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13
 14 **UNITED STATES DISTRICT COURT**
 15 **DISTRICT OF NEVADA**

16
 17 NIKE, INC.

18 and

19 CONVERSE, INC.,

20 Plaintiffs,

21 vs.

22 QILOO INTERNATIONAL LIMITED

23 Defendant.

**MEMORANDUM OF LAW IN
 SUPPORT OF PLAINTIFFS’
 EMERGENCY MOTION FOR
 ENTRY OF TEMPORARY
 RESTRAINING ORDER, SEIZURE
 ORDER, AND PRELIMINARY
 INJUNCTION**

24
 25 **MEMORANDUM OF LAW**

26 Pursuant to Rule 65 of the Federal Rules of Civil Procedure, Lanham Act Section 34 (15
 27 U.S.C. § 1116), the Patent Act, 35 U.S.C. § 283, and Local Rule 7-5, Plaintiffs NIKE, Inc.
 28 (“NIKE”) and Converse, Inc. (“Converse”) respectfully move the Court for an emergency

1 temporary restraining order without notice and a preliminary injunction against Qiloo
2 International Limited (“QiLoo”).

3 I. INTRODUCTION

4 NIKE and its wholly owned subsidiary Converse are seeking relief on an *ex parte* and
5 emergency basis because, right now, at the biannual World Shoe Association (“WSA”) trade
6 show in Las Vegas, QiLoo is offering to sell shoes that infringe at least Converse’s registered
7 trademarks. NIKE and Converse have notified QiLoo of infringements at WSA seven times over
8 the past four and a half years. (Declaration of Erik S. Maurer (“Maurer Decl.”) ¶ 9). Every time,
9 QiLoo ignores Plaintiffs’ rights, completes the show, and returns to Asia, only to reappear at the
10 next WSA show with new and continuing infringements. QiLoo is back, yet again.

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12 Because QiLoo has proven itself to be a recidivist, serial infringer that willfully ignores
13 Plaintiffs’ rights, good cause exists for not providing QiLoo notice of this motion. If provided
14 notice, QiLoo is likely to conceal evidence of its on-going infringements and return to Fujian,
15 China to fulfill its infringing sales. (*Id.*, at ¶ 9). Further, if QiLoo is notified of – but evades –
16 Plaintiffs’ enforcement efforts now, QiLoo will likely change its identity before returning to the
17 United States, making it impossible for Plaintiffs to enforce their rights. (*Id.*). Moreover,
18 although Plaintiffs are seeking relief on an *ex parte* basis, Plaintiffs will promptly provide QiLoo
19 with notice through multiple means, once service is effected at the WSA show, including by
20 emailing the papers to QiLoo representatives in China. In addition, Plaintiffs will not oppose a
21 hearing on this motion in less than the two day notice required for seeking to dissolve a
22 temporary restraining order under Rule 65 of the Federal Rules of Civil Procedure.

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24 Further, pursuant to Local Rule 7-5, Plaintiffs are seeking the TRO on an emergency
25 basis because QiLoo will be at WSA only until Wednesday, February 8, 2012. Once the WSA
26 ends, QiLoo will likely return to China with its infringing products and sales orders, which are
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1 evidence in this case. (*Id.*, at ¶ 9) Moreover, Plaintiffs would have no effective or efficient
2 means of serving QiLoo with process in China.

3 Pursuant to the Court’s inherent authority and its authority under the anti-counterfeiting
4 provisions of the Lanham Act, 15 U.S.C. § 1116(d), Plaintiffs further ask the Court to order the
5 U.S. Marshals Service, Plaintiffs’ counsel, and their assistants to seize QiLoo’s infringing goods
6 and documents/things used in support of QiLoo’s infringements because, if this evidence is not
7 collected now, it will be difficult or impossible to collect later and Plaintiffs will have no way to
8 track and stop QiLoo’s infringements. (Maurer Decl, at ¶ 9). Indeed, QiLoo is likely to default
9 and Plaintiffs will have no effective means of enforcing their intellectual property rights.

11 As set forth below, the relief Plaintiffs request is necessary and appropriate, and has been
12 granted by this Court under similar circumstances. To that end, this case is similar to the case of
13 *NIKE, Inc. v. Meitac Int’l*, 2006 WL 3883278 (D.Nev. 2006), in which this Court issued a TRO,
14 authorized seizure of infringing shoes, and, in due course, entered a preliminary injunction.
15 (Maurer Decl., Ex. QQ). Here, as there, Plaintiffs respectfully request that this Court act now to
16 stop Defendant’s pattern of willful infringements.

18 **II. STATEMENT OF FACTS**

19 Converse is a wholly-owned NIKE subsidiary. As set forth in the following tables, some
20 of the rights asserted in this dispute are assigned to NIKE and others are assigned to Converse.
21 QiLoo has been notified of all the asserted patents and trademarks by NIKE.

23 **A. NIKE’S ASSERTED DESIGN PATENTS**

24 NIKE is one of the world’s largest and best known manufacturers of innovative footwear
25 designs. (Maurer Decl., ¶ 3). To that end, NIKE spends substantial time and resources
26 designing footwear ornamentation and takes steps to protect its innovative designs. (*Id.*, at ¶ 4).
27 Relevant to this dispute, NIKE owns all right, title, and interest in the United States design
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1 patents in Table 1 of the Complaint that is reproduced below (“NIKE Design Patents”). A copy
2 of each NIKE Design Patent has also been attached to the Maurer Decl. as indicated in Table 1.
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TABLE 1: NIKE DESIGN PATENTS		
United States Design Patent No.	Issue Date of Patent	Maurer Decl. Exhibit
D361,884	September 5, 1995	A
D429,877	August 29, 2000	B
D462,830	September 17, 2002	C
D475,523	June 10, 2003	D
D494,353	August 17, 2004	E
D499,247	December 7, 2004	F
D500,585	January 11, 2005	G
D500,917	January 18, 2005	H
D523,618	June 27, 2006	I
D524,028	July 4, 2006	J
D524,529	July 11, 2006	K
D532,600	November 28, 2006	L
D546,541	July 17, 2007	M
D547,541	July 31, 2007	N
D555,332	November 20,	O
D573,338	2007July 22, 2008	P
D573,339	July 22, 2008	Q
D575,046	August 19, 2008	R
D578,294	October 14, 2008	S
D579,186	October 28, 2008	T
D580,636	November 18, 2008	U
D580,646	November 18, 2008	V

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TABLE 1: NIKE DESIGN PATENTS		
United States Design Patent No.	Issue Date of Patent	Maurer Decl. Exhibit
D586,548	February 17, 2009	W

Each of the NIKE Design Patents has been alive and enforceable since issuance, and is presumed valid pursuant to 35 U.S.C. § 282.

B. ASSERTED TRADEMARKS

As a result of continuous and long-standing promotion, substantial sales, and consumer recognition of certain of their footwear designs, Converse and NIKE have developed trademark rights in those designs. Specifically, Converse and NIKE own common law and registered trademark rights in the appearance of the footwear designs described below.

1) CONVERSE – CHUCK TAYLOR ALL STAR

Converse has continuously promoted and sold shoes bearing its Chuck Taylor All Star footwear designs (“CTAS Designs”) for more than sixty years. (Declaration of Wayne Patrick Seehafer [“Seehafer Decl.”], ¶ 3). Images of the CTAS Designs appear in Table 2 below.

TABLE 2: CTAS DESIGNS	
 <p>Chuck Taylor All Star Low</p>	 <p>Chuck Taylor All Star High</p>
 <p>Chuck Taylor All Star Outsole</p>	

1 Today, Converse offers shoes bearing the CTAS Designs in a wide variety of styles for
2 consumers throughout the United States and globally. (Seehafer Decl., ¶ 4). Converse has spent
3 over \$88 million advertising and promoting shoes bearing the CTAS Designs over the past five
4 years alone, and has now sold over one billion pairs of shoes bearing the CTAS Designs. (*Id.* at
5 ¶ 6). Total, over the past decade, Converse sold over 153 million pairs of shoes bearing the
6 CTAS high and low designs throughout the United States, and those sales earned Converse more
7 than \$2.4 billion in gross U.S. revenue. (*Id.* at ¶ 5). Over the past five and one half years alone,
8 Converse sold approximately 108 million pairs of shoes bearing the CTAS designs throughout
9 the United States, and those sales earned Converse approximately \$1.8 billion in gross U.S.
10 revenue. (*Id.*)

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12 The CTAS Designs have also enjoyed widespread and unsolicited publicity. For
13 example, the CTAS Designs have been celebrated in books, magazines, and newspapers. (*Id.* at
14 ¶ 7). They have appeared in movies and on television shows. (*Id.*) And famous artists and
15 companies from all walks of life – including John Lennon, Kurt Cobain, John Varvatos,
16 Metallica, and DC Comics, to name but a few – have collaborated with Converse on special
17 releases of the CTAS Designs. (*Id.* at ¶ 7).

18
19 Taken together, these facts evidence Converse’s common law trademark rights in the
20 CTAS Designs. Importantly, surveys conducted by independent experts confirm that the Chuck
21 Taylor All Star low and high designs have acquired substantial distinctiveness, or secondary
22 meaning, and, thus, are Converse trademarks. Discounting survey noise, 42.12% of relevant
23 consumers associate the CTAS low design with Converse. (Maurer Decl. Ex. NN, Report of
24 Gerald Ford, at ¶ 5). Discounting survey noise, 49% of relevant consumers associate the CTAS
25 high design with Converse. (Maurer Decl. Ex. OO, Report of Dr. Susan McDonald, at p. 13). It
26 is the studied opinions of Mr. Ford and Dr. McDonald that “a substantial segment of the relevant
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1 universe associate the trade dress of the Converse CTASL [CTAS low design] with ...
 2 Converse,” (Maurer Decl. Ex. NN, Ford Report, at ¶ 26), and “that the Converse Chuck Taylor
 3 All Star [high] sneaker is deservedly, ‘iconic,’ as suggested by the fact that the vast majority of
 4 consumers in the market ... accurately identify it by appearance alone, stripped of formal brand
 5 identifiers.” (Maurer Decl. Ex. OO, McDonald Report, at p. 13).

7 With this backdrop, it is not surprising that the United States Patent and Trademark
 8 Office (“USPTO”) granted Converse trademark registrations for its CTAS outsole, low, and high
 9 designs, as reflected in the table below (the “CTAS Registrations”). A copy of each CTAS
 10 Registration is attached to the Maurer Decl. as indicated in Table 3.

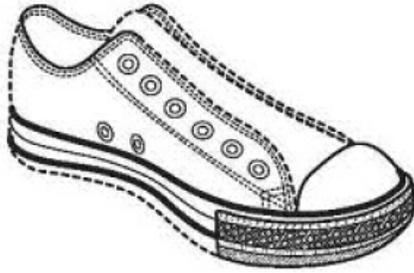
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Table 3: CONVERSE TRADEMARK REGISTRATIONS

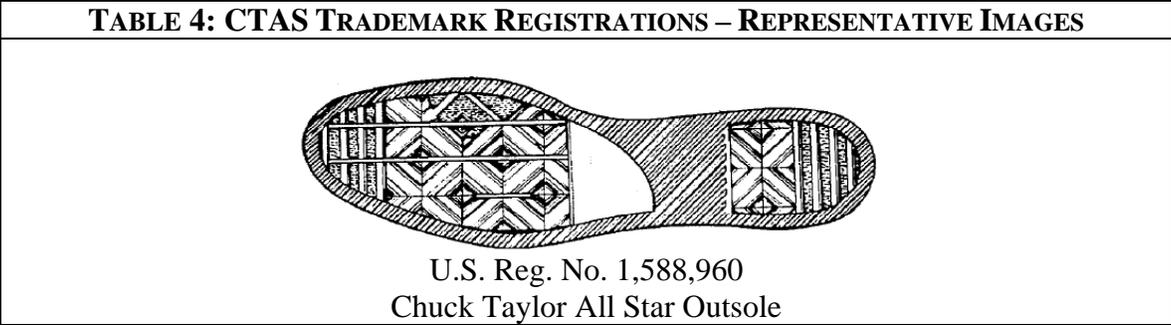
13 United States Trademark Reg. No.	Trademark	Trademark Registration Date	Maurer Decl. Exhibit
14 Registration No. 1,588,960	Chuck Taylor Outsole Design	March 27, 1990	X
15 Registration No. 3,258,103	Chuck Taylor Outsole Design	July 3, 2007	Y
16 Registration No. 4,062,112	Chuck Taylor Low Design	November 29, 2011	AA
17 Registration No. 4,065,482	Chuck Taylor High Design	December 6, 2011	BB

19 Representative images of the registered designs from the CTAS Registrations are shown
 20 in Table 4 below.

22 **TABLE 4: CTAS TRADEMARK REGISTRATIONS – REPRESENTATIVE IMAGES**

 <p>23 24 25 26 27 28</p> <p>U.S. Reg. No. 4,062,112 Chuck Taylor All Star Low Top</p>	 <p>U.S. Reg. No. 4,065,482 Chuck Taylor All Star High Top</p>
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Converse’s common law trademark rights in the CTAS Designs together with Converse’s federal rights in the CTAS Registrations are referred to collectively as the “Converse Trademarks.” Over the years, Converse has taken steps to enforce the Converse Trademarks and police its exclusive right to use the CTAS Designs. (Maurer Decl., ¶ 4).

2) NIKE – AIR FORCE ONE (“AF1”)

NIKE has continuously promoted and sold shoes bearing its Air Force One footwear design (“AF1 Design”) for almost thirty years. (Declaration of Kelly B. Hibler [“Hibler Decl.”], ¶ 3). An image of the AF1 Design appears in Table 5 below.



Total, in the United States alone, NIKE has sold over 55 million pairs of shoes bearing the AF1 low design and those sales earned NIKE more than \$2.25 billion in gross U.S. revenue. (Hibler Decl., ¶ 5). Compared with other brands, shoes bearing NIKE’s AF1 low design are routinely one of the top selling footwear products every month throughout the United States. (*Id.*). Shoes bearing the AF1 low design are one of NIKE’s best-selling products of all time in

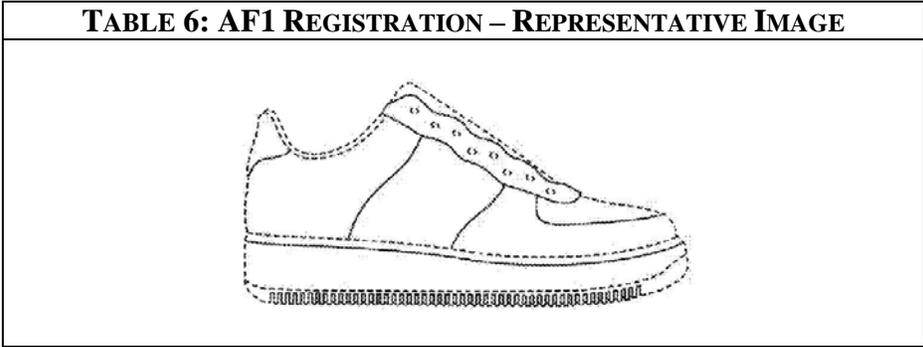
1 the United States and around the world. (*Id.*). Over the past two years alone, NIKE has sold
2 more than 15 million pairs of shoes bearing AF1 designs around the world. (*Id.* at ¶ 5.A.).
3 NIKE’s gross revenue from sales of shoes bearing AF1 designs in North America averaged over
4 approximately \$200 million per year over the past five years. (*Id.*).
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6 The AF1 Design, like the CTAS Designs, has enjoyed widespread and unsolicited
7 publicity. For example, the AF1 Design has been celebrated in books, magazines, and
8 newspapers. (*Id.* at ¶ 7). It has appeared in movies and on television shows, and is the subject of
9 numerous songs, including a hit music video. (*Id.*). Beginning in 2006 and throughout 2007, the
10 AF1 Design was feted with celebrations marking its 25th Anniversary. (*Id.* at ¶ 6). A history of
11 the AF1 Design is available at: www.nike.com/af1/index.jhtml#l=1thology.
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13 Together, these facts evidence NIKE’s common law trademark rights in the AF1 Design.
14 A survey conducted by independent survey expert George Mantis confirms that the NIKE AF1
15 Design has acquired substantial distinctiveness, or secondary meaning, and, thus, is a NIKE
16 trademark. Specifically, discounting for survey noise, 48.8% of relevant consumers associate the
17 Air Force 1 design with NIKE. (Maurer Decl. Ex. PP, Mantis Report, at p. 9). Mr. Mantis’s
18 “opinion [is] that the appearance of the Nike Air Force 1 sneaker functions as a source identifier
19 [because] almost one-half of all individuals interviewed, associate the appearance of the Nike Air
20 Force 1 sneaker with one brand of sneakers, specifically, Nike.” (*Id.* at 10).
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22 On June 24, 2008, the UPSTO granted NIKE U.S. Trademark Registration No. 3,451,905
23 for the AF1 Design (the “AF1 Registration,” Maurer Decl., Ex. Z). A representative image of
24 the registered AF1 Design is shown in Table 6 below.
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NIKE’s common law trademark rights in the AF1 Design and federal rights in the AF1 Registration are referred to collectively hereafter as the NIKE Trademark. Over the years, NIKE has taken steps to enforce the NIKE Trademark and police its exclusive right to use the AF1 Design. (Maurer Decl., ¶ 4).

C. QILOO AND ITS INFRINGING ACTIVITIES

QiLoo is a manufacturer of footwear products in Fujian Province, China. (See <http://www.qiloo.com/company.asp/>, last visited, February 3, 2012). With the exception of its temporary presence in Las Vegas during the WSA trade show, Plaintiffs cannot locate any domestic presence or assets for QiLoo. (Maurer Decl., ¶ 6).

The WSA trade show is “the most comprehensive footwear and accessories show in the world. The twice-yearly event gathers exhibitors showcasing thousands of brands, attracting category leaders, industry newsmakers, top designers, as well as retailers from every market segment, retail and distribution channel.” (Maurer Decl. Ex. MM, http://www.wsashow.com/media_information/landing, last visited February 3, 2012). Manufacturing exhibitors at WSA, like QiLoo, sell their products to retailers (or “buyers”) during the show. Because they are purchasing six or more months’ supply, buyers at WSA commonly place bulk orders for tens of thousands of pairs of shoes from the manufacturing exhibitors. (*Id.* at ¶ 8). The current WSA trade show began today and runs through Wednesday, February 8, 2012. (*Id.* at ¶ 7).

Earlier today, Plaintiffs’ representative visited QiLoo’s booth at the WSA show.

(Declaration of Thomas Scavuzzo [“Scavuzzo Decl.”], ¶ 2). There, Mr. Scavuzzo inspected numerous shoes that have outsole and upper designs that look like the outsole and upper designs of Converse’s Chuck Taylor All Star shoes, including the designs depicted in Converse’s Trademark Registration Numbers: 1,588,960; 3,258,103; 4,062,112; and 4,065,482 (hereafter, “Infringing Shoes”). (*Id.* at ¶ 3).

Today, however, is not the first time QiLoo has promoted and offered to sell shoes covered by Plaintiffs’ rights at WSA. The following chart lists QiLoo’s past infringements and NIKE’s notices of infringement. (*Id.*, at ¶ 9).

Notice Letter	Infringing Model Numbers	Infringed Patents/Trademarks	Maurer Decl. Ex.
February 2, 2007	<ul style="list-style-type: none"> QL-20756, QL-21193, QL-21212, QL-21533, QL-21784, and QL-21810 	<ul style="list-style-type: none"> D361,884; D429,877; D475,523; D494,353; D499,247; D500,585; D500,917; D523,618; D524,529; D532,599; D532,600; and D462,830 	CC
July 30, 2008	<ul style="list-style-type: none"> QL-23832, QL-24108, QL-25322, and QL-25733 	<ul style="list-style-type: none"> D499,247; D500,585; D546,541; and D547,541 	DD
August 1, 2009	<ul style="list-style-type: none"> QL-25322 	<ul style="list-style-type: none"> D578,294; D579,186; and D586,548 	EE
February 3, 2010	<ul style="list-style-type: none"> QL-23416 and QL-26294 	<ul style="list-style-type: none"> D573,338; D573,339; D575,045; D575,046; D580,636; 580,646; and D586,548 TM Reg. No. 3,451,905 	FF
August 11, 2010	<ul style="list-style-type: none"> QL-23416, QL-23860, QL-24715, QL-25472, QL-26294, QL-27141, QL-27188 	<ul style="list-style-type: none"> D555,332 and D586,548, TM Reg. Nos. 1,588,960; 3,258,103; and 3,451,905 	GG
February 9, 2011		<ul style="list-style-type: none"> D524,028 TM Reg. Nos. 1,588,960; 3,258,103; and 3,451,905 	HH

Notice Letter	Infringing Model Numbers	Infringed Patents/Trademarks	Maurer Decl. Ex.
July 28, 2011		<ul style="list-style-type: none"> TM Reg. Nos. 1,588,960; 3,258,103; and Chuck Taylor low and high trade dress 	II

III. ARGUMENT

A. THE LEGAL STANDARDS FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

The Court is specifically authorized to issue injunctive relief in this case under the Lanham Act, 15 U.S.C. § 1116, and under the Patent Act, 35 U.S.C. § 283. The Court must make two determinations before issuing a TRO: (1) that Plaintiffs are being “immediately and irreparably” harmed by QiLoo’s infringements (Rule 65(b), Fed.R.Civ.P.), and (2) that the four factors required to issue a preliminary injunction are satisfied, at least preliminarily -- *i.e.*, (A) a reasonable likelihood of success on the merits; (B) irreparable harm if an injunction is not granted; (C) a balance of hardships tipping in Plaintiffs’ favor; and (D) the injunction’s favorable impact on the public interest. *AstraZeneca LP v. Apotex, Inc.*, 633 F.3d 1042, 1049 (Fed. Cir. 2010).¹ Here, Plaintiffs satisfy all of the requirements for a TRO and preliminary injunction.

B. PLAINTIFFS WILL BE IMMEDIATELY AND IRREPARABLY HARMED UNLESS QILOO IS RESTRAINED NOW

QiLoo is causing Plaintiffs immediate and irreparable harm in at least three distinct ways. First, QiLoo has made it impossible for Plaintiffs to secure relief unless a TRO issues and it is stopped while physically present in Las Vegas now. QiLoo has no known domestic presence and is unlikely to preserve any evidence of its current identity or of its infringements now that suit has been filed. (*Id.*, at ¶ 6). Moreover, QiLoo is taking infringing orders that it will only fulfill

¹ In patent cases, temporary restraining orders and preliminary injunctions are governed by the law of the Federal Circuit. *Hybritech Inc. v. Abbott Labs.*, 849 F.2d 1446, 1451 n.12 (Fed. Cir. 1988). Likewise, in trademark cases, temporary restraining order standards mirror those for a preliminary injunction. *See Stuhlberg Int’l Sales Co., Inc. v. John D. Brush & Co., Inc.*, 240 F.3d 832, 839 n. 7 (9th Cir. 2001) (“Because our analysis is substantially identical

1 after it leaves the country where Plaintiffs have no effective recourse, let alone ability to monitor
2 or disrupt infringements that began here. (*Id.*, at ¶ 9). In sum, QiLoo has developed a system for
3 flaunting United States intellectual property laws and flooding world markets with knock-off
4 designs. Because QiLoo limits its presence in the United States and will cover its tracks once
5 alerted to this action, its systematic infringement can only be stopped through an *ex parte* TRO.
6 (*Id.*, at ¶ 9).

8 Second, QiLoo is eroding and devaluing Plaintiffs’ intellectual property rights by
9 undermining Plaintiffs’ control over products bearing Plaintiffs’ proprietary designs. Loss of
10 control over proprietary intellectual property rights constitutes a well-recognized form of
11 irreparable harm and supports issuance of a TRO and preliminary injunction. *See Stuhlberg*, 240
12 F.3d at 841 (“threatened loss of prospective customers or goodwill certainly supports a finding of
13 the possibility of irreparable harm.”); *Gallagher Benefit Servs., Inc. v. De La Torre*, 283 Fed.
14 Appx. 543, 546 (9th Cir. 2008) (potential loss of goodwill and customers causes irreparable
15 injury); *M2 Software, Inc. v. Madacy Entm’t*, 421 F.3d 1073, 1088 (9th Cir. 2005) (“Use of
16 similar marks by third-party companies in the relevant industry weakens the mark at issue.”);
17 *Farmer Brothers Co. v. Albrecht*, 2011 WL 4736858, *3 (D. Nev. October 6, 2011) (“Loss of
18 customers or goodwill constitutes irreparable harm . . .”); *Tile Outlet Always In Stock, Inc. v. Big*
19 *Leaps, Inc.*, 2010 WL 5239229, at *3 (D. Nev. Dec. 16, 2010) (irreparable injury exists when
20 continuing infringement will result in loss in plaintiff’s reputation and goodwill).

23 Finally, because QiLoo has no domestic presence and no identifiable domestic assets
24 (Maurer Decl., ¶ 6), it will be difficult or impossible for Plaintiffs to recover a money judgment.
25 Thus, Plaintiffs harm is irreparable because monetary remedies are inadequate. *Robert Bosch,*
26 *LLC v. Pylon Mfg. Corp.*, 659 F.3d 1142, 1156 (Fed. Cir. 2011) (citing *O2 Micro Int’l Ltd. v.*

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28 for the injunction and the TRO, we do not address the TRO separately.”)

1 *Beyond Innovation Tech. Co.*, 2007 WL 869576, at *2 (E.D. Tex. Mar. 21, 2007), vacated and
2 remanded on other grounds, 521 F.3d 1351 (Fed. Cir. 2008) (finding irreparable harm where
3 “all three defendants are foreign corporations and that there is little assurance that [plaintiff]
4 could collect monetary damages”)); *Bushnell, Inc. v. Brunton Co.*, 673 F. Supp. 2d 1241, 1263
5 (D. Kan. 2009) (granting preliminary injunction where “the prospect of collecting money
6 damages from a foreign defendant with few to no assets in the United States tips in favor of a
7 finding of irreparable harm”); *Canon Inc. v. GCC Int’l Ltd.*, 450 F. Supp. 2d 243, 256 (S.D.N.Y.
8 2006) (granting preliminary injunction where defendant was largely based abroad).

10 Thus, for at least three distinct reasons, Plaintiffs are likely to suffer irreparable injury
11 and have satisfied the first requirement for securing a TRO. *Winter v. NRDC*, 129 S. Ct. 365,
12 374–76 (2008) (the questions are “likely to succeed on the merits [and] likely to suffer irreparable
13 harm in the absence of preliminary relief”) emphasis added.

15 **C. PLAINTIFFS SATISFY THE REQUIREMENTS FOR A PRELIMINARY INJUNCTION**

16 **1) PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS**

17 **i. NIKE WILL LIKELY PREVAIL ON ITS DESIGN PATENT INFRINGEMENT**
18 **CLAIMS**

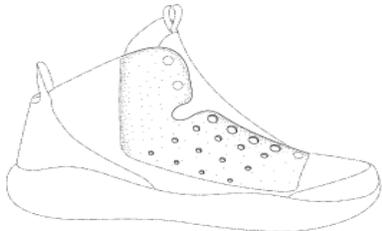
19 To demonstrate a likelihood of success on the merits, NIKE must show that, in light of
20 the presumptions and burdens that will apply at trial on the merits, (1) QiLoo likely infringes the
21 NIKE Design Patents, and (2) the claims of the NIKE Design Patents will likely withstand any
22 challenges QiLoo raises to validity. *AstraZeneca*, 633 F.3d at 1050. NIKE establishes both
23 factors here.

24 First, at this stage, NIKE must merely establish a reasonable likelihood that it will prove
25 at trial, by a preponderance of the evidence, that QiLoo infringes the NIKE Design Patents. *See*
26 *Tech. Licensing Corp. v. Videotek, Inc.*, 545 F.3d 1316, 1326-27 (Fed. Cir. 2008) (stating that, to
27 prove infringement, the patentee has the burden of persuasion by a preponderance of the
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1 evidence).

2 Infringement of a design patent occurs when the accused design is substantially the same
3 as the design patent’s claim under the ordinary observer test. *Egyptian Goddess, Inc. v. Swisa,*
4 *Inc.*, 543 F.3d 665, 683 (Fed. Cir. 2008). The ordinary observer test provides that “if, in the eye
5 of an ordinary observer, giving such attention as a purchaser usually gives, two designs are
6 substantially the same ... the first one patented is infringed by the other.” *Catalina Lighting, Inc.*
7 *v. Home Depot USA, Inc.*, 295 F.3d 1277, 1286 (Fed. Cir. 2002) (quoting *Gorham Co. v. White,*
8 81 U.S. 511, 528 (1872)).

10 QiLoo’s Infringing Shoes satisfy the ordinary observer test because the ornamental
11 designs of QiLoo’s Infringing Shoes appear to be virtually identical copies of NIKE’s patented
12 footwear designs. (Maurer Decl., ¶ 10); *L.A. Gear, Inc. v. Thom McAn Shoe Co.*, 988 F.2d 1117,
13 1125-26 (Fed. Cir. 1993) (“[w]hen the patented design and the design of the article sold by the
14 patentee are substantially the same, it is not error to compare the patentee’s and the accused
15 articles directly; . . . indeed, such a comparison may facilitate application of the *Gorham*
16 criterion of whether an ordinary purchaser would be deceived into thinking that one were the
17 other.”). Representative examples of QiLoo’s patent infringements are shown below.

20 TABLE 7: QILOO’S DESIGN PATENT INFRINGEMENTS – REPRESENTATIVE IMAGES	
21 <u>NIKE’s Design Patents</u>	21 <u>QiLoo’s Infringing Shoes</u>
22 23 24 25 26 26  26 D586,548	22 23 24 25 26 26  26 QL-26294

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TABLE 7: QiLoo's DESIGN PATENT INFRINGEMENTS – REPRESENTATIVE IMAGES

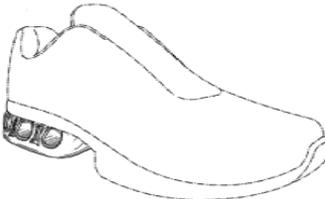
<u>NIKE's Design Patents</u>	<u>QiLoo's Infringing Shoes</u>
 <p data-bbox="519 619 657 661">D475,523</p>	 <p data-bbox="1153 619 1291 661">QL-21810</p>
 <p data-bbox="519 913 657 955">D429,877</p>	 <p data-bbox="1015 913 1437 955">QL-21810 (view of heel portion)</p>
 <p data-bbox="519 1270 657 1312">D462,830</p>	 <p data-bbox="1015 1270 1437 1312">QL-21533(view of heel portion)</p>
 <p data-bbox="519 1606 657 1648">D555,332</p>	 <p data-bbox="1153 1606 1291 1648">QL-24715</p>
 <p data-bbox="519 1932 657 1974">D500,585</p>	 <p data-bbox="1153 1932 1291 1974">QL-21712</p>

TABLE 7: QILOO'S DESIGN PATENT INFRINGEMENTS – REPRESENTATIVE IMAGES	
<u>NIKE's Design Patents</u>	<u>QiLoo's Infringing Shoes</u>
 <p>D494,353</p>	 <p>QL-21533</p>

The strong similarities between NIKE's patented designs and QiLoo's Infringing Shoes demonstrate not only NIKE's substantial likelihood of success on the merits, but also that QiLoo willfully copied NIKE's designs. *L.A. Gear, Inc.*, 988 F.2d at 1127 (finding willful infringement and stating that defendant's deliberate copying was strong evidence of willful infringement). Thus, NIKE has a strong likelihood of proving QiLoo infringed its Design Patents.

Second, NIKE's Design Patents are presumed valid. *See Adv. Comm'n Design, Inc. v. Premier Retail Networks, Inc.*, 46 Fed. Appx. 964, 983 (Fed. Cir. 2002). This presumption exists at every stage of the litigation. *Id.* Because QiLoo has never challenged the validity of the NIKE Design Patents – *indeed, QiLoo has never even responded to any of NIKE's cease and desist letters* – the existence of NIKE's Design Patents, and their accompanying presumptions of validity, establish a likelihood of success on the merits at this stage of the case. *Id.* (explaining that if "the [alleged infringer] fails to identify any persuasive evidence of invalidity, the very existence of the patent satisfies the patentee's burden on the validity issue.").

ii. PLAINTIFFS WILL LIKELY PREVAIL ON THEIR TRADEMARK INFRINGEMENT AND UNFAIR COMPETITION CLAIMS

Plaintiffs are likely to succeed on their trademark infringement claims against QiLoo under the Lanham Act. To succeed on the merits of their trademark infringement claims, Plaintiffs must show (1) that the Converse and NIKE Trademarks are valid and (2) that QiLoo's

1 use of the Converse and NIKE Trademarks creates a likelihood of consumer confusion. *See*
2 *Grocery Outlet, Inc. v. Albertson's, Inc.*, 497 F.3d 949, 951 (9th Cir. 2007) (citing *Brookfield*
3 *Commc'ns, Inc. v. West Coast Entm't Corp.*, 174 F.3d 1036, 1046 (9th Cir. 1999)). As set forth
4 below, Plaintiffs are likely to prevail on their trademark infringement claims.

5
6 **1. THE CONVERSE AND NIKE TRADEMARKS ARE VALID AND PROTECTABLE**

7 Plaintiffs' certificates of trademark registration (Maurer Decl. Exs. X, Y, Z, AA, and BB)
8 are *prima facie* evidence of the validity, ownership, and exclusive rights of Converse and NIKE
9 to use the registered trademarks. 15 U.S.C. § 1057. Moreover, Converse's rights in connection
10 with CTAS outsole Registration No. 1,588,960 are incontestable. 15 U.S.C. § 1065. However,
11 this Court need not rest on the existence of Plaintiffs' registrations.

12
13 As evidenced in Section II above, Plaintiffs own strong rights in the Converse and NIKE
14 Trademarks as a result of their continuous and long-standing promotion and sales of footwear
15 designs embodying the marks. Of particular note:

- 16
- 17 • Converse has continuously promoted and sold shoes bearing the CTAS Designs
18 for more than 60 years and sold more than 153 million pairs of shoes bearing
19 those designs over the past ten years alone earning more than \$2.4 billion in gross
20 U.S. revenue (Seehafer Decl., ¶¶ 3, 5);
 - 21 • Converse has spent over \$88 million advertising and promoting shoes bearing the
22 CTAS Designs in the last five years alone (Seehafer Decl., ¶ 6);
 - 23 • NIKE has continuously promoted and sold shoes bearing the AF1 Design for
24 nearly 30 years (Hibler Decl., ¶ 3);
 - 25 • NIKE has sold more than 55 million pairs of shoes bearing the AF1 Design in the
26 United States, earning more than \$2.25 billion in gross U.S. revenue (Hibler
27 Decl., ¶ 5); and
 - 28 • The public has come to associate the CTAS Designs with Converse, and the AF1
Design with NIKE, as evidenced by unsolicited publicity and expert survey
evidence showing substantial secondary meaning in the marks (Maurer Decl. Exs.
NN (CTAS low, Ford Report), OO (CTAS high, McDonald Report), and PP (AF1
low, Mantis report)).

1 All of these facts evidence Plaintiffs' ownership of valid and enforceable common law
2 and registered trademark rights in the Converse and NIKE Trademarks. *See e.g., Power Balance*
3 *LLC v. Power Force LLC*, 2010 WL 5174957, *3 (C.D. Cal. Dec. 14, 2010) ("Secondary
4 meaning can be established in many ways, including (but not limited to) ... survey evidence;
5 exclusivity, manner, and length of use of a mark; amount and manner of advertising; amount of
6 sales and number of customers" (quoting *Filipino Yellow Pages, Inc. v. Asian Journal Pubs.,*
7 *Inc.*, 198 F.3d 1143, 1151 (9th Cir. 1999))); *see also* 2 McCarthy, at § 15:30 (listing factors
8 courts consider when determining whether a mark has acquired secondary meaning).

10 **2. QILOO'S INFRINGING SHOES ARE LIKELY TO CAUSE CONFUSION**

11 QiLoo's use of footwear designs that are virtually identical to the Converse and NIKE
12 Trademarks creates a likelihood of confusion. Under Ninth Circuit law, likelihood of confusion
13 is determined using the following eight factors: "(1) strength of the mark; (2) proximity or
14 relatedness of the goods; (3) similarity of the marks; (4) evidence of actual confusion; (5)
15 marketing channels used; (6) type of goods and the degree of care likely to be exercised by the
16 purchaser; (7) defendant's intent in selecting the mark; and (8) likelihood of expansion of the
17 product lines." *AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348-49 (9th Cir. 1979). Although
18 eight factors are enumerated, the "test is 'pliant,' illustrative rather than exhaustive and is best
19 understood as simply providing helpful guide posts." *Id.* (citation omitted).

22 **a. Strength of the Marks Factor – Favors Plaintiffs**

23 Under the first *Sleekcraft* factor, the Converse and NIKE Trademarks are entitled to the
24 strongest of protection. The strength of the Converse and NIKE Trademarks is reflected in the
25 widespread and unsolicited publicity they have enjoyed, and the substantial secondary meaning
26 consumers associate between the Converse and NIKE Trademarks and Plaintiffs. (Hibler Decl.,
27 ¶ 6-7; Seehafer Decl., ¶ 7; Maurer Decl., Exs. NN, OO, and PP). *See Mattel, Inc. v. MGA*

1 *Entm't, Inc.*, 782 F. Supp. 2d 911, 1008 (C.D. Cal. 2011) (The strength of a mark rests on its
2 distinctiveness, which is “related to the questions of secondary meaning.”); *Zobmondo Entm't,*
3 *LLC v. Falls Media, LLC*, 602 F.3d 1108, 1115 (9th Cir. 2010) (Federal trademark “registration
4 alone may be sufficient in an appropriate case to satisfy a determination of distinctiveness.”).
5 Indeed, few if any other footwear designs can claim the longevity and commercial success of the
6 CTAS and AF1 Designs. To that end, collectively, Plaintiffs have continuously sold products
7 bearing the Converse and NIKE Trademarks for nearly a century. (*See* Seehafer Decl., ¶ 3;
8 Hibler Decl., ¶ 3). Further, the CTAS and AF1 Designs are some of the best-selling footwear
9 designs of all time. (*See* Seehafer Decl., ¶ 5; Hibler Decl., ¶ 5). To that end, Plaintiffs’ sales
10 volumes (more than 150 million units and \$2.4 billion gross U.S. revenue for CTAS designs over
11 the past ten years and 55 million units and \$2.25 billion gross U.S. revenue total) far exceed sales
12 volumes of other products bearing marks that courts have held to be famous – not merely
13 distinctive and strong – marks. *See, e.g., BOSE Corp. v. OSC Audio Products, Inc.*, 293 F.3d
14 1367, 1371-73 (Fed. Cir. 2002) (“The [WAVE] product has enjoyed commercial success, with
15 current annual sales of \$100 million ... and sales since inception of \$250 million”); *Wolf*
16 *Appliance, Inc. v. Viking Range Corp.*, 686 F. Supp. 2d 878, 889 (W.D. Wis. 2010) (“Since
17 2000, plaintiff has sold more than 325,000 units with red knobs, generating more than \$800
18 million in revenue.”); *Fiji Water Co., LLC v. Fiji Mineral Water USA, LLC*, 741 F. Supp. 2d
19 1165, 1177 (C.D. Cal. 2010) (“FIJI has sold nearly 65 million cases of water . . . since 1997, over
20 which 90 percent of which were sold in the United States.”).

21
22
23
24 **b. Proximity or Relatedness of the Goods Factor – Favors Plaintiffs**

25 The second *Sleekcraft* factor also favors Plaintiffs. QiLoo is using the Converse and
26 NIKE Trademarks on shoes that are intended to mimic genuine Converse and NIKE shoe
27 designs. Moreover, at WSA, QiLoo promotes its Infringing Shoes to the world’s single largest
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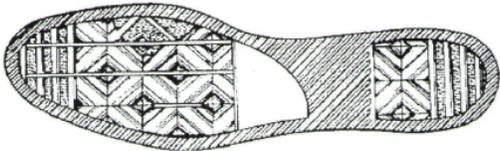
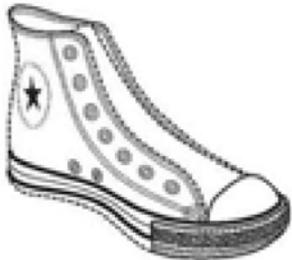
1 gathering of buyers/retailers. (See Maurer Decl. Ex. MM). Because many of the buyers/retailers
 2 at WSA are the same businesses that sell genuine Converse and NIKE products, QiLoo is
 3 positioned to promote and sell Infringing Shoes to the same buyers that distribute shoes bearing
 4 the Converse and NIKE Trademarks. (Seehafer Decl., ¶ 4; Hibler Decl., ¶ 4).

5
 6 Consequently, the Infringing Shoes and Converse’s and NIKE’s genuine shoe designs are
 7 closely related. See *Sleekcraft*, 599 F.3d at 350, n. 10 (related goods are “those products which
 8 would be reasonably thought by the buying public to come from the same source if sold under
 9 the same mark”).

10 ***c. Similarity of the Marks Factor – Favors Plaintiffs***

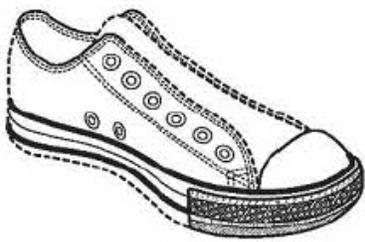
11 Because QiLoo’s Infringing Shoes are copies of the Converse and NIKE Trademarks,
 12 this factor overwhelmingly favors Plaintiffs and supports issuance of a TRO. Table 8 compares
 13 the NIKE and Converse Trademarks with representative images of the Infringing Shoes.
 14

15 **TABLE 8: QILOO’S TRADEMARK INFRINGEMENTS**

<u>NIKE and Converse Trademarks</u>	<u>QiLoo’s Infringing Shoes</u>
 <p data-bbox="435 1457 743 1524">CTAS Outsole Design TM Reg. No. 1,588,960</p>	 <p data-bbox="1154 1457 1292 1491">QL-23860</p>
 <p data-bbox="435 1850 743 1917">CTAS High Design TM Reg. No. 3,258,103</p>	 <p data-bbox="1154 1866 1292 1900">QL-25472</p>

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TABLE 8: QiLoo's TRADEMARK INFRINGEMENTS

<u>NIKE and Converse Trademarks</u>	<u>QiLoo's Infringing Shoes</u>
 <p data-bbox="430 619 747 693">CTAS Low Design TM Reg. No. 4,062,112</p>	 <p data-bbox="1153 640 1291 682">QL-25216</p>
 <p data-bbox="430 997 747 1071">AF1 Low Design TM Reg. No. 3,451,905</p>	 <p data-bbox="1153 997 1291 1039">QL-23416</p>

d. Evidence of Actual Confusion Factor – Neutral

Because QiLoo is only in the United States for a few days every year and fulfills its infringing sales in Asia, Plaintiffs have not been able to track QiLoo's infringements to collect evidence of actual confusion. It is because evidence of actual confusion is often difficult to prove that courts discount this factor. *Sleekcraft*, 559 F.2d at 352. As a result, Plaintiffs need not provide evidence of actual confusion to obtain a finding of likelihood of confusion. *Hokto Kinoko Co. v. Concord Farms, Inc.*, 2011 WL 3625382, *12 (C.D. Cal Aug. 16, 2011) (“[T]he Ninth Circuit has recognized that evidence of actual confusion is not required to establish likelihood of confusion.” (citing *Am. Int’l Group, Inc. v. Am. Int’l Bank*, 926 F.2d 829 (9th Cir. 1991))). Nevertheless, it is precisely because Plaintiffs cannot track evidence of QiLoo’s continuing infringements that a TRO is necessary and appropriate.

1 **e. Marketing Channels Factor – Favors Plaintiffs**

2 For the same reasons that the Infringing Shoes are in close proximity/related to the
3 Converse and NIKE Trademarks, the fourth *Sleekcraft* factor also favors Plaintiffs. By
4 promoting, selling, and offering to sell Infringing Shoes to buyers who can also be retailers of
5 Plaintiffs' products, it is highly likely that QiLoo is injecting its infringing products into channels
6 of trade that are similar to Plaintiffs' channels of trade. *See Sleekcraft*, 599 F.2d at 353
7 (“Convergent marketing channels increase the likelihood of confusion.”).
8

9 **f. Types of Goods & Degree of Care Likely to be Exercised – Favors**
10 **Plaintiffs**

11 The average athletic footwear buyer is unlikely to exercise a heightened degree of care
12 when making purchases of relatively inexpensive footwear. (Maurer Decl., ¶ 5). *See e.g.*,
13 *adidas-Am., Inc. v. Payless Shoesource, Inc.*, 546 F. Supp. 2d 1029, 1060 (D.Or. 2008) (citations
14 omitted) (“Courts have found that purchasers of ‘relatively inexpensive athletic and sportswear’
15 are ‘not likely to exercise a great deal of care in distinguishing between trademarks when
16 purchasing the goods.’”); *K-Swiss, Inc. v. USA AISIQI Shoes, Inc.*, 291 F. Supp. 2d 1116, 1125
17 (C.D. Cal. 2003) (finding consumers unlikely to exercise high degree of care when purchasing
18 athletic shoes). Although a number of institutional buyers attending the WSA may be considered
19 sophisticated, many of these purchasers are more likely to be marketing representatives or agents
20 who may not have specific knowledge regarding differences between QiLoo’s and Plaintiffs’
21 products and they are certainly more sophisticated than their ultimate consumers. As a result,
22 this factor favors Plaintiffs.
23

24 **g. Defendant’s Intent in Selecting Marks Factor – Favors Plaintiffs**

25 The strong similarities between QiLoo’s Infringing Shoes and the Converse and NIKE
26 Trademarks is compelling evidence that QiLoo intends to trade on Plaintiffs’ goodwill.
27 Importantly, “[w]hen the alleged infringer knowingly adopts a mark similar to another’s,
28

1 reviewing courts presume that the defendant can accomplish his purpose: that is, that the public
2 will be deceived.” *Sleekcraft*, 599 F.2d at 354.

3 Furthermore, NIKE has notified QiLoo of its infringements at WSA seven times over the
4 past four and one half years. QiLoo has ignored each of NIKE’s letters only to reappear at the
5 next WSA with new and, often, continuing infringements. QiLoo has, and will continue to
6 promote, sell, and offer to sell Infringing Shoes at the WSA with the knowledge that it is
7 infringing upon Plaintiffs’ trademark rights. (Maurer Decl. ¶ 9). Accordingly, this factor favors
8 Plaintiffs. *See Brookfield*, 174 F.3d at 1059 (“This factor favors the plaintiff where the alleged
9 infringer adopted his mark with knowledge, actual or constructive, that it was another’s
10 trademark.”).

11
12
13 ***h. Likelihood of Expansion Factor – Favors Plaintiffs***

14 Because each and every one of QiLoo’s sales of Infringing Shoes that intentionally
15 mimic Plaintiffs’ genuine CTAS and AF1 Designs is a potentially lost sale of the genuine
16 products covered by the Converse and NIKE Trademarks, this factor favors Plaintiffs. *See*
17 *Sleekcraft*, 599 F.2d at 354 (“When goods are closely related, any expansion is likely to result in
18 direct competition.”).

19 In sum, seven of the eight *Sleekcraft* factors favor Plaintiffs, while one factor (actual
20 confusion) is neutral only because QiLoo has thwarted Plaintiffs’ collection of actual confusion
21 evidence. *See generally, Vertos Medical, Inc. v. Globus Medical, Inc.*, 2009 WL 3740709, *7
22 (N.D. Cal. Nov. 6, 2009) (“[B]ecause actual confusion may be difficult to prove, the absence of
23 such evidence is generally not noteworthy.” (citing *Brookfield*, 174 F.3d at 1050)). Thus,
24 Plaintiffs are likely to succeed on the merits of their trademark infringement claims.
25

26 **2) PLAINTIFFS WILL BE IRREPARABLY INJURED ABSENT IMMEDIATE RELIEF**

27 For the reasons discussed in Section III.B, Plaintiffs will suffer immediate and irreparable
28

1 harm if QiLoo's willful patent and trademark infringements are not enjoined now.

2 Additionally, if QiLoo is allowed to promote and sell the Infringing Shoes at the current
3 WSA show, then return to Asia to fulfill these sales and perhaps build additional business, there
4 is no way to know the extent of Plaintiffs' long-term loss of market share and concomitant
5 erosion of exclusive patent and trademark rights. Courts in similar situations have granted
6 preliminary relief because these injuries cannot be readily quantified:
7

8 Competitors change the marketplace. Years after infringement has begun, it may be
9 impossible to restore a patentee's (or an exclusive licensee's) exclusive position by an
10 award of damages and a permanent injunction. Customers may have established
relationships with infringers. The market is rarely the same when a market of multiple
sellers is suddenly converted to one with a single seller by legal fiat.

11 *Polymer Techs., Inc. v. Bridwell*, 103 F.3d 970, 975-76 (Fed. Cir. 1996); *Gallagher*, 283 Fed.
12 Appx. at 545 (finding that the threat of loss of prospective customers or goodwill supports a
13 finding of irreparable harm). Thus, Plaintiffs' irreparable harm warrants preliminary relief.
14

15 **3) THE BALANCE OF HARDSHIPS WEIGHS IN PLAINTIFFS' FAVOR**

16 The balance of hardships tips in Plaintiffs' favor for at least three reasons. First,
17 Plaintiffs will suffer the extensive irreparable harm described above absent an injunction. *NIKE*,
18 *Inc. v. Meitac Int'l*, 2006 WL 3883278, *3 (D.Nev. 2006) (if defendant is not enjoined, "Nike
19 will be severely handicapped in its ability to prevent further importation of infringing products,
20 thereby destroying any potential of preserving the status quo pending a resolution of this case on
21 its merits.").

22 Second, Plaintiffs' reputation will be harmed if QiLoo is allowed to continue to
23 manufacture and sell the Infringing Shoes because Plaintiffs will be unable to effectively police
24 the market and enforce its intellectual property rights. *See California Med. Prods., Inc. v.*
25 *Emergency Med. Prods., Inc.*, 796 F. Supp. 640, 647 (D.R.I. 1992) (denial of preliminary relief
26 can damage patentee's reputation); *see also Wetzel's Pretzels, LLC v. Johnson*, 797 F. Supp. 2d
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1 1020, 1028-29 (C.D. Cal. 2011) (holding that balance of hardships favored trademark owner who
2 would suffer harm to its goodwill and reputation absent a preliminary injunction). It is difficult
3 to earn respect in the marketplace among competitors if intellectual property rights are not
4 enforced by the courts. *Id.* This is particularly true here, where QiLoo's contacts with the
5 United States are premised upon its infringing conduct, including promotions, sales, and offers to
6 sell Infringing Shoes at the WSA show made over a period of a few days twice yearly. If
7 Plaintiffs cannot effectively enforce its patent and trademark rights against QiLoo while it is
8 present in the United States attending the WSA show, its patents and trademarks will be of little
9 value in the marketplace.

11 Third, in similar circumstances, courts have concluded that the existence of a non-
12 infringing alternative that the defendant can sell in place of the infringing product tips the
13 balance of hardships strongly in the plaintiff's favor. *See, e.g., Henkel Corp. v. Coral, Inc.*, 21
14 U.S.P.Q.2d 1081, 1101 (N.D. Ill. 1990) (injunction granted where defendant can switch to
15 selling a non-infringing product even though it is required to raise its prices, or reduce its profit);
16 *MGM Well Servs., Inc. v. Mega Lift Sys., LLC*, 505 F. Supp. 2d 359, 379 (S.D. Tex. 2007)
17 (holding that injunction against selling infringing products should not impose an unreasonable
18 hardship where defendant already sold a non-infringing alternative). Because the NIKE Design
19 Patents and the Converse and NIKE Trademarks protect only the ornamental features of the
20 subject designs, QiLoo has a virtually unlimited field of non-infringing alternatives to choose
21 from – *i.e.*, any designs that do not have the same appearances as Plaintiffs' designs.

24 More importantly, any harm to QiLoo that could possibly result from a preliminary
25 injunction is self-inflicted. QiLoo took a calculated risk when it copied Plaintiffs' designs, and
26 returned to the United States to promote, sell, and offer to sell Infringing Shoes – particularly
27 after NIKE previously notified it of its infringements. The risks included QiLoo being found
28

1 liable for patent and trademark infringement, and enjoined from further sales. Under such
2 circumstances, courts refuse to weigh any “harm” to the infringer when it assumed the risk. *See*
3 *Celsis In Vitro, Inc. v. CellzDirect, Inc.*, 2012 WL 34381, *8 (Fed. Cir. Jan. 9, 2012) (affirming
4 grant of preliminary injunction, stating that “the preliminary record suggests that [defendant’s]
5 losses were the result of its own calculated risk in selling a product with knowledge of
6 [plaintiff’s] patent”); *Smith Int’l, Inc. v. Hughes Tool Co.*, 718 F.2d 1573, 1581 (Fed. Cir. 1983)
7 (reversing denial of preliminary injunction where infringer was aware of patents and “took a
8 calculated risk that it might infringe those patents.”). Accordingly, the balance of hardships
9 strongly tips in Plaintiffs’ favor.

11 **4) THE PUBLIC INTEREST FAVORS PRELIMINARY RELIEF**

12 The public interest favors Plaintiffs for at least two reasons. First, public policy favors
13 protection of the rights secured by valid patents, including the right to prevent infringement
14 through preliminary relief. *Smith Int’l*, 718 F.2d at 1581 (“Without the right to obtain an
15 injunction, the right to exclude granted to the patentee [by the Constitution and Congress] would
16 have only a fraction of the value it was intended to have”); *NIKE*, 2006 WL 3883278, *3 (“the
17 public interest is clearly served by seeing that patents are enforced”).

18 Likewise, in the trademark context, courts often define the public interest as the right of
19 the public not to be deceived or confused from competing uses of a trademark. *See Tile Outlet*,
20 2010 WL 5239229, at *3. Here, an injunction not only protects Plaintiffs’ interest in maintaining
21 control over its trademarks and avoiding injury to its reputation and goodwill, but it also protects
22 the public from consumer confusion. *See Brookfield*, 174 F.3d at 1066 (“preliminary injunctive
23 relief is appropriate ... to promote the public interest in protecting trademarks generally.”).

24 Second, enjoining QiLoo’s infringing activities will not harm the public. There are many
25 other shoes on the market, including QiLoo’s shoes that are not covered by the NIKE Design
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1 Patents or the Converse and NIKE Trademarks. The public will still be able to purchase those
2 other non-infringing shoes, despite an injunction against QiLoo. *MGM Well Servs.*, 505 F. Supp.
3 2d at 379 (granting injunction on products for which alternatives were available in the market);
4 *National Presto Indus. Inc. v. Dazey Corp.*, 18 U.S.P.Q.2d 1113, 1121 (N.D. Ill. 1990) (granting
5 TRO; “If an injunction makes the Dazey cooker unavailable, the public has plenty of substitutes,
6 including [plaintiff’s products].”). Thus, the public interest favors an injunction.

8 **D. THE TEMPORARY RESTRAINING ORDER SHOULD INCLUDE A SEIZURE ORDER**

9 Because all of the relevant factors heavily favor Plaintiff, this Court should grant
10 Plaintiffs’ request for a TRO and, in due course, a preliminary injunction. As part of the TRO,
11 the Court should include a seizure order to ensure compliance with the order and to prevent
12 further infringements and injury to Plaintiffs. The Court is empowered to grant a seizure order
13 on two grounds. First, pursuant to the Court’s inherent power and Rule 64, Fed.R.Civ.P. *Reebok*
14 *International Ltd. v. Marnatech Enterprises Inc.*, 970 F.2d 552, 559 (9th Cir. 1992) (district
15 courts have inherent power to issue provisional remedies ancillary to providing final equitable
16 relief, issuing injunction and freezing assets in trademark case).

18 Second, Lanham Act Sect. 34, 15 U.S.C. § 1116(d), expressly empowers the Court, upon
19 *ex parte* submission, to grant an order for the seizure of goods and counterfeit marks. As set
20 forth above, Plaintiffs satisfy each of the requirements for issuance of a seizure order enumerated
21 at 15 U.S.C. § 1116(d)(4)(B). Specifically: (i) an *ex parte* seizure order is necessary because
22 QiLoo is likely to conceal evidence of its infringements and flee the country upon notice of this
23 suit; (ii) Plaintiffs have not publicized the requested seizure; (iii) QiLoo has used counterfeit
24 marks as evidenced by the nearly identical copies of the Converse and NIKE Trademarks
25 exemplified in Table 8 above; (iv) Plaintiffs will suffer immediate and irreparable injury for at
26 least three distinct reasons explained in III.B. above; (v) Plaintiffs’ representative observed
27
28

1 Infringing Products and supporting materials to be seized at QiLoo’s WSA booth earlier today;
2 (vi) the balance of harms tips decidedly in Plaintiffs’ favor, as explained in III.C.3. above; (vii)
3 based on QiLoo’s pattern of ignoring Plaintiffs’ notices of infringements and lack of any
4 domestic presence, it is highly likely that QiLoo would conceal evidence of its infringements and
5 default if provided notice of this action.
6

7 Because the facts support entry of a seizure order, Plaintiffs respectfully submit a
8 proposed order in the form required by 15 U.S.C. § 1116(d)(5) herewith. The proposed seizure
9 order authorizes the United States Marshals Service, along with Plaintiffs’ attorneys and
10 paralegals, to seize QiLoo’s Infringing Products, QiLoo’s records – including computers and
11 electronic evidence – of promotions, sales, and offers to sell infringing products, and QiLoo’s
12 promotional display(s), sales equipment, and materials used to facilitate their infringements at
13 the WSA show between February 6-8, 2012.
14

15 Seizure orders such as the one proposed here are common in intellectual property cases
16 because intellectual property rights, like the design patents and trademarks in this case, confer
17 the right to exclude others from using another’s property without authorization. Therefore,
18 Courts issue “not just temporary restraining orders, which are frequently ignored-but seizure
19 orders providing for the seizure of the counterfeit merchandise.” *Vuitton v. White*, 945 F.2d 569,
20 571-72 (3d Cir. 1991); *Reebok Int’l*, 970 F.2d at 559 (affirming seizure order, as part of
21 injunction against willful trademark infringer).
22

23 Lastly, pursuant to Rule 65(c), Fed. R. Civ. P., and 15 U.S.C. § 1116(d)(4)(A), Plaintiffs
24 propose posting a bond in the amount of Twenty Five Thousand dollars (\$25,000.00). To the
25 extent Defendant believes that a higher bond is necessary, Defendant shall file an application to
26 the Court and provide proper notice to counsel for Plaintiffs.
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IV. CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request entry of an order temporarily restraining QiLoo from infringing the NIKE Design Patents and the Converse and NIKE Trademarks for the duration of the WSA Show, February 6-8, 2012. The Court's order should authorize the U.S. Marshal Service, Plaintiffs' counsel, and their assistants to seize QiLoo's infringing goods and documents/things used in support of QiLoo's infringements at the WSA show over the next two days until February 8, 2012. Furthermore, Plaintiffs request that the Court set a hearing for Plaintiffs' motion for a preliminary injunction.

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Respectfully submitted,

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