supported the Campaign. Because consumers who have actually been confused would believe that goods purchased from Demstore.com were from or affiliated with OFA, or believe that Demstore.com is the legitimate source for such goods, they would have no reason to notify either OFA or Demstore.com of such confusion. *See, e.g., AmBrit, Inc. v. Kraft, Inc.*, 812 F.2d 1531, 1544 (11th Cir. 1986) ("It is likely that many consumers who were confused never realized they had been confused..."). Nonetheless, the other factors weigh heavily in favor of a likelihood of confusion finding, so even in the absence of actual confusion evidence, this factor is not dispositive of the analysis.

**e. Defendants Have Not Acted in Good Faith in Using the Rising Sun Trademarks**

In using the Rising Sun Trademarks, Defendants intend to capitalize on the goodwill associated with the Campaign and symbolized by the Rising Sun Trademarks. Defendants have been aware that OFA owns the 2008 Rising Sun Trademark since no later than June, 2007, when OFA sent a letter to Defendants requesting that they cease and desist using the trademark. Defendants have been aware that OFA owns the 2012 Rising Sun Trademark since no later than April, 2011, when OFA sent a letter to Defendants requesting that they cease and desist using the Rising Sun Trademarks. Moreover, because the Rising Sun Trademarks are so ubiquitous, Defendants have had constructive notice that the Rising Sun Trademarks are associated with the Campaign ever since the Campaign started using the Rising Sun Trademarks - in early 2007 for the original mark, and 2011 for the 2012 mark. Defendants have repeatedly refused to stop using



the Rising Sun Trademarks. Such conduct can give rise to an inference of bad faith. *Russian Acad. of Sciences*, 1998 WL 34333239, at \*7; *Malarkey-Taylor*, 929 F.Supp. at 478 (finding that defendant's adoption of challenged mark was not innocent and was at its own risk given that it was informed of plaintiff's senior mark). While consumers may believe they are supporting the Campaign by purchasing merchandise bearing OFA's marks from Defendants, OFA is not associated with Defendants in any way, none of the revenue obtained by Defendants goes to OFA, and OFA does not get any of the many other benefits of a purchase of merchandise from OFA itself (including obtaining contact information, the ability to communicate with the voter in the purchasing and delivery environments, etc.). Thus, by selling merchandise bearing the Rising Sun Trademarks, Defendants clearly benefit at the expense of OFA's trademark rights. This factor weighs strongly in favor of a finding of likelihood of confusion.

**f. Consumers Pay Little Attention to the Source of Low-Cost Goods**

While the sophistication of the consumer market for campaign merchandise runs across a broad spectrum, most of the purchases of merchandise bearing the Rising Sun Trademarks are for relatively small dollar amounts, averaging approximately \$43 per purchase. Burdick Decl. ¶ 18. Generally, consumers pay relatively little attention to small value purchases, and, accordingly, courts consider consumers of less expensive products more likely to be confused. *See Globalaw*, 452 F. Supp.2d at 56. Consequently, this factor weighs in favor of a likelihood of confusion finding.

**g. The Factors Weigh Heavily in Favor of Likelihood of Confusion**

Defendants are selling identical and highly similar merchandise through overlapping marketing channels using trademarks that are identical to the Rising Sun Trademarks owned by OFA. All of the factors most relevant in this context – strength of mark, similarity of mark,

proximity of product, marketing channels used, and defendant's intent – weigh heavily in favor of a finding of likelihood of confusion.<sup>2</sup> The other factors are either neutral or weigh in favor of OFA. Therefore, OFA is likely to succeed in showing trademark infringement, false designation of origin, and unfair competition.

### **C. OFA Will Likely Suffer Irreparable Harm in the Absence of an Injunction**

Trademark infringement raises a presumption of irreparable harm. *Malarkey-Taylor*, 929 F.Supp. at 478; *Health Ins. Ass'n of Am. v. Novelli*, 211 F.Supp.2d 23, 28 (“trademark infringement by its very nature causes irreparable injury”) (internal citation omitted). Here, OFA has shown that there is a strong likelihood it will succeed on the merits, and therefore, irreparable harm should be presumed. Nonetheless, Defendants' illicit use of OFA's trademarks causes and will cause OFA irreparable harm by (1) diminishing OFA's ability to attract and retain supporters and donors by obtaining contact information and interacting with voters through the sale of merchandise, (2) limiting OFA's ability to control the context in which its Campaign merchandise bearing the Rising Sun Trademarks is sold, and (3) diverting proceeds to Defendants instead of the Campaign, where any legal remedy would not provide relief to OFA in a timeframe that would remedy the harm caused to the Campaign by Defendants' infringement.

OFA has spent significant time, effort and money developing the goodwill that is currently associated with the Campaign and symbolized by the Rising Sun Trademarks. Burdick Decl. ¶ 19. OFA relies heavily on attracting and retaining large numbers of donors who contribute relatively small dollar amounts to the Campaign. Burdick Decl. ¶ 6. The sale of Campaign merchandise at the <https://store.barackobama.com> website is a crucial part of this

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<sup>2</sup> Consumer confusion is also highly likely due to Defendants' use of the Rising Sun Trademarks on a webpage that advertises: "President Obama Store – All you need to show your support!" See Exhibit 2. This language suggests a sponsorship by or affiliation with OFA where none exists. Thus, when consumers see merchandise bearing the Rising Sun Trademarks marketed and sold in this context, they are even more likely to be deceived into thinking that such an affiliation exists.



approach. Burdick Decl. ¶ 7. Each time a supporter makes a relatively small purchase on the website, OFA obtains contact information from that supporter and then has the ability to reach out to that individual to seek further donations and further opportunities to promote the Campaign. Burdick Decl. ¶ 8. Furthermore, when supporters browse the website in order to purchase merchandise, they are given the opportunity to learn about the Campaign, and the Campaign relies on these interactions with supporters to help promote the Campaign. Burdick Decl. ¶ 20. And, when merchandise purchased through OFA's website is shipped, OFA includes promotional materials in the packages, such that the very shipping of this merchandise provides an additional opportunity for OFA to promote the Campaign. Burdick Decl. ¶ 21. Where Defendants are permitted to sell merchandise bearing the Rising Sun Trademarks through the Demstore.com website, without authorization, OFA loses all of these crucial opportunities to interact with potential supporters. Without an immediate injunction from this Court, OFA will continue to be irreparably harmed in these ways.

OFA is only now starting to significantly suffer from diverted sales, because the vast majority of campaign merchandise sales occur during the final six months preceding the election. Burdick Decl. ¶ 22. Indeed, in the 2008 election cycle, OFA sold over 65% of its campaign merchandise in the final six months preceding the election, and over 50% of its campaign merchandise in the final three months preceding the election. Burdick Decl. ¶¶ 11, 12. In just the final six months preceding the 2008 election, OFA sold over \$23 million in merchandise through its online store, making up over 65% of its total merchandise sales. Burdick Decl. ¶ 23. Similarly, OFA expects to make over 65% of its merchandise sales between now and the November 2012 election. Burdick Decl. ¶ 14. Furthermore, sales of campaign merchandise bearing the Rising Sun Trademarks constitute approximately 2.5% of total contributions made by



individuals to the Campaign. Burdick Decl. ¶ 5. While some supporters make contributions without purchasing merchandise, sales of merchandise are a significant component of OFA's incoming funds. Burdick Decl. ¶¶ 5-7, 11, 16. While OFA could recover monetary damages through summary judgment or trial, because of the election timeframe within which OFA operates, such relief will almost certainly come after the Campaign is able to use the money in its reelection efforts, and therefore, without an injunction now, any future monetary relief, on its own, will be too late. Therefore, monetary relief would be an inadequate remedy for Defendants' infringement of OFA's trademarks. In such circumstances injunctive relief is appropriate. *See CSX Transp., Inc. v. Williams*, 406 F.3d 667, 673 (D.C. Cir. 2005) (irreparable injury is suffered where monetary damages are inadequate) (internal citation omitted).

Finally, Defendants' continuing disregard for OFA's trademark rights demonstrates that Defendants are highly likely to continue to infringe on OFA's rights, absent an injunction. Courts have routinely issued injunctions in such circumstances. *See Hanley-Wood LLC v. Hanley Wood LLC*, 783 F.Supp.2d 147, 151 (D.D.C. 2011) (continuing disregard for plaintiff's rights "alone entitles Plaintiff to a permanent injunction"); *Lifted Research Grp., Inc. v. Behdad, Inc.* 591 F.Supp.2d 3, 8 (D.D.C. 2008) (same).

#### **D. The Balance of Equities Tips in Favor of OFA**

OFA has invested significant resources creating a unique, positive association between the Campaign and the Rising Sun Trademarks. Defendants are now profiting from that goodwill with full knowledge that they lack authorization to use OFA's trademarks. Any harm Defendants would suffer from the issuance of an injunction in favor of OFA results from Defendants' voluntarily deciding not to cease their use of the Rising Sun Trademarks after being informed of their infringement by OFA. "[T]he balance of harms cannot favor a defendant

whose injury results from the knowing infringement on the plaintiff's trademark." *Malarkey-Taylor*, 929 F.Supp. at 478; see also *Russian Academy of Sciences*, 1998 WL 34333239, at \*9. Even so, the issuance of a preliminary injunction would not force Defendants to stop selling campaign merchandise in general, just merchandise bearing the Rising Sun Trademarks. As Defendants' www.demstore.com website makes clear, Defendants sell a host of other products that do not feature the Rising Sun Trademarks. Consequently, the balance of hardships tips heavily in OFA's favor.

#### **E. The Public Interest Will Be Served by Granting a Preliminary Injunction**

It is in the public interest for the Court to prevent public confusion over the source or origin of products provided to the public. *Malarkey-Taylor*, 929 F.Supp. at 478. While it is always in the public interest to prevent public confusion over the source or origin of products, this is particularly important here, where supporters of the Campaign are likely being deceived that they are supporting the Campaign by purchasing merchandise from Defendants when in fact they are only supporting Defendants' profits. In this way, consumers are being denied the opportunity to participate in the political process in the manner they intended. Thus, it is in the public interest to ensure that consumers can express financial support for a political campaign without being deceived as to who or what is actually being supported.

### **IV. CONCLUSION**

Defendants' use of the Rising Sun Trademarks is likely to result in confusion amongst consumers. Defendants' use of the Rising Sun Trademarks has reduced OFA's ability to control the context in which Campaign merchandise is sold and distributed, and has diverted financial

resources away from OFA and to Defendants. Defendants' infringement is ongoing and continues to cause irreparable harm to OFA and its rights. Because of the unique timing of the election cycle, money damages would be inadequate relief for OFA's harm, because any such damages would be awarded after OFA could use them in its reelection efforts. It is in the public's interest to limit or avoid any confusion being caused by Defendants' use of OFA's trademarks, especially since this confusion likely involves consumers being deceived about where their financial support for political candidates really goes. Consequently, OFA is entitled to a preliminary injunction enjoining Defendants' further infringement.

WHEREFORE, OFA respectfully requests this Court (a) grant OFA's Application for Preliminary Injunction; (b) enter an Order enjoining Defendants, and any employees, agents, servants, officers, representatives, directors, attorneys, successors, affiliates, assigns, and entities owned or controlled by Defendants, and all those in active concert or participation with Defendants, and each of them who receives notice directly or otherwise of such injunction from:

1. using the Rising Sun and 2012 Rising Sun Trademark, or any other trademarks that are confusingly similar to the Rising Sun Trademarks, for retail products, or making any other unlawful use of the Rising Sun Trademarks or any other trademarks owned by OFA,
2. using any false designation of origin or false description, or performing any act which is likely to lead members of the trade or public to believe that any product manufactured, imported, distributed, offered for sale, or sold by Defendants is in any manner associated or connected with OFA, or is licensed, sponsored, approved, or authorized by OFA,



3. engaging in any other activity constituting unfair competition with OFA, or constituting infringement of the Rising Sun Trademarks,
4. taking any action, including the unauthorized use of the Rising Sun Trademarks, that dilutes the unique association between the Rising Sun Trademarks and OFA, or that tarnishes the reputation or image of OFA,
5. disposing of, destroying, altering, moving, removing, concealing, tampering with, or in any manner secreting any business records (including computer records) of any kind, including invoices, correspondence, books of account, receipts or other documentation relating or referring in any manner to any retail services offered in connection with the Rising Sun Trademarks, or any mark or designation that is confusingly similar to any of the Rising Sun Trademarks, and
6. instructing, assisting, aiding or abetting any other person or entity in engaging in or performing any of the activities referred to in subparagraphs (1) through (5) above; and

(c) order such other and further relief as this Court deems just.

DATED: June 7, 2012

By: /s/ Barry J. Reingold

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