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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

THE BROOKLYN BREWERY  
CORPORATION, a New York  
Corporation,

Plaintiff,

v.

BLACK OPS BREWING, INC., a  
California Corporation,

Defendant.

No. 1:15-cv-01656-GEB-EPG

**ORDER GRANTING PLAINTIFF'S  
MOTION FOR PRELIMINARY  
INJUNCTION**

Plaintiff The Brooklyn Brewery Corporation ("Plaintiff") moves for a preliminary injunction enjoining and restraining Defendant Black Ops Brewing ("Defendant") from using the marks "Black Ops Brewing," "Black Ops," and "blackopsbrewery.com." (Pl.'s Proposed Order Granting Prelim. Inj. 1:19-21, ECF No. 3-13.) Plaintiff has submitted evidence evincing that Plaintiff markets and sells a brand of beer bearing Plaintiff's registered trademark "Brooklyn Black Ops." (Ottaway Decl. ¶¶ 4, 5, ECF No. 3-7.) Plaintiff argues that Defendant's "continu[ed] [] use [of the marks] 'Black Ops' and 'Black Ops Brewing' despite having actual knowledge of Plaintiff's superior rights, [constitutes] deliberate[] infring[ement] [of] Plaintiff's [registered mark] and trad[es] on Plaintiff's goodwill." (Pl.'s Memo. of P & A in Supp. of Pl.'s Mot. for Prelim. Inj. ("Mot."))

1 6:22-25, ECF No. 3-1.) Plaintiff also argues: "Plaintiff will  
2 continue to suffer irreparable harm due to Defendant's  
3 intentional infringement [upon Plaintiff's registered mark] if  
4 Defendant is not preliminarily enjoined from using 'Black Ops,'  
5 'Black Ops Brewery' and all similar marks." (Id. 21:23-25.)

6 **I. FACTUAL BACKGROUND**

7 Plaintiff has submitted averments establishing that it  
8 is a beer brewer located in New York that produces a brand of  
9 beer sold under the mark "Brooklyn Black Ops." (Decl. of Eric  
10 Ottaway ("Ottaway Decl.") ¶4, ECF No. 3-7.) The preliminary  
11 injunction factual record also contains evidence evincing that  
12 Plaintiff's "Brooklyn Black Ops" product is a Russian Imperial  
13 Stout beer that is "aged for four months in bourbon barrels,  
14 bottled flat, and re-fermented with Champagne yeast," and is  
15 currently sold on a limited seasonal basis. (Broussard Decl., ¶  
16 12, Ex. 39 & 40, ECF Nos. 18-1, 18-40, 18-41.)

17 Plaintiff declares it has sold beer under the mark  
18 "Brooklyn Black Ops" since 2007 and currently "sells beer under  
19 [this mark] in [twenty-seven] states." (Ottaway Decl. ¶¶ 4, 5.)  
20 Plaintiff's evidence demonstrates it owns a federal trademark  
21 registration for "Brooklyn Black Ops," which issued in 2009.  
22 (Ottaway Ex. 5, ECF No. 3-12.) Plaintiff avers that it has sold  
23 tens of thousands of cases of its "Brooklyn Black Ops" beer  
24 during the last eight years. (Ottaway Decl. ¶ 4.) Plaintiff  
25 further declares its beer is sold and promoted through  
26 distributors, in carefully selected retail and specialty stores,  
27 at bars and restaurants, and at festivals and entertainment  
28 events. (Id.) Plaintiff also avers: "[Plaintiff] and [its]

1 customers and distributors, as well as others in the trade and in  
2 the media, frequently refer to the beer as simply 'Black Ops,'  
3 including when purchasing it at restaurants, bars and stores."  
4 (Id.) Plaintiff declares that it has promoted its "Brooklyn  
5 Black Ops" beer on its website and social media platforms,  
6 through promotional events and sponsorships, print media, and  
7 through promotions conducted by nationwide distributors and  
8 retailers. (Id. ¶ 13.)

9 Plaintiff's averments evince that it is planning a  
10 strategic launch of its entire beer portfolio, including its  
11 "Brooklyn Black Ops" beer, in California, and is negotiating with  
12 distributors and identifying potential retailers. (Id. ¶ 16.)

13 The preliminary injunction factual record establishes  
14 that in 2015 Defendant opened a brewery called "Black Ops  
15 Brewing". (Dabney Ex. 1, ECF No. 3-3.) Defendant avers that it  
16 currently does not sell beer outside of Fresno County,  
17 California. (Broussard Decl. ¶ 15.) Defendant further avers "it  
18 uses the term 'Black Ops' only in conjunction with the name of  
19 the brewery [; and that all of Black Ops Brewing's beers have  
20 identifying names such as Valor, Shrapnel, and the Blonde  
21 Bomber." (Id.) Plaintiff provides evidence demonstrating that the  
22 term "Black Ops" appears on the label of each of the above-listed  
23 Defendant produced beers. (Dabney Ex. 1.)

24 Further, Plaintiff provides evidence showing that on  
25 March 24, 2015, Defendant applied for registration of the mark  
26 "Black Ops Brewing" for beer and taproom services with the United  
27 States Patent and Trademark Office ("PTO") on the Principal  
28 Register. (Dabney Ex. 3, ECF No. 3-5.) On July 1, 2015 the PTO

1 issued an official letter rejecting Defendant's application.  
2 (Dabney Ex. 4, ECF No. 3-6.) The PTO explained in the letter that  
3 Defendant's mark "is highly similar in sound, appearance, meaning  
4 and overall commercial impression to registrant's mark, Brooklyn  
5 Black Ops." (Id.) The PTO also stated in the letter that the  
6 parties' goods are identical (both beer), and that Defendant's  
7 taproom services are related to the goods and services to which  
8 Plaintiff's registered mark applies. (Id.) Further, the PTO  
9 stated: "[i]t is likely that consumers will mistakenly believe  
10 the goods and services emanate from the same source." (Id.) The  
11 PTO also stated: "The overriding concern is not only to prevent  
12 buyer confusion as to the source of the goods and services, but  
13 to protect the [Plaintiff] from adverse commercial impact due to  
14 use of a similar mark by a newcomer." (Id.)

15 Plaintiff provides evidence that supports its argument  
16 that notwithstanding the PTO's rejection of Defendant's trademark  
17 registration application, Defendant continues promoting and  
18 selling beer and taproom services under the mark "Black Ops  
19 Brewing." (Dabney Ex. 1.) Specifically, Plaintiff's evidence  
20 shows that Defendant sells its beer through retail and specialty  
21 stores, as well as at bars and restaurants; (Dabney Ex. 2, ECF  
22 No. 3-4) and that Defendant advertises its beer and services on  
23 its website at "blackopsbrewing.com" and on its Facebook page.  
24 (Dabney Ex. 1 & 2.) Plaintiff avers that both Plaintiff and  
25 Defendant's beer bottle products appear black as sold at retail,  
26 are oversized, and are sold at retail in a single bottle, as  
27 opposed to in six-packs. (Ottaway Decl. ¶¶ 10, 15.)

28 Plaintiff also avers that on July 20, 2015, Plaintiff

1 sent Defendant a letter demanding that Defendant cease all use of  
2 the marks "Black Ops" and "Black Ops Brewing." (Dabney Decl. ¶  
3 9.) Plaintiff has also provided evidence that Plaintiff renewed  
4 its cease and desist demand on August 27, 2015. (Id.) Plaintiff's  
5 evidence shows that Defendant continues using the marks to  
6 promote and sell beer and taproom services. (Dabney Ex. 1 & 2.)

## 7 **II. LEGAL STANDARD**

8 To obtain a preliminary injunction, Plaintiff "must  
9 establish that [(1)] [it] is likely to succeed on the merits,  
10 [(2)] that [it] is likely to suffer irreparable harm in the  
11 absence of preliminary relief, [(3)] that the balance of equities  
12 tips in [its] favor, and that [(4)] an injunction is in the  
13 public interest." See Serv., Inc. v. Winsor Grain, Inc., 868 F.  
14 Supp. 2d 998, 1001 (E.D. Cal. 2012). A preliminary injunction is  
15 considered an "extraordinary remedy that may only be awarded upon  
16 a clear showing that the plaintiff is entitled to such relief."  
17 Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 22 (2008).

## 18 **III. DISCUSSION**

### 19 **A. Likelihood of Success on the Merits**

20 Plaintiff's Complaint consists of two claims under the  
21 Lanham Act and two California state claims, all of which are  
22 premised upon trademark infringement allegations. These claims  
23 are "substantially congruent" and therefore they can all be  
24 analyzed under the federal trademark Lanham Act. Clearly v. News  
25 Corp., 30 F.3d 1255, 1263 (9th Cir. 1994).

26 To establish a trademark infringement claim under the  
27 Lanham Act, Plaintiff "must prove: (1) that it has a protectable  
28 ownership interest in the mark; and (2) that the defendant's use

1 of the mark is likely to cause consumer confusion.'" Network  
2 Automation , Inc. v. Advanced Sys. Concept, Inc., 638 F.3d 1137,  
3 1144 (9th Cir. 2011) (quoting Dep't of Parks & Recreation v.  
4 Bazaar Del Mundo Inc., 448 F.3d 1118, 1124 (9th Cir. 2006)).

5 **1. Plaintiff's Protectable Ownership Interest in the**  
6 **Marks**

7 Plaintiff argues: "With respect to the first element  
8 for infringement, Plaintiff owns an incontestable federal  
9 registration for 'Brooklyn Black Ops'" and cites to Exhibit 5  
10 attached to the Ottaway Declaration (ECF No. 3-12) in support of  
11 its argument. Mot. 9:2-5. This exhibit shows Plaintiff owns a  
12 federal trademark registration for the mark "Brooklyn Black Ops,"  
13 which issued for beer in 2009.<sup>1</sup> Under the Lanham Act "[a] mark  
14 attains incontestable status in a category if the registrant  
15 continuously uses the mark for five consecutive years after  
16 registering it in that category . . . ." Entrepreneur Media, Inc.  
17 v. Smith, 279 F.3d 1135, 1139 n.1 (9th Cir. 2002) (citing Lanham  
18 Trade-Mark Act, 15 U.S.C. § 1065<sup>2</sup>). Plaintiff avers that it has  
19 continuously sold, and continues to sell, its "Brooklyn Black  
20 Ops" product since the mark's registration in 2009. (Ottaway  
21 Decl. ¶¶ 4,5.) Therefore, Plaintiff's evidence demonstrates that  
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23 <sup>1</sup> Plaintiff also supports its likelihood of success argument by contending it  
24 "owns a common law mark for 'Black Ops' for beer." (Mot. 9:10.) Defendant  
25 counters that "[c]ommon law trademarks are only enforceable within the  
26 geographic region where the trademark owner was using it in business." (Opp'n  
27 11:2-4 (citing Optimal Pets, Inc. v. Nutri-Vet, LLC, 877 F. Supp. 2d 953, 958-  
28 59 (C.D. Cal. 2012)).) However, this issue need not be decided in light of  
rulings on other issues.

<sup>2</sup> 15 U.S.C. § 1065 prescribes: ". . . the right of the owner to use [its]  
registered mark in commerce for the goods or services on or in connection with  
which such registered mark has been continuous for five consecutive years  
subsequent to the date of such registration and is still in use in commerce,  
shall be incontestable . . .".

1 it owns an incontestable federal registration for "Brooklyn Black  
2 Ops" for beer.

3           When a mark achieves incontestable registration status,  
4 15 U.S.C. § 1115(b) prescribes that this status is "prima facie  
5 evidence of the validity of the registered mark and of the  
6 registration of the mark, of the registrant's ownership of the  
7 mark, and of the registrant's exclusive right to use the  
8 registered mark in commerce or in connection with the goods or  
9 services specified in the registration." Accordingly, Plaintiff  
10 has demonstrated it has a protectable ownership interest in its  
11 "Brooklyn Black Ops" mark.

## 12           **2. Likelihood of Consumer Confusion**

13           Plaintiff further argues that "[w]ith respect to the  
14 second element for infringement, Defendant's use of 'Black Ops'  
15 and 'Black Ops Brewing' (collectively, 'Defendant's Marks')  
16 creates a likelihood of confusion with . . . Plaintiff's Brooklyn  
17 Black Ops . . . mark[]." (Mot. 10:2-6.)

18           Defendant counters: "there is simply no merit to the  
19 Plaintiff's bare assertion of public confusion between the  
20 Plaintiff's 'Brooklyn Black Ops' aged Russian Imperial Stout  
21 product and Defendant's products merely because 'Black Ops'  
22 appears on the label." (Def.'s Opp'n to Pl.'s Mot. for Prelim.  
23 Inj. ("Opp'n") 1:15-18, ECF No. 18.)

24           "[T]he likelihood of confusion is the central element  
25 of a trademark infringement action." CytoSport, Inc. v. Vital  
26 Pharm., Inc., 617 F. Supp. 2d 1051, 1065 (E.D. Cal. 2009). In AMF  
27 Inc. v. Sleekcraft Boats, the Ninth Circuit developed the  
28 following eight factors to guide the determination of likelihood

1 of confusion:

- 2 1. strength of the mark;
- 3 2. proximity of the goods;
- 4 3. similarity of the marks;
- 5 4. evidence of actual confusion;
- 6 5. marketing channels used;
- 7 6. type of goods and degree of care likely to be
- 8 exercised by the purchaser;
- 9 7. Defendant's intent in selecting the mark; and
- 10 8. likelihood of expansion of the product lines.

11 AMF Inc. v. Sleekcraft Boats, 599 F.2d 341, 348-349 (9th Cir.

12 1979), abrogated on other grounds by Mattel, Inc. v. Walking

13 Mountain Prod., 353 F.3d 792, 810 n.19 (9th Cir. 2003).

14 "The list of factors is not a scorecard – whether a

15 party 'wins' a majority of the factors is not the point. Some

16 factors are much more helpful than others, and the relative

17 importance of each individual factor will be case specific. [I]t

18 is often possible to reach a conclusion with respect to

19 likelihood of confusion after considering only a subset of the

20 factors." Thane Int'l v. Trek Bicycle Corp., 305 F.3d 894, 901

21 (9th Cir. 2002) (citations and internal quotations omitted).

22 **a. Strength of the Mark**

23 "Trademark law offers greater protection to marks that

24 are 'strong,' i.e., distinctive. The strength of a mark is

25 determined by its placement on a 'continuum of marks from

26 'generic,' afforded no protection; through 'descriptive' or

27 'suggestive,' given moderate protection; to 'arbitrary' or

28 'fanciful' awarded maximum protection.'" E. & J. Gallo Winery v.



1 Gallo Cattle Co., 967 F.2d 1280, 1291 (9th Cir. 1992) (quoting  
2 Nutri/Sys., Inc. v. Con-Stan Indus., Inc., 809 F.2d 601, 605 (9th  
3 Cir. 1987)). "Arbitrary marks are common words that have no  
4 connection with the actual product – for example, 'Dutch Boy'  
5 paint." Gerawan Farming, Inc. v. Prima Bella Produce, Inc., No.  
6 CV F 10-0148 LJO JLT, 2011 WL 3348056 at \*17 (E.D. Cal. Aug. 2,  
7 2011) (citing Dreamwerks Prod. Grp., Inc. v. SKG Studio, 142 F.3d  
8 1127, 1130, n. 7 (9th Cir. 1998)).

9 Plaintiff argues it "selected the name 'Black Ops' to  
10 refer to a 'secret mission or campaign carried out by a military,  
11 governmental, or other organization.'" (Mot. 3:8-11.) Plaintiff  
12 contends its mark is "arbitrary because 'Black Ops' does **not**  
13 describe or suggest the nature or character of Plaintiff's beer."  
14 (Id. 17:5-7.)

15 Defendant counters: "As 'Brooklyn' refers to the  
16 geographic area and brewery that produces the product, 'Black'  
17 refers to a dark beer, and 'Ops' is suggestive of hops, an  
18 ingredient in beer; the mark is, at best, merely suggestive."  
19 (Opp'n 12:14-16.)

20 Plaintiff replies that that Defendant "improperly  
21 dissects" the unitary phrase "Black Ops". (Pl.'s Reply in Supp.  
22 of Mot. for Prelim. Inj. ("Reply") 2:14 n. 1, ECF No. 21.)

23 "A court may not review the validity of a composite-  
24 term trademark by 'dissecting' the term and reviewing the  
25 validity of its component parts individually." Self-Realization  
26 Fellowship Church v. Ananda Church of Self-Realization, 59 F.3d  
27 902, 912 (9th Cir. 1995). Plaintiff's mark "Brooklyn Black Ops,"  
28 taken as a whole, does not describe or suggest a particular

1 quality of Plaintiff's beer. Plaintiff's mark "consists of common  
2 words arranged in an arbitrary way that is non-descriptive of any  
3 quality of [its product and is therefore] arbitrary and is  
4 'awarded maximum protection.'" Off. Airline Guides, Inc. v. Goss,  
5 6 F.3d 1385, 1390 (9th Cir. 1993).

6 **b. Proximity of the Goods**

7 The "proximity of the goods" factor concerns the  
8 relatedness of goods. "For related goods, the danger presented is  
9 that the public will mistakenly assume there is an association  
10 between the producers of the related goods, though no such  
11 association exists." Sleekcraft, 599 F.2d at 350. "The more  
12 likely the public is to make such an association, the less  
13 similarity in the marks is requisite to a finding of likelihood  
14 of confusion." Id.; see also CytoSport, Inc., 617 F.Supp.2d at  
15 1066, aff'd, 348 Fed. Appx. 288 (9th Cir. 2009) ("It is well  
16 established that the greater the similarity between the products  
17 or services, the greater the likelihood of confusion.") "Thus,  
18 less similarity between the marks will suffice when the goods are  
19 complementary, the products are sold to the same class of  
20 purchasers, or the goods are similar in use and function." Id.  
21 (internal citations omitted).

22 Plaintiff argues: "[t]he parties offer identical  
23 products – beer – under their marks." (Mot. 14:14.)

24 Defendant counters:

25 The Plaintiff's "Brooklyn Black Ops" is a  
26 highly specialized product (a Russian  
27 Imperial Stout beer that is "*aged for four  
28 months in bourbon barrels, bottled flat, and  
re-fermented with Champagne yeast*") that  
sells for \$29.99 a bottle. See, e.g., Pom  
Wonderful, LLC v. Robert G. Hubbard, 775 F.3d

1 1118, 1127 (9th Cir. 2014)(purchasers of more  
2 expensive goods are expected to be more  
3 discerning and less likely to be confused).  
4 On the other hand, Defendant Black Ops  
5 Brewing, Inc. does not make any aged beers or  
6 Russian Imperial Stouts. Instead, its beers  
7 retail for less than \$7.00 a bottle and  
8 consist of far less exotic fare; such as  
9 IPAs, browns, and reds. Significant  
10 differences in price decreases the likelihood  
11 of confusion. L.A. Gear, Inc. v. Thorn McAn  
12 Shoe Co., 988 F.2d 1117, 1134 (Fed. Cir.  
13 1993).

14 (Opp'n 12:28-13:9.)

15 Both Plaintiff and Defendant use the mark in connection  
16 with the sale of beer. Therefore, this factor 'weighs heavily' in  
17 favor of finding a likelihood of confusion. See Sweetwater  
18 Brewing Co., LLC v. Great Am. Rests., Inc., 266 F. Supp. 2d 457,  
19 463 (E.D. Va. 2003)(finding infringement as a matter of law  
20 because each party sold microbrews); see also Anheuser-Busch,  
21 Inc. v. Caught-on-Bleu, Inc., 288 F.Supp.2d 105, 118 (D.N.H.  
22 2003), aff'd, 105 Fed. Appx. 285 (1st Cir. 2004)(finding no  
23 distinction between ale and lager for likelihood of confusion  
24 purposes because they are both "beers").

25 **c. Similarity of the Marks**

26 "Similarity of the marks is tested on three levels:  
27 sight, sound, and meaning. Each must be considered as they are  
28 encountered in the marketplace. Although similarity is measured  
by the marks as entities, similarities weigh more heavily than  
differences." Sleekcraft, 599 F.2d at 351.

Each party's mark appears on the products respective  
photographed below:

Plaintiff:

Defendant:

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Plaintiff contends that "the . . . marks are identical or substantially identical in sight, sound and meaning." (Mot. 11:9-10.) Specifically Plaintiff argues:

On beer bottles, Plaintiff's mark "Black Ops" is displayed in all-capitalized, large-block, white letters, with "Brooklyn" in smaller, deemphasized letters and coloring. (See, eg., Ottaway Decl. ¶ 10 & Ex. 1.) On beer bottles, Defendant's mark "Black Ops" is displayed in all-capitalized, large-block, white letters, with "Brewing, Inc." in smaller letters. (See, e.g., Dabney ex. 2 at p. 11.) "Black Ops" is spelled and pronounced identically in the parties' marks. The size and the color of the parties' bottles themselves are substantially similar, as both bottles are over-sized and appear black while on sale at retail with liquid in them. (Ottaway Decl. ¶¶ 10, 15 & Ex. 1; Dabney Ex. 2 at p. 11.) The parties' beer bottles are sold at retail as singles. (Id.) . . . Thus the parties' marks are substantially identical in sight, sound and meaning.

(Mot. 11:22-12:7.)

Moreover, "[i]t is well settled that if a mark comprises both a word and a design, then the word is normally accorded greater weight, because it would be used by purchasers to

1 request the goods." . . . This is  
2 particularly the case with alcohol beverages,  
3 which are "frequently purchased at bars and  
clubs without the purchaser seeing any  
bottles or labels."

4 (Mot. 12:16-13:8-10 (internal citations omitted).)

5 Defendant counters that "[i]n this dispute, the names  
6 and logos of the parties are not the same." (Opp'n 14:5.)  
7 Specifically Defendant rejoins:

8 The Plaintiff utilizes a large circular logo  
9 featuring a prominently displayed white "B"  
on a green circle backdrop, with "Brooklyn"  
10 in large capitalized letters over it, and  
"Brewery" capitalized on the bottom. It does  
11 not utilize "Black" or "Ops" in its trade  
name. Its "*Brooklyn Black Ops*" aged Russian  
12 Imperial Stout product uses a completely  
black 750 ml bottle and a champagne style  
13 cork closing device. The bottle features a  
large silver circle logo with a stylized "B"  
14 in the center and a prominent label bearing  
the name "*Brooklyn Black Ops*." It also  
15 features a second stylized "B" in raised  
relief using a circle emblem.

16 In contrast, the Defendant's beers have  
17 identifying names like the "*Blonde Bomber*,"  
"*Recon Red*," "*Bayonet Brown*," and "*Shrapnel*."  
18 . . . Its emblem is red, white and blue and  
reminiscent of aviator wings. The Defendant's  
19 bottles are standard 22 oz. amber bottles,  
topped with a standard bottle cap; that  
20 prominently feature the individual product  
names and labels. It uses the term "Black  
21 Ops" only in conjunction with the name of the  
brewery.

22 (Opp'n 14:5-21.)

23 "[I]n the case of alcoholic beverages, the degree of  
24 similarity need not be as high as usual since the likelihood of  
25 confusion is greater because drinks are frequently purchased at  
26 bars and clubs without the purchaser seeing any bottles or  
27 labels." A. Smith Bowman Distillery, Inc. v. Schenley Distillers,  
28 Inc., 198 F.Supp. 822, 827-828 (D. Del. 1961). Defendant points

1 to differences between the labels. However, the sounds and  
2 meanings of the two marks are identical. Further, alcoholic  
3 beverages are often consumed in environments in which similarity  
4 in sound and meaning are likely to factor heavily in building  
5 consumer brand recognition and trademark association. *Id.*  
6 Therefore, this factor weighs in favor of finding a likelihood of  
7 confusion.

8 **d. Evidence of Actual Confusion**

9 "Evidence that the use of the two marks has already led  
10 to confusion is persuasive proof that future confusion is  
11 likely." Sleekcraft, 599 F.2d at 352. However, "[b]ecause of the  
12 difficulty in garnering such evidence, the failure to prove  
13 instances of actual confusion is not dispositive." *Id.* at 353.  
14 "Consequently, this factor is weighed heavily only when there is  
15 evidence of past confusion, or perhaps, when the particular  
16 circumstances indicate such evidence should have been available."  
17 *Id.*

18 Plaintiff argues: "Plaintiff does not yet have evidence  
19 of actual confusion, as Defendant has just commenced sales and  
20 its volume is relatively low. Moreover, Plaintiff will not  
21 commence sales in California until 2016. Thus, this factor is  
22 neutral in the likelihood of confusion analysis." (Mot. 20:24-  
23 21:1.)

24 This factor weighs against finding of a likelihood of  
25 confusion.

26 **e. Marketing Channels Used**

27 "Convergent marketing channels increase the likelihood  
28 of confusion." Sleekcraft, 599 F.2d at 353. "In assessing

1 marketing channel convergence, courts consider whether the  
2 parties' customer bases overlap and how the parties advertise and  
3 market their products." Pom Wonderful LLC v. Hubbard, 775 F.3d  
4 1118, 1130 (9th Cir. 2014). "Marketing channels can converge even  
5 when different submarkets are involved so long as 'the general  
6 class of . . . purchasers exposed to the products overlap.'" Id.

7 Plaintiff contends:

8 Defendant's beer is promoted and sold in the  
9 same trade channels where Plaintiff's beer is  
10 sold, and in some of the same stores where  
11 Plaintiff's beer is likely to be sold.  
12 Further, the parties use similar promotional  
13 methods, including their respective websites  
14 and Facebook, to promote their beers.  
15 Finally, the parties' products are craft beer  
16 which is marketed to the same class of  
17 consumers. Thus, the parties' trade channels  
18 are nearly identical.

19 (Mot. 16:7-16 (internal citations omitted).)

20 Plaintiff argues that it is "negotiating with  
21 California distributors to commence distribution of its 'Brooklyn  
22 Black Ops' . . . beer in 2016, at which time Plaintiff's beer  
23 will be available in retail stores, bars, and restaurants  
24 throughout California." (Mot. 15:25-28.)

25 Defendant rejoins:

26 [T]he parties do not share the same marketing  
27 channels. The Plaintiff uses distributors and  
28 sells its products east of the Mississippi.  
It has not sold its goods on the West Coast,  
including California. On the other hand, the  
Defendant's goods are sold only in Fresno  
County, California. It has no sales force or  
distributors. Approximately three (3)  
restaurants (in Fresno and Clovis,  
California) carry its beer on tap and two  
stores (both in Fresno) sell bottles of its  
beer. The Defendant has never sold any of its  
products outside of Fresno County, California  
and thus, it has never sold any beer in any  
location where "Brooklyn Black Ops" aged

1 Russian Imperial Stout, or any other of the  
2 Plaintiff's products are available.

3 (Opp'n 15:23-16:4.)

4 Both parties utilize online social media to promote  
5 their beer, and distribute their alcohol through retail stores  
6 and restaurants. Moreover, Plaintiff is in the process of  
7 negotiating with distributors for its product in California and  
8 identifying potential retailers so that it could expand sales of  
9 its "Brooklyn Black Ops" Russian Imperial Stout to California.  
10 Where a federal registrant evinces a "present likelihood that the  
11 federal registrant will expand [its product's] use into the area  
12 of use of the intrastate user" the registrant is "entitled under  
13 the authority of the Lanham act to injunctive relief." Mister  
14 Donut of America, Inc. v. Mr. Donut, Inc., 418 F.2d 838, 844 (9th  
15 Cir. 1969). Therefore the marketing channels converge factor  
16 weighs in favor of finding a likelihood of confusion.

17 **f. Type of Goods and the Degree of Care Likely to**  
18 **be Exercised by the Purchaser**

19 "We examine the relatedness of the parties' goods  
20 because the more closely related the goods are, the more likely  
21 consumers will be confused by similar marks . . . Related goods  
22 are those products which would be reasonably thought by the  
23 buying public to come from the same source if sold under the same  
24 mark. In practice, this definition does not necessarily require a  
25 close proximity before goods will be found related." Entrepreneur  
26 Media, Inc. v. Smith, 279 F.3d 1135, 1147(9th Cir.  
27 2002)(citations and quotations omitted).

28 Plaintiff argues in relevant part: "The goods here are



1 craft beers, which retail for under \$30. These 'common consumer  
2 items' are regularly purchased by consumers not exercising a high  
3 degree of care." (Mot. 18:19-22.)

4 Plaintiff further contends:

5 [T]he conditions under which consumers  
6 purchase beers are frequently so "chaotic"  
7 and "impuls[ive]" that less similarity  
8 between marks used on beer is needed for a  
9 finding of likelihood of confusion than the  
10 similarity required for other types of  
11 products. Guinness, 2002 WL 1543817 at \* 6  
12 ("chaotic conditions under which alcoholic  
13 beverages are purchased in bars, and the  
14 impulse nature of these purchases" support a  
15 likelihood of confusion - granting  
16 preliminary injunction); . . .

17 (Id. 19:7-13.)

18 Defendant counters that Plaintiff's "Brooklyn Black  
19 Ops" beer "sells for \$29.99 a bottle" and "[a] craft beer  
20 consumer who is willing to pay over \$29.00 a bottle for a premium  
21 Russian Imperial Stout . . . is not likely to mistake a blonde or  
22 an IPA produced by Black Ops Brewing for such a premium and  
23 specialized product simply because somewhere on the bottle, the  
24 words 'Black Ops' can be found." (Opp'n 16:27-17:4.)

25 In assessing the likelihood of confusion to  
26 the public, the standard used by the courts  
27 is the typical buyer exercising ordinary  
28 caution. Although the wholly indifferent may  
be excluded, the standard includes the  
ignorant and the credulous. When the buyer  
has expertise in the field, a higher standard  
is proper though it will not preclude a  
finding that confusion is likely. Similarly,  
when the goods are expensive, the buyer can  
be expected to exercise greater care in his  
purchases; again though confusion may still  
be likely.

Sleekcraft, 599 F.2d at 353 (internal citations omitted).

Beer is a "common consumer[] item[] and [is] often

1 purchased several times a year[;] [a] reasonable consumer . . .  
2 is [therefore] unlikely to exercise a high degree of care in  
3 selecting" beer. K-Swiss, Inc. v. USA AISIQI Soes Inc., 291 F.  
4 Supp. 2d 1116, 1125 (C.D. Cal. 2003); see also Guinness United  
5 Distillers & Vintners B.V. v. Anheuser-Busch, Inc., No. 02  
6 CIV.0861(LMM), 2002 WL 1543817, at \*6 (July 12, 2002) ("[High  
7 end] [b]eer and scotch are relatively low cost products, and the  
8 average consumer is not likely to seek to identify the true  
9 manufacturer of these products."). Therefore, due to the  
10 relatively inexpensive nature of the parties' beer products and  
11 the "chaotic" environment in which the parties' products are  
12 likely to be purchased this factor weighs in favor of finding a  
13 likelihood of confusion.

14 **g. Defendant's Intent in Selecting the Mark**

15 "When the alleged infringer knowingly adopts a mark  
16 similar to another's, reviewing courts presume that the defendant  
17 can accomplish his purpose: that is, that the public will be  
18 deceived." Sleekcraft, 599 F.2d at 354.

19 Defendant argues that "[a]t the time of the selection  
20 of the name, the Defendant was not aware of the existence of  
21 Plaintiff['s mark] . . . ." (Opp'n. 17:11-12.) "[T]he Defendant  
22 selected 'Black Ops Brewing, Inc.' for its name to honor the  
23 owners family members' military service and because their friends  
24 and neighbors serve in the local military installations." (Id.  
25 17:8-10.) Even though the injunctive record supports Defendant's  
26 assertion that it selected its mark in good faith, Defendant  
27 continued using its mark after it became aware of Plaintiff's  
28 registered mark. Although "[g]ood faith is less probative of the

1 likelihood of confusion, [and] may be given considerable weight  
2 in fashioning a remedy," the good faith Defendant has shown in  
3 its initial selection of the mark does not cause this factor  
4 weighs in Defendant's favor. Sleekcraft, 599 F.2d at 354.

5 **h. Balance of the Pertinent Sleekcraft Factors**

6 Having examined the pertinent Sleekcraft factors, the  
7 injunctive record evinces that Defendant's use of the marks  
8 "Black Ops Brewing," "Black Ops," and "blackopsbrewery.com." is  
9 "creates a likelihood that the consuming public will be confused  
10 as to who makes what product." Thane Intern., 305 F.3d at 901.

11 **B. Irreparable Harm**

12 "To be entitled to injunctive relief, it is not  
13 sufficient that [P]laintiff demonstrate a likelihood of success  
14 on the merits of its claims. Plaintiff must also demonstrate that  
15 absent the injunction, it will be irreparably harmed by  
16 [D]efendant's alleged infringing conduct." CytoSport, 617 F.  
17 Supp. 2d at 1080.

18 Plaintiff contends:

19 Plaintiff will continue to suffer irreparable  
20 harm due to [D]efendant's intentional  
21 infringement if Defendant is not  
22 preliminarily enjoined from using "Black  
23 Ops," "Black Ops Brewery" and all similar  
24 marks. Plaintiff is planning its strategic  
25 and long-anticipated launch of its entire  
26 beer portfolio, including its popular "Black  
27 Ops" beer, in California. Defendant's acts  
28 have robbed Plaintiff of control over the  
reputation of the beer sold under the "Black  
Ops" mark - a reputation which Plaintiff has  
spent eight years and a substantial amount of  
resources building and carefully cultivating  
- at a time when Plaintiff is most relying on  
that reputation to support its expansion.

(Mot. 21:23-22:4.)

1 Plaintiff further argues that "California consumers who  
2 anticipate the availability of Plaintiff's 'Black Ops' brand in  
3 California will be misled by Defendant's preemptive flooding of  
4 the California market with its imposter brand." (Id. 22:23-26.)  
5 Plaintiff contends: "retailer interest in carrying Plaintiff's  
6 beer is likely to be weakened by the existence of Defendant's  
7 brand, as retailers are likely to perceive the parties' brands to  
8 be the same or interchangeable." (Id. 23:3-5.)

9 Moreover, Plaintiff argues:

10 Because Plaintiff does not control the retail  
11 establishments to which Defendant sells  
12 "Black Ops" beer, the irreparable injury to  
13 Plaintiff is substantially magnified because  
14 the cache and aura around which Plaintiff's  
15 "Black Ops" brand has been built will be  
16 destroyed, which will cause the further loss  
of customers and goodwill. Finally in this  
regard, consumers who are unsatisfied with  
Defendant's "Black Ops" beer will be unlikely  
to purchase Plaintiff's "Black Ops" beer  
thinking that it is connected with the "Black  
Ops" beer that they did not enjoy.

17 (Id. 23:12-19 (internal citations omitted).)

18 Defendant counters: "Plaintiff's motion fails to  
19 provide any evidence, let alone the required clear showing that  
20 it will be immediately irreparably harmed if a preliminary  
21 injunction does not issue." (Opp'n 19:3-5.)

22  
23 In trademark cases, courts have found  
24 irreparable harm in the loss of control of a  
25 business's reputation, a loss of trade and  
26 loss of goodwill. Opticians Ass'n of Am. v.  
27 Indep. Opticians of Am., 920 F.2d 187, 195  
28 (3rd Cir. 1990). Trademarks serve as the  
identity of their owners and in them resides  
the reputation and goodwill of their owners.  
Thus, if another person infringes the marks,  
that person borrows the owner's reputation  
whose quality no longer lies within the  
owner's control. Id. A trademark owner's loss

1 of the ability to control its marks, thus  
2 create the potential for damage to its  
3 reputation. Id. at 196.

4 CytoSport, Inc., 617 F. Supp. 2d at 1080.

5 In the context of trademark law, a finding of  
6 irreparable harm must be grounded in evidence not in conclusory  
7 or cursory allegations. Herb Reed Enterprises, LLC v. Florida  
8 Entertainment Management, Inc., 736 F.3d 1239, 1249-1251 (9th  
9 Cir. 2013), cert denied, 135 S. Ct. 57 (2014).

10 Plaintiff evidence demonstrates that Defendant's use of  
11 the marks "Black Ops Brewing," "Black Ops," and  
12 "blackopsbrewery.com." will cause Plaintiff to lose its ability  
13 to control its brand reputation and goodwill, since what could be  
14 perceived by consumers as the quality of Plaintiff's product  
15 risks no longer being within Plaintiff's control. In trademark  
16 cases, courts have found irreparable harm in the loss of control  
17 of a business's reputation, a loss of trade and loss of goodwill.  
18 CytoSport, Inc., 617 F. Supp. 2d at 1080.

19 "Irreparable harm must be of a peculiar nature, so that  
20 compensation in money alone cannot atone for it. Grounds for  
21 finding irreparable injury include loss of control of reputation,  
22 loss of trade, and loss of good will." Opticians Ass'n of America  
23 v. Independent Opticians of America , 920 F.2d 187, 195 (3d Cir.  
24 1990). If Defendant uses Plaintiff's mark, Defendant "borrows  
25 the [Plaintiff's] reputation, whose quality no longer lies within  
26 [Plaintiff's] own control. This is an injury, even though the  
27 borrower does not tarnish it, or divert any sales by its use" and  
28 "creates the potential for damage to [Plaintiff's] reputation.  
Potential damage to reputation constitutes irreparable injury for

1 the purpose of granting [Plaintiff's request for] a preliminary  
2 injunction . . . ." Id.

3 **C. Balance of the Equities**

4 Plaintiff argues: "Any potential harm to Defendant that  
5 may result from being preliminarily enjoined from infringing  
6 Plaintiff's marks - an unlawful activity - is legally irrelevant  
7 in light of Plaintiff's overwhelming likelihood of success on the  
8 merits and the massive irreparable harm caused to Plaintiff by  
9 Defendant's conduct." (Mot. 8-12.)

10 Defendant counters:

11 Here, the Plaintiff does not sell any beer in  
12 this state, let alone the sole county where  
13 the Defendant operates. In the highly  
14 unlikely event that any consumer is somehow  
15 confused between the Defendant's beer and the  
16 Plaintiff's "Brooklyn Black Ops" aged Russian  
17 Imperial Stout product, then the Plaintiff as  
the more established and sizable business can  
easily address such minor identity problems.  
Therefore, the balance of the hardships also  
weighs heavily against the issuance of a  
preliminary injunction.

18 (Opp'n 20:4-9.)

19 Any harm suffered by Defendant will result from being  
20 enjoined from engaging in unlawful trademark infringement. See  
21 Triad Sys. Corp. v. Southeastern Express Co., 64 F.3d 1330, 1338  
22 (9th Cir. 1994) (Defendant "cannot complain of the harm that will  
23 befall it when properly forced to desist from its infringing  
24 activities.") Therefore the balance of equities weighs in favor  
25 of Plaintiff.

26 **D. Public Interest**

27 "In the trademark context, courts often define the  
28 public interest at stake as the right of the public not to be

1 deceived or confused." CytoSport, 617 F. Supp. 2d at 1081.

2 Plaintiff has demonstrated a likelihood of consumer  
3 confusion. Therefore, the public interest weighs in favor of  
4 issuing a preliminary injunction.

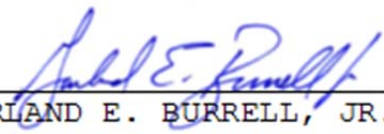
5 **IV. CONCLUSION**

6 For the foregoing reasons, Plaintiff's motion for a  
7 preliminary injunction is GRANTED upon the terms set forth as  
8 follows:

9 1. Plaintiff The Brooklyn Brewery Corporation shall post a  
10 bond in the amount of \$85,000.00 with the Clerk within  
11 fourteen (14) days from the date on which this Order is  
12 filed. The injunction shall be effective immediately upon  
13 the Court's receipt of Plaintiff's bond.

14 2. Defendant Black Ops Brewing, Inc., its principals,  
15 employees, owners, agents, officers, directors,  
16 attorneys, representatives, affiliates, subsidiaries, and  
17 successors and assigns, and all those in active concert  
18 or participation with any of them, are preliminary  
19 enjoined and restrained from using the marks "Black Ops  
20 Brewing," "Black Ops," "blackopsbrewery.com," or any  
21 other mark that infringes or unfairly competes with  
22 Plaintiff's "Brooklyn Black Ops" mark.

23 Dated: January 6, 2016

24  
25   
26 \_\_\_\_\_  
27 GARIAND E. BURRELL, JR.  
28 Senior United States District Judge