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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CHROMA MAKEUP STUDIO LLC,)	CASE NO.: CV 12-9893 ABC (PJWx)
)	
Plaintiff,)	
)	ORDER RE: PLAINTIFF'S MOTION FOR
v.)	A PRELIMINARY INJUNCTION
)	
BOLDFACE GROUP, INC.; BOLDFACE)	
LICENSING + BRANDING,)	
)	
Defendants.)	
_____)	

Pending before the Court is Plaintiff Chroma Makeup Studio LLC's ("Chroma's") motion for a preliminary injunction, filed on December 5, 2012. (Docket No. 19.) Defendants Boldface Group, Inc. and Boldface Licensing + Branding (together "Boldface") opposed on December 17 and Chroma replied on December 24. The Court ordered the parties to file supplemental briefs, which they did on January 3 and January 8, 2013. The Court heard oral argument on Monday, January 14, 2013. For the reasons below, the motion is DENIED.

BACKGROUND¹

1
2 This trademark case arises out of a clash between Chroma, a
3 primarily Los Angeles-based business selling cosmetic products and
4 services under various marks using the word CHROMA, and Boldface, a
5 licensing company engaged in the nationwide roll-out of a cosmetics
6 line under marks using the word KHROMA, which is affiliated with the
7 celebrity Kardashian sisters – Kourtney, Kim, and Khloe.² By way of
8 this motion, Chroma seeks to enjoin Boldface’s use of the word KHROMA
9 on its cosmetics throughout the United States, believing that the
10 product launch has caused and will cause substantial consumer
11 confusion.

12 Plaintiff Chroma’s backstory is one of small business success.
13 It operates from two locations, one in Beverly Hills and one in
14 Encino. The Beverly Hills location is one block from Rodeo Drive in
15 Beverly Hills, California, in what has become known as the “Golden
16 Triangle,” the most exclusive shopping district in Los Angeles. (Rey
17 Decl. ¶ 4.) For twelve years, Chroma has used the marks CHROMA,
18 CHROMA COLOUR, CHROMA MAKEUP STUDIO, and CHROMA MAKEUP STUDIO along
19

20 ¹The Court has reviewed the parties’ objections to evidence and
21 to the extent those objections are inconsistent with the Court’s
22 ruling, they are OVERRULED. The Court GRANTS Boldface’s requests for
judicial notice.

23 ²The Kardashians are famous television personalities. Kourtney
24 became famous from an appearance on a 2005 reality series called
25 Filthy Rich: Cattle Drive; two years later, all three sisters were
26 featured on a reality series called Keeping Up with the Kardashians,
27 now in its seventh season, with 3.6 million viewers for the seventh
28 season finale and at least two more seasons on the horizon.
(Sobiesczyk Decl. ¶ 3.) That show also spawned three spin-off series.
(Id. ¶ 4.) In 2010, the Kardashians wrote a best-selling book and
that year, Kim Kardashian was the highest paid reality television star
at \$6 million. (Id.) In 2012, Khloe Kardashian was a host of the
reality competition series The X Factor. (Id.)

1 with a "C" design (together called the "Chroma marks"³) for its beauty
 2 services, as well as cosmetics and beauty products, which it sells
 3 from its Beverly Hills location, from the Chroma Makeup Studio at
 4 Butterfly Loft in Encino, California, and online through its website
 5 www.chromamakeupstudio.com. (Id. ¶¶ 5–6.)⁴ Chroma has not registered
 6 any marks with the United States Patent and Trademark Office ("PTO").

7 Chroma considers itself a provider of a "premiere line of
 8 cosmetics and [] elite makeup services" (Compl. ¶ 20), and has gained
 9 prominence in the beauty industry in Los Angeles. It has celebrity
 10 clients; it was ranked #1 in the beauty supply category on the "L.A.
 11 Hotlist!" in 2011; and it has been covered in local magazines like Los
 12 Angeles Confidential, Beverly Hills, and Moxley Head to Toe Guide to
 13 Beauty Services in Los Angeles, as well as in national magazines like
 14 Vogue, Elle, Self, Genlux, and Lucky. (Rey Decl. ¶¶ 9–11; Casino
 15 Decl. ¶¶ 6–8, Ex. 1.) Its cosmetics are considered high-end, with
 16 some priced as high as \$135. (Ostoya Decl. ¶ 21, Ex. A.) Its yearly
 17 sales from 2001 to 2012 ranged between \$406,484.80 and \$552,402.37,
 18 40% of which came from product sales and 60% from sales of services.
 19 (Rey Reply Decl. ¶ 14.)⁵ Sales increased between 2001 and 2007,

20
 21 ³For the first time in its supplemental brief, Boldface argues
 22 that Chroma's marks are limited to CHROMA MAKEUP STUDIO and CHROMA
 23 COLOUR. Because this argument was raised for the first time after
 24 Chroma's reply brief and Chroma has not had a chance to respond, the
 25 Court declines to consider it. See Graves v. Arpaio, 623 F.3d 1043,
 1048 (9th Cir. 2010).

24 ⁴Photographs of Chroma's products are attached as Appendix A.

25
 26 ⁵In its supplemental brief, Chroma's counsel inconsistently
 27 represented that Chroma's yearly sales of between \$400,000 and
 28 \$550,000 were for products only, and because the products sell around
 \$20 an item on average, that represents sales of 25,000 to 27,500
 products each year. (Chroma Supp. Br. 10.) The Court accepts the

(continued...)

1 decreased in 2008 and 2009, and began growing again from 2010 to the
2 present. (Id.)

3 Chroma's business has been largely confined to California and the
4 Los Angeles area: while it has clients in more than 40 states and in
5 some foreign countries (Rey Decl. ¶ 11; Casino Decl. ¶ 9); 97.5% of
6 its product sales take place in California (Rey Reply Decl. ¶ 14); and
7 71.6% of its clients are in California, 77.8% of whom are located in
8 Los Angeles County (Casino Supp. Decl. ¶¶ 5-7, Exs. 2, 3). Both
9 founders of Chroma claim to have intended for years to expand the
10 distribution of Chroma products to exclusive department stores and
11 retailers like Sephora and QVC, but they point to only one recent
12 discussion with a potential licensing partner, Gunthy Renker, as
13 specific evidence of efforts at expansion, and any deal with Renker
14 has been put on hold pending this lawsuit. (Rey Decl. ¶ 16; Casino
15 Decl. ¶ 10; see also Rae Decl. ¶ 4.) Chroma also has not advertised
16 at all, opting instead to rely upon "word-of-mouth" referrals to
17 expand its business. (Rae Decl. ¶ 3.)

18 Defendant Boldface's backstory is very different. It was founded
19 by two women in April 2012 as a "celebrity cosmetics and beauty
20 licensing company" with a business model to design, develop, and
21 market cosmetics and beauty-related goods. (Ostoya Decl. ¶¶ 3, 6.)⁶
22 Before forming the company, in October 2011 the founders of Boldface
23 were approached by the Kardashians to submit a proposal to jointly

24
25 ⁵(...continued)
26 statements by Chroma's principal in his declaration, not counsel's
27 representations in Chroma's brief.

28 ⁶Defendant Boldface Licensing + Branding is a wholly owned
subsidiary of Defendant Boldface Group, Inc., which is a holding
company. (Ostoya Decl. ¶ 2.)

1 develop a beauty and cosmetics line affiliated with the Kardashian
2 sisters. (Id. ¶ 8.) The founders spent six months researching and
3 developing the products, during which time they came up with the brand
4 name KHROMA BEAUTY, among others. (Id.) They claim not to have known
5 about Chroma's existence when they came up with the name. (Id.)⁷
6 Boldface then entered an exclusive licensing agreement with the
7 Kardashians to use their names and likenesses in connection with the
8 development, manufacture, promotion, and sale of cosmetics, beauty
9 products, and other related goods that would be marketed in close
10 connection with the Kardashians' names and likenesses. (Id. ¶¶ 9–10.)

11 Before presenting possible brand names to the Kardashians,
12 Boldface used an attorney to conduct a trademark search related to the
13 term "KHROMA BEAUTY." (Id. ¶ 12.) The search yielded dozens of uses
14 of the word "chroma" and certain variants in relation to cosmetics and
15 beauty products, including Chroma's use. (Mantell Decl., Ex. A at
16 56.) Boldface concluded that the word "chroma" was being used in the
17 public generically, or at least descriptively, to denote "color."
18 (Ostoya Decl. ¶ 13; Mantell Decl. ¶¶ 2–3, Ex. A; Def.'s Request for
19 Judicial Notice ("RJN"), Ex. 1.) After presenting three possible
20 brand names, Boldface and the Kardashians gravitated toward the mark
21 "KHROMA BEAUTY," although they also discussed using "KARDASHIAN
22 KHROMA." (Ostoya Decl. ¶ 11.) In June 2012, Boldface filed two

23
24 ⁷Chroma claims that a "friend" of the Kardashians told one of the
25 owners that she asked Kim, "Why would you name your line after the
26 makeup studio with a makeup line that I go to in Beverly Hills?" Kim
27 purportedly replied, "We liked the name, and if it becomes a problem,
28 someone else will have to deal with it." (Rey Decl. ¶ 14.) Kim
Kardashian denies even knowing this person, let alone talking with
her. (Kardashian Decl. ¶ 2.) The Court notes this conflict only
because the parties have spent time discussing it. It has no
impact on the resolution of this motion.

1 trademark applications with the PTO for the marks "KHROMA BEAUTY BY
2 KOURTNEY, KIM AND KHLOE" and "KARDASHIAN KHROMA," Serial Nos.
3 85/646521 and 85/642342, covering "personal care products including
4 cosmetics, body and beauty care products" in International Class 3.
5 (Id. ¶ 14.) Those applications remain pending.⁸

6 On June 6, 2012, Boldface issued a press release announcing the
7 launch of the product line labeled "KHROMA BEAUTY BY KOURTNEY, KIM AND
8 KHLOE KARDASHIAN" and indicating that some products would appear in
9 Ulta stores in December 2012 with a "comprehensive launch" in January
10 or February 2013. (Sobiesczyk Decl., Ex. 4.)⁹ The press release
11 noted that the "Kardashian's immediate brand recognition factor gives
12 Khroma Beauty an advantage over most launching brands as it holds a
13 wide ranging, aspirational appeal." (Id.) The product launch has
14 received extensive nationwide media coverage (id. ¶ 14, Ex. 6), was
15 featured on an episode of the Kardashians' reality television show
16 Keeping Up with the Kardashians (id. ¶ 15), has been promoted on each
17 of the Kardashian sisters' websites (id. ¶ 12), and has its own
18 Facebook page with 52,000 "likes" (id. ¶ 13).

19 On November 8, 2012, Boldface shipped KHROMA BEAUTY products to
20 approximately 4,500 retail stores throughout the United States and
21

22 ⁸Although not mentioned by either party, on September 26, 2012,
23 the PTO issued office actions for both applications initially refusing
24 registration because, inter alia, Boldface's marks create likely
25 confusion with a federal registration for "KROMA" on cosmetics, owned
26 by a company in Florida called Lee Tillett, Inc. (Def.'s RJN, Ex. 1
27 at 173; Thomas Decl. ¶ 3.) Boldface has six months from the date of
28 those actions to respond. Boldface has also filed a declaratory
judgment action against Lee Tillett, Inc. that it does not infringe
the "KROMA" mark. See Boldface Licensing Branding v. By Lee Tillett, Inc., No. 12-10269 ABC (PJWx) (filed Nov. 30, 2012).

⁹Photographs of these products are attached as Appendix B.

1 KHROMA BEAUTY products can currently be found at Ulta, CVS, Kmart,
2 Sears, Heb, Meijer, Walgreens Puerto Rico, Fred Meyer, and Duane Reade
3 (in February 2013), and by April 2013 the products will be available
4 on Boldface's website devoted to KHROMA BEAUTY products. (Ostoya
5 Decl. ¶¶ 16, 18.) Boldface is also in discussions with (and has
6 received some orders from) international distributors, including in
7 the European Union, Australia, Canada, and Japan. (Id. ¶ 17.) The
8 products are priced between \$6.49 and \$19.99, as compared to Chroma's
9 products priced between \$17.50 and \$23.50, with one product priced at
10 \$135. (Id. ¶ 20; Sobiesczyk Decl. ¶ 26.)¹⁰ Boldface claims it could
11 have rolled out higher-end (and higher-priced) products, but it chose
12 to create cosmetics for the mass market at accessible prices, which
13 would more likely reach the Kardashians' fan base. (Ostoya Decl. ¶¶
14 22-23.)

15 Based on orders already placed, Boldface expects substantial
16 sales through December 2013, which will be many multiples of Chroma's
17 annual sales. (Id. ¶ 28.)¹¹ Because those orders were placed before
18 this lawsuit was filed, Boldface expects to receive 1.3 million units
19 of KHROMA BEAUTY products over the next four to six weeks, and it will
20 incur storage costs if it is enjoined from selling those products
21 pending resolution of this case. (Id. ¶ 26.) Boldface has also
22 rolled out an extensive advertising campaign through June 2013,
23

24 ¹⁰Chroma's eye shadow/blush "kit" sells for \$135, while
25 Boldface's KHROMA BEAUTY eye shadow/blush "palette" sells for \$12.99.
26 (Sobiesczyk Decl. ¶ 26.)

27 ¹¹Because Boldface has filed its revenue figures and other
28 financial information under seal, the Court will not set forth the
exact figures in this Order, nor are the exact figures necessary to
the resolution of this motion.

1 primarily in print beauty and celebrity magazines. (Id. ¶ 27.)

2 Boldface claims it would not be able to pay the costs of production or
3 storage of the KHROMA BEAUTY products – and therefore would be put out
4 of business – if an injunction were to stop sales. (Id. ¶ 28.)

5 Chroma claims that, based upon the roll-out of the KHROMA BEAUTY
6 products, it has experienced more than 50 instances of purported
7 consumer confusion over its and Boldface's products, including
8 customers who have expressed fear that others might associate the
9 Kardashians with their Chroma products. (Rey Decl. ¶¶ 12–13, Ex. 2;
10 Rey Reply Decl. ¶¶ 7–11, Exs. 1–6.) As a result, Chroma posted a
11 letter on its website on October 29, 2012 explaining that it was not
12 associated with the Kardashians or their products. (Sobiesczyk Decl.
13 ¶ 10, Ex. 4.) Chroma and its employees worry that its clients will be
14 dissuaded from purchasing Chroma products for fear of being associated
15 with the Kardashians' KHROMA BEAUTY products and therefore its
16 business will suffer. (Rey Decl. ¶¶ 15, 17; Cohen Decl. ¶¶ 2–4;
17 Galperson Decl. ¶¶ 2–4.) Indeed, a prominent branding consultant in
18 the beauty industry declined to refer her clients to Chroma for the
19 December 2012 holiday season in light of the "controversy" concerning
20 KHROMA BEAUTY (Casino Decl. ¶ 13, Ex. 2), and Chroma has been advised
21 that future brand expansion and licensing opportunities have been
22 compromised (Rae Decl. ¶¶ 7–8).

23 By way of this lawsuit, Chroma has asserted claims for trademark
24 infringement under the Lanham Act, 15 U.S.C. § 1125(a)(1), and unfair
25 competition under California Business and Professions Code section
26 17200. Chroma has moved for a preliminary injunction on both claims.

27 **LEGAL STANDARD**

28 "A plaintiff seeking a preliminary injunction must establish that

1 h e is likely to succeed on the merits, that he is likely to suffer
2 irreparable harm in the absence of preliminary relief, that the
3 balance of hardships tips in his favor, and that an injunction is in
4 the public interest." Winter v. Natural Res. Defense Council, Inc.,
5 555 U.S. 7, 20 (2008); Marlyn Nutraceuticals, Inc. v. Mucos Pharma
6 GmbH & Co., 571 F.3d 873, 877 (9th Cir. 2009). This recitation of the
7 requirements for a preliminary injunction did not completely erase the
8 Ninth Circuit's "sliding scale" approach, which provided that "the
9 elements of the preliminary injunction test are balanced, so that a
10 stronger showing of one element may offset a weaker showing of
11 another." Vanguard Outdoor, LLC v. City of Los Angeles, 648 F.3d 737,
12 739 (9th Cir. 2011).

13 "In one version of the 'sliding scale,' a preliminary injunction
14 could issue where the likelihood of success is such that serious
15 questions going to the merits were raised and the balance of hardships
16 tips sharply in [plaintiff's] favor." Id. at 740 (internal quotation
17 marks omitted; brackets in original). This "serious questions" test
18 survived Winter. Id. Therefore, "serious questions going to the
19 merits and a hardship balance that tips sharply in the plaintiff's
20 favor can support issuance of an injunction, so long as the plaintiff
21 also shows a likelihood of irreparable injury and that the injunction
22 is in the public interest." Id. (internal quotation marks omitted).

23 DISCUSSION

24 A. Likelihood of Success on the Merits

25 The Lanham Act proscribes activities that are likely to cause
26 confusion, mistake, or deception as to the association, sponsorship,
27
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1 or approval of goods or services by another. 15 U.S.C. § 1125(a).¹²
2 In order to show trademark infringement, the plaintiff must
3 demonstrate that the defendant is "using a mark confusingly similar to
4 a valid, protectable trademark" owned by the plaintiff. Brookfield
5 Commc'ns, Inc. v. W. Coast Entm't Corp., 174 F.3d 1036, 1046 (9th Cir.
6 1999). Federal registration of a trademark creates a presumption that
7 the mark is valid, but because Chroma has not registered its marks, it
8 cannot avail itself of this statutory presumption and must establish
9 that it owns a valid trademark that has been infringed. See Glow
10 Indus., Inc. v. Lopez, 252 F. Supp. 2d 962, 976 (C.D. Cal. 2002).

11 1. Validity

12 To be valid, a trademark must be "distinctive." Zobmondo Entm't,
13 LLC v. Falls Media, LLC, 602 F.3d 1108, 1113 (9th Cir. 2010). Marks
14 are generally classified in one of five categories of distinctiveness:
15 (1) generic; (2) descriptive; (3) suggestive; (4) arbitrary; or (5)
16 fanciful. Id. "Suggestive, arbitrary, and fanciful marks are
17 considered 'inherently distinctive' and are automatically entitled to
18 federal trademark protection because 'their intrinsic nature serves to
19 identify a particular source of a product.'" Id. Generic marks are
20 never entitled to trademark protection and descriptive marks may
21 become protected if they have acquired "secondary meaning," that is,
22 "acquired distinctiveness 'as used on or in connection with the
23 [trademark owner's] goods in commerce.'" Id. The inquiry into
24 validity is an "intensely factual issue," and "the factfinder's
25 function is to determine, based on the evidence before it, what the

26
27 ¹²The parties agree that the analysis for Chroma's § 1125(a)
28 claim and state-law claim is identical, so the Court will not address
them separately. See Walter v. Mattel, Inc., 210 F.3d 1108, 1111 (9th
Cir. 2000).

1 perception of the purchasing public is.'" Id.

2 Chroma argues that its CHROMA marks are either inherently
3 distinctive as arbitrary or suggestive, or, if they are descriptive,
4 that they have acquired distinctiveness through secondary meaning,
5 whereas Boldface argues that the word "chroma" is either generic or
6 merely descriptive of cosmetics and beauty products without secondary
7 meaning inuring to Chroma's benefit. The Court finds that, at this
8 stage, Chroma has demonstrated that a factfinder would likely find the
9 CHROMA marks suggestive for cosmetics, rendering the marks inherently
10 distinctive.

11 a. Arbitrary or Generic

12 At the outset, the Court can dispose of the parties' respective
13 arguments that the mark is either arbitrary or generic because the
14 evidence does not support either conclusion.

15 Arbitrary marks are "common words that have no connection with
16 the actual product – for example, 'Dutch Boy' paint." Survivor
17 Media, Inc. v. Survivor Prods., 406 F.3d 625, 631–32 (9th Cir. 2005).
18 The parties agree that the term "chroma" is Latin for a classical
19 Greek word meaning "color," and in English it means the purity of
20 color saturation. It appears in Webster's dictionary, although that
21 source notes that the term "chroma" standing alone has a chiefly
22 British usage. (Mot. 8–9.) It apparently functions more commonly as
23 a classical Greek root for English words coined in the Nineteenth
24 Century like "chromatic" and "chromatology." Without citing evidence,
25 Chroma asserts that the term is "not widely known in the United
26 States." (Id.) Assuming these definitions are correct, the word
27 bears at least some connection to cosmetics because it refers to
28 color, and the makeup at issue here involves the use of color (e.g.,

1 eye-shadow, blush, lipstick, etc.). Therefore, the word "chroma" is
2 not arbitrary as used on cosmetics.

3 At the other end of the spectrum, a generic word "describe[s] the
4 product in its entirety, and [is] not entitled to trademark
5 protection. . . . Examples include 'Liquid controls' for equipment
6 that dispenses liquid, or 'Multistate Bar Examination' for a bar
7 examination that may be taken across multiple states." Surfvivor, 406
8 F.3d at 632. Boldface argues that the doctrine of "foreign
9 equivalents" compels a finding that the term "chroma" is generic
10 because it means "color" in Greek. "Under the doctrine of foreign
11 equivalents, foreign words from common languages are translated to
12 English to determine genericness, descriptiveness, as well as
13 similarity of connotation in order to ascertain confusing similarity
14 with English word marks." Palm Bay Imports, Inc. v. Veuve Clicquot
15 Ponsardin Maison Fondée En 1772, 396 F.3d 1369, 1377 (Fed. Cir. 2005).
16 One rationale behind the doctrine is to prevent merchants from
17 "obtain[ing] the exclusive right over a trademark designation if that
18 exclusivity would prevent competitors from designating a product as
19 what it is in the foreign language their customers know best."
20 Otokoyama Co. v. Wine of Japan Import, Inc., 175 F.3d 266, 270–71 (2d
21 Cir. 1999). The doctrine is not an absolute rule, though, and "it
22 does not mean that words from dead or obscure languages are to be
23 literally translated into English for descriptive purposes.'" In re
24 Spirits Int'l, N.V., 563 F.3d 1347, 1351 (Fed. Cir. 2009) (quoting 2
25 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition §
26 11:34 (4th ed. 2009)).

27 Here, Chroma claims without much support that the doctrine does
28 not apply because the word "chroma" was used in the ancient Greek

1 language as "color," and because that language has not been spoken for
2 over two thousand years, consumers would not translate it. Boldface
3 does not respond to this point. On this thin record, the Court finds
4 that the doctrine of foreign equivalents does not apply here because
5 there is no evidence that the buying public would translate "chroma"
6 to "color." Absent an English translation of the term "chroma," the
7 evidence does not support a finding of the CHROMA marks are generic.

8 b. Suggestive or Descriptive

9 The crux of the validity question here is placing the word
10 "chroma" when used with cosmetics on one side of the suggestive/
11 descriptive line, and that determination is hardly "an exact science
12 and is a tricky business at best.'" Zobmondo, 602 F.3d at 1114. "A
13 suggestive mark is one for which 'a consumer must use imagination or
14 any type of multistage reasoning to understand the mark's significance
15 . . . the mark does not describe the product's features, but suggests
16 them.'" Id. (ellipsis and emphasis in original). "By contrast, a
17 merely descriptive mark 'describes the qualities or characteristics of
18 a good or service' . . . 'in a straightforward way that requires no
19 exercise of the imagination to be understood.'" Id. This assessment
20 must be made "by reference to the goods or services that it
21 identifies[.]'" Id. If a mark is considered merely descriptive, the
22 owner must show that the mark has acquired secondary meaning for it to
23 be protectable. Id. at 1113. A mark may be descriptive even if it
24 does not describe the "essential nature" of the product; "it is enough
25 that the mark describe some aspect of the product." Id. at 1116.

26 In the Ninth Circuit, the distinction between suggestive and
27 descriptive marks is assessed using two – and possibly three –
28 "tests": the "imagination" test, the "competitors' needs" test, and

1 potentially the "extent-of-use" test. Id. at 1115–18. Importantly,
2 these tests are only criteria offering guidance and other evidence may
3 be relevant. Id. at 1115.

4 The imagination test is considered the "'primary criterion'" for
5 evaluating distinctiveness, id. at 1116, and it looks to whether
6 "'imagination or a mental leap is required in order to reach a
7 conclusion as to the nature of the product being referenced,'" id. at
8 1115. Boldface argues that the word "chroma" is descriptive of
9 cosmetics because it simply means color. The Court has already
10 concluded that the doctrine of foreign equivalents does not apply, so
11 there must be some evidence that consumers understand the word
12 "chroma" to directly refer to color when it appears on cosmetics. The
13 word "chroma" is defined in the dictionary as the purity of color
14 saturation, albeit the entry also notes that the word has a chiefly
15 British usage. (Mot. 8.) Further, the PTO considers "chroma"
16 descriptive when used with hair care and coloring products because it
17 directly refers to color, such as "the purity of color, or its freedom
18 from white or gray," or the "intensity of distinctive hue; saturation
19 of color," or even as an aspect of color in the "Munsell color system
20 by which a sample appears to differ from a grey in the same lightness
21 or brightness and that corresponds to saturation of the perceived
22 color." (Thomas Supp. Decl. ¶ 7.) In the abstract or related to
23 hair-care products, then, "chroma" might generally refer to color or
24 color saturation.

25 But for trademark purposes, the word must be considered "'by
26 reference to the goods or services that it identifies[.]'" Zobmondo,
27 602 F.3d at 1114. Boldface has not demonstrated that consumers of
28 cosmetics understand "chroma" to mean color on cosmetics, such that no

1 mental leap is required to understand the connection between "chroma"
2 and those products. To the contrary, cosmetics consumers must make
3 one – and possibly a second – inferential leap: first, to understand
4 that "chroma" refers to "color" or "color purity" or "saturation"; and
5 second, to understand that color or color purity or saturation refers
6 directly to cosmetics bearing the mark. This connection is
7 particularly attenuated for products that do not have an obvious
8 connection to color, such as those reducing shine, lengthening
9 eyelashes, or toning the skin. The mental leap required by customers
10 is underscored by Chroma's own use of the word "chroma" on its
11 products alongside the word "color," which suggests that consumers do
12 not immediately understand the word "chroma" to mean color on
13 cosmetics. (Casino Decl. ¶ 5 (explaining that Chroma "chose the name
14 CHROMA for the studio and CHROMA COLOUR for [its] product line because
15 [it] wanted [its] cosmetics to be about color."); see also Ostoya
16 Decl., Ex. A (using tagline "COLOR • PURITY • YOU" and naming product
17 categories "Lip Colours," "Eye Colours," and "Cheek Colours").)
18 Therefore, the imagination test weighs in favor of finding the CHROMA
19 marks suggestive.

20 The competitors' needs test "'focuses on the extent to which a
21 mark is actually needed by competitors to identify their goods or
22 services.'" Zobmondo, 602 F.3d at 1117. This test is related to the
23 imagination test "'because the more imagination that is required to
24 associate a mark with a product or service, the less likely the words
25 used will be needed by competitors to describe their products or
26 services.'" Id.

27 This test weighs in favor of finding the CHROMA marks suggestive
28 because competitors likely do not need to use the word "chroma" to

1 describe their own cosmetics. Because Boldface has not demonstrated
2 that the doctrine of foreign equivalents applies, competitors could
3 readily use the words "color," "purity," "hue," or any number of other
4 words to describe that aspect of their products. See Entrepreneur
5 Media, Inc. v. Smith, 279 F.3d 1135, 1143 (9th Cir. 2002) ("[I]f there
6 are numerous synonyms for a common trademarked word, others will have
7 less need to use the trademarked term.").¹³

8 The extent-of-use test "evaluates 'the extent to which other
9 sellers have used the mark on similar merchandise,'" which may
10 indicate that the term is merely descriptive of a class of products,
11 although the Ninth Circuit has not formally adopted this test as a
12 factor in determining distinctiveness. Zobmondo, 602 F.3d at 1118.

13 Chroma claims that this test is limited to direct competitors,
14 and Boldface is its only direct competitor.¹⁴ Yet, in Zobmondo the
15 Ninth Circuit merely required a showing of uses on "similar
16 _____

17 ¹³Boldface cites some instances of other products using the word
18 "chroma" on cosmetics to denote color, such as bareMinerals Prime Time
19 Primer Shadow Chroma Violet, Mac Chroma Copper Cobra eye shadow, and
20 Mac Nail Laquer in Chroma Copper Cobra. (Mantell Supp. Decl., Ex. B.)
21 While "[w]idespread use of a word by others may serve as confirmation
22 of the need to use that word," Entrepreneur, 279 F.3d at 1143
23 (emphasis in original), this is far from widespread use of the word
24 "chroma" to directly mean "color" that would suggest that competitors
25 need to use the word "chroma" to describe cosmetics. Boldface also
26 cites products called Color Me Beautiful Chroma Soft Eye Pencils, New
27 York Color Chroma Lip Gloss, and New York Color Chroma Face Glow.
28 (Mantell Supp. Decl., Ex. B.) Given that these products use both the
words "color" and "chroma," these products do not demonstrate that
producers need the word "chroma" to describe their products.

25 ¹⁴Chroma notes two other companies that use variants of the word
26 "chroma" on cosmetics, but Chroma does not regard either one as a
27 competitor because Chroma was unaware of them: Lee Tillett, Inc.,
28 which has a federal registration for the mark KROMA for cosmetics
(Def.'s RJN, Ex. 1 at 173; Thomas Decl. ¶ 3); and Biotherm of Monaco,
which has used the mark RIDES REPAIR CHROMA-LIFT for face cream since
2009. (Rey Reply Decl. ¶ 3.)

1 merchandise," not use on directly competing products. Id. Indeed, in
2 that case the court considered third-party uses of the term at issue
3 in websites, copyright registrations, and books in evaluating the
4 parties' use of the mark on board games. Id. at 1118-19; see also
5 Filipino Yellow Pages, Inc. v. Asian Journal Publ'ns, Inc., 198 F.3d
6 1143, 1151 (9th Cir. 1999) (citing Los Angeles Times article using
7 term at issue "in a generic sense"); Surgicenters of Am., Inc. v. Med.
8 Dental Surgeries, Co., 601 F.2d 1011, 1013, 1017 n.17 (9th Cir. 1979)
9 (citing magazine and medical journal articles, letters, television
10 transcripts, and a proposed federal regulation using the term at issue
11 to determine whether term was generic or descriptive).

12 Boldface has proffered evidence of uses of the word "chroma" on
13 cosmetics and for beauty salons (Mantell Decl., Ex. B) and in numerous
14 PTO applications and registrations using the word "chroma" with
15 cosmetics and hair-care and similar products. But this evidence only
16 has limited value. As discussed more fully below, the PTO records
17 support the conclusion that the Chroma marks are inherently
18 distinctive, not merely descriptive as Boldface contends. Likewise,
19 Boldface's other evidence of third-party uses does not necessarily
20 demonstrate distinctiveness in the absence of contextual evidence of
21 how the marks were used, whether the products bearing the marks were
22 well-promoted, or whether the marks were recognized by customers. See
23 Zobmondo, 602 F.3d at 1119 ("And Zobmondo's evidence of third-party
24 use, without contextual information such as sales figures and
25 distribution locations, falls short of establishing a long-standing
26 consumer understanding" of the mark at issue); see also id. at 1119
27 n.11. As a result, the extent-of-use test is at best inconclusive of
28 distinctiveness.

1 Apart from the three tests identified in Zobmondo, Boldface cites
2 32 current trademark registrations, 20 cancelled registrations, and 13
3 pending registrations using "chroma" or slight variants to argue that
4 the PTO treats the word "chroma" as descriptive of various types of
5 beauty products. (Def.'s RJN, Ex. 1.) Even in the absence of the
6 presumption of validity arising from a federal registration, "courts
7 may . . . defer to the PTO's registration of highly similar marks."
8 Lahoti v. Vericheck, Inc., 586 F.3d 1190, 1199 (9th Cir. 2009).
9 Therefore, the PTO's registration of a similar mark is "evidence of .
10 . . . distinctiveness," so long as the registered mark and the disputed
11 mark have "strong similarity" in "appearance and purposes." Id.
12 However, many third-party registrations using a similar term can in
13 some cases demonstrate that a mark is descriptive, not suggestive, by
14 showing that "those third parties and the public consider such a
15 [term] descriptive, such that there will be no likely confusion[.]'"
16 Id. at 1200. Importantly, the Court might rely exclusively on strong
17 evidence of similar registrations to determine distinctiveness. Id.
18 at 1204.

19 The PTO has found the word "chroma" or its variants inherently
20 distinctive on cosmetics eight times since 1990 (Thomas Decl. ¶ 3):

- 21 • RIDES REPAIR CHROMA-LIFT for "cosmetics, namely creams for
22 the face," with REPAIR disclaimed (U.S. Reg. No. 3958286);
- 23 • CROMA HEALTH CARE INNOVATION & design for "cosmetics," with
24 HEALTH disclaimed (U.S. Reg. No. 3746910);
- 25 • KROMA for "cosmetics" generally (U.S. Reg. No. 4079066);
- 26 • CHROMA GEL for products related to artificial nails, with
27 GEL disclaimed (U.S. App. Ser. No. 85375699, allowed for
28 registration on Principal Register);
- REVLON CHROMA CHAMELEON for "nail enamel" (U.S. App. Ser.
No. 85646764, published for opposition and, if no opposition
is filed, allowed for registration on Principal Register);

- 1 • CHROMA LUMINESCENT for "cosmetics, non-medicated skincare
2 preparations, non-medicated hair-care preparations, non-
3 medicated body care preparations, namely, cosmetic
4 preparations for body care" (U.S. App. Ser. No. 85667308,
5 published for opposition and, if no opposition is filed,
6 allowed for registration on Principal Register);
- 7 • CHROMA-WEAR for "nail polish" (U.S. Reg. No. 1597085,
8 cancelled in 1996); and
- 9 • KROMA BONDZ for skin care, hair care, and cosmetic products
10 (U.S. Reg. No. 2541170, cancelled in 2008).

11 Not all of these registrations and applications involve precisely
12 identical marks and some of the marks are not used on identical
13 products (such as REVLON CHROMA CHAMELEON and CHROMA-WEAR for nail
14 products). Nevertheless, they all involve similar enough marks used
15 on similar enough goods to support a conclusion that Chroma's marks
16 are inherently distinctive. In fact, the registration for KROMA on
17 cosmetics is particularly probative of suggestiveness because of its
18 similarity to Chroma's marks for cosmetics. See Lahoti, 586 F.3d at
19 1194, 1199 (noting the "strong similarity" between the registered
20 "Vericheck" mark for "check verification services" and the disputed
21 "VeriCheck" mark for "Check Verification and Check Collection
22 Services").

23 To rebut this evidence, Boldface cites several registrations –
24 all obtained by the company L'Oreal – for trademarks using the word
25 "chroma" for hair coloring and related hair products that either were
26 registered on the Supplemental Register or included a disclaimer¹⁵ for
27 the word "chroma," both of which would indicate that the PTO

28 ¹⁵See Trademark Manual of Examining Procedure ("TMEP") § 1213 ("A
disclaimer is a statement that the applicant or registrant does not
claim the exclusive right to use a specified element or elements of
the mark in a trademark application or registration. A disclaimer may
be included in an application as filed or may be added by amendment,
e.g., to comply with a requirement by the examining attorney.").

1 considered the word "chroma" descriptive for that category of
2 products. (Def.'s RJN, Ex. 1 at 42 (CHROMA PERFECT, U.S. Reg. No.
3 3125361, CHROMA disclaimed); id. at 47 (CHROMA REFLECT, U.S. Reg. No.
4 3025362, CHROMA disclaimed); id. at 56 (CHROMA GLOSS, U.S. Reg. No.
5 3497385, Supplemental Register); id. at 61 (CHROMA RICHE, U.S. Reg.
6 No. 3533396, CHROMA disclaimed); id. at 103 (CHROMA SENSITIVE, U.S.
7 Reg. No. 3930217, Supplemental Register); id. at 162 (CHROMA CRISTAL,
8 U.S. Reg. No. 3956949, CHROMA disclaimed); id. at 167 (CHROMA CARE,
9 U.S. Reg. No. 3996377, CHROMA disclaimed); id. at 322 (CHROMA PROTECT,
10 U.S. Reg. No. 3043475, CHROMA disclaimed).) As noted previously, for
11 three of these registrations (CHROMA SENSITIVE, CHROMA GLOSS, and
12 CHROMA REFLECT), the PTO explained that the word "chroma" means color
13 "purity" or "saturation," and that it was descriptive of hair coloring
14 and related products. (Thomas Supp. Decl. ¶ 7.)

15 These registrations are not strong evidence that the word
16 "chroma" is descriptive on cosmetics for at least two reasons. First,
17 there is some evidence to suggest that the PTO views the use of the
18 word "chroma" on cosmetics differently than on hair-care products.
19 For example, the PTO has not cited likely confusion with marks for
20 cosmetics as a reason for refusing to register any of the marks for
21 hair-care products with the word "chroma." (Thomas Supp. Decl. ¶ 6.)
22 See Lahoti, 586 F.3d at 1201 ("Whether a mark is suggestive or
23 descriptive 'can be determined only by reference to the goods or
24 services that it identifies.'").

25 Second, the PTO appears to have an inconsistent practice of
26 treating the word "chroma" as descriptive even within the category of
27 hair-care products. Chroma points to at least six additional
28 registrations and applications on the Principal Register using the

1 word "chroma" for similar hair-care products as to which the PTO did
2 not require either a disclaimer of the word "chroma" or require that
3 the registrations be included on the Supplemental Register. (Thomas
4 Decl. ¶ 4; Def.'s RJN, Ex. 1 at 122 (CHROMA LABS for hair color, hair
5 conditioners, hair gels, hair lotions, hair shampoo, and hair spray,
6 U.S. Reg. No. 3420241); id. at 224 (CHROMA PERFECT by L'Oreal for the
7 same categories as L'Oreal's other registrations, U.S. App. Ser. No.
8 85694590); id. at 246 (CHROMA-FIL for hair color, U.S. Reg. No.
9 1000025, expired 1995); id. at 252 & 257 (CLAIROL CHROMA for permanent
10 wave lotion and hair coloring preparations, U.S. Reg. No. 1159644,
11 canceled in 1988, and U.S. Reg. No. 1255733, canceled in 1990); id. at
12 279 (CHROMA-LOCK for hair color, U.S. Reg. No. 1864153, canceled in
13 2005).) This inconsistent practice is perhaps best exemplified by the
14 two identical applications for CHROMA PERFECT filed by the L'Oreal
15 company six years apart: the PTO required a disclaimer of "chroma" in
16 the first one but not in the second. (Compare Def.'s RJN, Ex. 1 at 42
17 with id. at 224.) In the end, the PTO's consistent treatment of the
18 word "chroma" on cosmetics as inherently distinctive carries far more
19 weight in this case than the PTO's inconsistent treatment of the word
20 "chroma" on hair-care products as merely descriptive.¹⁶

21
22 ¹⁶Adding yet another layer of complication, some applications and
23 registrations cover both cosmetics and hair-care products. (Def. RJN,
24 Ex. 1 at 80 (CHROMAVIS), 113 (CHROMASILK), 132 (CHROMABRIGHT), 149
25 LIPOCHROMAN), 184 (CHROMASYNC), 218 (CHROMA LUMINESCENT), 284 (KROMA
26 BONDZ), 306 (HYDROCHROMATIC), 316 (GAMMA CROMA).) Boldface cites
27 these registrations, as well as 1,182 active registrations for other
28 marks for both cosmetics and hair-care products (Mantell Supp. Decl.,
Ex. A), to argue that cosmetics and hair-care products are related and
therefore the PTO's treatment of the word "chroma" as descriptive of
hair-care products applies to cosmetics. But this evidence actually
shows the opposite – all the cited registrations including the word
"chroma" appear on the Principal Register with no disclaimers, so they
(continued...)

1 c. Conclusion on Validity

2 Chroma has demonstrated that the imagination test, the
3 competitors' needs test, and the records from the PTO all weigh in
4 favor of finding Chroma's marks inherently distinctive. Therefore,
5 Chroma will likely demonstrate that its Chroma marks are valid without
6 also showing that the marks have achieved secondary meaning.

7 2. Likelihood of Confusion

8 The touchstone of a Lanham Act claim is the likelihood of
9 consumer confusion, which "requires the factfinder to determine
10 whether a 'reasonably prudent consumer in the marketplace is likely to
11 be confused as to the origin of the good or service bearing one of the
12 marks.'" Survivor, 406 F.3d at 630. Likelihood of confusion is
13 determined by evaluating the familiar factors outlined in AMF Inc. v.
14 Sleekcraft Boats, 599 F.2d 341, 348-49 (9th Cir. 1979): (1) strength
15 of the marks; (2) relatedness of the goods; (3) similarity of the
16 marks; (4) evidence of actual confusion; (5) marketing channels; (6)
17 degree of consumer care; (7) defendant's intent in selecting the mark;
18 and (8) likelihood of expansion of the product lines. Survivor, 406
19 F.3d at 631. "[T]his eight-factor test for likelihood of confusion is
20 pliant," so the "relative importance of each individual factor will be
21 case-specific" and even a "subset of the factors" could demonstrate
22 likely confusion. Brookfield, 174 F.3d at 1054.

23 In this case, Chroma's claim is based on "reverse confusion,"
24 rather than the more common "forward confusion." The difference
25 between forward and reverse confusion turns on how consumers are

26
27 ¹⁶(...continued)
28 show that the PTO treats the word "chroma" as inherently distinctive
when used on both cosmetics and hair-care products.

1 potentially deceived as to source: "Forward confusion occurs when
2 customers believe that goods bearing the junior mark came from, or
3 were sponsored by, the senior mark holder," whereas "reverse confusion
4 occurs when consumers dealing with the senior mark holder believe that
5 they are doing business with the junior one." Survivor, 406 F.3d at
6 630 (citing Dreamwerks Prod. Group, Inc. v. SKG Studio, 142 F.3d 1127,
7 1129-30 & n.5 (9th Cir. 1998)). Claims of reverse confusion "protect
8 the small senior user from losing control over its identity in 'the
9 rising tide of publicity associated with the junior mark.'" Walter v.
10 Mattel, Inc., 210 F.3d 1108, 1110 (9th Cir. 2000). In the reverse
11 confusion context, the first three Sleekcraft factors are "pivotal."
12 Dreamwerks, 142 F.3d at 1130; Glow, 252 F. Supp. 2d at 986.

13 a. Strength of the Mark

14 "The stronger a mark – meaning the more likely it is to be
15 remembered and associated in the public mind with the mark's owner –
16 the greater the protection it is accorded by the trademark laws.'" Network Automation, Inc. v. Advanced Sys. Concepts, Inc., 638 F.3d
17 1137, 1149 (9th Cir. 2011). In assessing a mark's strength, the Court
18 must analyze both its "conceptual" and "commercial" strength. Id.
19 Conceptual strength involves classifying the mark on the spectrum of
20 distinctiveness, while commercial strength is based on "'actual
21 marketplace recognition,'" including advertising expenditures. Id.;
22 see also Glow, 252 F. Supp. 2d at 989 (noting that commercial strength
23 is evaluated in light of "any advertising or marketing campaign by the
24 junior user that has resulted in 'a saturation in the public awareness
25 of the junior user's mark.'"). In reverse confusion cases, the Court
26 evaluates the conceptual strength of the senior user, but for
27 commercial strength, "the focus is on the relative strengths of the
28

1 marks so as to gauge the ability of the junior user's marks to
2 overcome the senior user's mark." Visible Sys. Corp. v. Unisys Corp.,
3 551 F.3d 65, 74 (1st Cir. 2008).

4 As to conceptual strength, because Chroma's marks are suggestive,
5 they are inherently distinctive but conceptually weak. See
6 Brookfield, 174 F.3d at 1058 ("We have recognized that, unlike
7 arbitrary or fanciful marks which are typically strong, suggestive
8 marks are presumptively weak."); Glow, 252 F. Supp. 2d at 990.
9 Moreover, there are many third-party uses of the word "chroma" on
10 cosmetics and related beauty products, creating a "crowded field" that
11 greatly diminishes the strength of Chroma's marks as source-
12 identifiers and entitling those marks to a "very limited scope of
13 protection." See Glow, 252 F. Supp. 2d at 990-91 (finding suggestive
14 mark weak because it "competes in an exceedingly crowded field of
15 beauty products using the word 'glow' in some manner as a trade name
16 or trademark"); see also Miss World (UK) Ltd. v. Mrs. Am. Pageants,
17 Inc., 856 F.2d 1445, 1449 (9th Cir. 1988) ("'[A] mark which is hemmed
18 in on all sides by similar marks on similar goods cannot be very
19 "distinctive." It is merely one of a crowd of marks. In such a
20 crowd, customers will not likely be confused between any two of the
21 crowd and may have learned to carefully pick out one from the
22 other.'").

23 As to the parties' comparative commercial strength, the Chroma
24 marks are not commercially strong, whereas Boldface's marks are.
25 Chroma does not advertise in media, and instead relies on word-of-
26 mouth referrals. Although that might have created some recognition
27 among consumers, there is no evidence that this recognition is
28 widespread or strong for this reason. Chroma has annual sales of

1 approximately \$400,000 to \$550,000 (only 40% of which is from
2 products), which includes increasing sales between 2001 and 2007, and
3 then again between 2010 and 2012. But those sales are not presented
4 in context, so there is no way to gauge how much strength those sales
5 created in the cosmetics industry generally, or even in the high-end
6 cosmetics market specifically. See Glow, 252 F. Supp. 2d at 983
7 (“Whether a volume of sales is significant will vary with the product
8 and the market. The numbers that result in . . . relief in one case
9 may not be significant in another.”). On this record, Chroma has not
10 demonstrated that its marks are particularly strong commercially.

11 On the other hand, Boldface’s marks are backed by the
12 Kardashian’s nationwide fame, and Boldface’s product line has received
13 extensive nationwide media coverage, has been shown to millions of
14 viewers on an episode of the Kardashians’ reality television show, has
15 been promoted on each of the Kardashian sisters’ websites, and has its
16 own Facebook page with 52,000 “likes.” The products are now in
17 approximately 4,500 retail stores throughout the United States, and by
18 April 2013 the products will be available on Boldface’s website. And
19 this is just Boldface’s initial launch. Boldface’s “ability to
20 saturate the marketplace creates a potential that consumers will
21 assume that [Chroma’s] mark refers to [Boldface], and thus perceive
22 that the businesses are somehow associated.” Cohn v. Petsmart, Inc.,
23 281 F.3d 837, 842 (9th Cir. 2002).

24 While Boldface’s commercially strong mark generally weighs in
25 favor of likely confusion, this factor is mitigated by the conceptual
26 weakness of Chroma’s marks. See Glow, 252 F. Supp. 2d at 990 (finding
27 that the likelihood of overwhelming the senior user in the marketplace
28 was “offset” by the conceptual weakness of the senior user’s

1 suggestive mark in a crowded field of products). Given the number of
2 cosmetics and related beauty products that use the word "chroma," the
3 Court is not convinced that consumers who encounter Chroma's products
4 will automatically believe they are associated with Boldface's
5 products, even given Boldface's strong commercial presence. Id. at
6 991 ("The key question in such a case is whether consumers who
7 encounter [the senior user's] products will believe that they are
8 associated with defendants' [products]."). Thus, this factor is at
9 most neutral in the likelihood of confusion analysis.

10 b. Relatedness of the Goods

11 Under this factor, parties need not be direct competitors, but
12 the goods must be "reasonably thought by the buying public to come
13 from the same source if sold under the same mark." Rearden LLC v.
14 Rearden Commerce, Inc., 683 F.3d 1190, 1212 (9th Cir. 2012) (internal
15 quotation marks omitted). The ultimate question is whether customers
16 are "'likely to associate' the two product lines." Survivor, 406
17 F.3d at 633.

18 In this case, the parties sell similar cosmetics, and some of the
19 products are identical (such as mascara, lip sets, and eye shadow).
20 Although Chroma offers its products at a somewhat higher price point
21 than Boldface's products and does not offer products in mass
22 retailers, these differences are not significant enough that the
23 products should be viewed as completely unrelated. Cosmetics selling
24 at different price points are commonly sold at the same national
25 retail chains, including Ulta, where Boldface's products are sold, and
26 customers might buy some higher-end items and some lower-end items at
27 the same time. (Sobiesczyk Decl. ¶ 19.) Consumers also commonly see
28 both higher-end brands and lower-end brands from the same company.

1 (Rae Decl. ¶ 6.)

2 Boldface argues that the parties' products are not closely
3 related because Chroma's primary business is a "makeup studio," Chroma
4 provides its products with "expert consultation," and Chroma has
5 brick-and-mortar stores, whereas Boldface does not offer any services
6 and has no brick-and-mortar stores. But those differences are
7 irrelevant to whether the products are closely related. Here, that is
8 undeniably true, such that the buying public might reasonably believe
9 Chroma's products are from the same source as Boldface's products.

10 Boldface also argues that this factor weighs less heavily in
11 favor of finding likely confusion when "advertisements are clearly
12 labeled or consumers exercise a high degree of care" in purchasing
13 cosmetics, "because rather than being misled, the consumer would
14 merely be confronted with choices among similar products." Network
15 Automation, 638 F.3d at 1150. Under the circumstances, the Court
16 agrees. Purchasers of elite, high-end cosmetics likely exercise care
17 in their purchasing decisions and Chroma repeatedly emphasizes the
18 elite nature of its higher-priced products and services, which are
19 primarily offered for sale in Chroma's boutique stores. Further,
20 Boldface's products, advertising, and promotional materials are
21 conspicuously labeled with Boldface's full mark KHROMA BEAUTY BY
22 KOURTNEY, KIM AND KHLOE and in connection with the Kardashians' names,
23 images, and likenesses (Ostoya Decl. ¶ 15), such that consumers more
24 likely choose among competitors, rather than experience confusion as
25 to the source of the products. Given these mitigating facts, the
26 factor of relatedness of the goods weighs only slightly in favor of
27 finding a likelihood of confusion.

28

1 c. Similarity of the Marks

2 “The more similar the marks in terms of appearance, sound, and
3 meaning, the greater the likelihood of confusion.” Network
4 Automation, 638 F.3d at 1150. In evaluating appearance, sound, and
5 meaning, the Court follows three “axioms”: “first, the marks must be
6 considered in their entirety and as they appear in the marketplace;
7 second, similarity is adjudged in terms of appearance, sound, and
8 meaning; and third, similarities are weighed more heavily than
9 differences.” GoTo.com, Inc. v. Walt Disney Co., 202 F.3d 1199, 1206
10 (9th Cir. 2000).

11 Meaning. Chroma claims that CHROMA and KHROMA have the same
12 meaning, derived from ancient Greek to mean “color.” Boldface does
13 not respond to this point, so the Court will treat their meaning as
14 identical and weigh this subfactor in favor of likely confusion.

15 Sound. The words CHROMA and KHROMA sound identical, despite the
16 different spelling. See Surfivor, 406 F.3d at 633 (treating
17 “survivor” and “surfivor” as phonetically “nearly identical”).
18 Although each parties’ marks include other surrounding words, those
19 words may not always be spoken together with the words CHROMA and
20 KHROMA, especially in this case, where Chroma relies exclusively on
21 word-of-mouth for its advertising. See Sleekcraft, 599 F.2d at 351
22 (“Sound is also important because reputation is often conveyed word-
23 of-mouth.”).¹⁷ This subfactor weighs in favor of finding likely

24
25 ¹⁷Chroma claims that the Kardashians and the public refer to
26 Boldface’s product line simply as KHROMA, so the marks sound alike,
27 despite any other words the parties may use. (Sobiesczyk Decl. ¶ 25;
28 Sobiesczyk Reply Decl. ¶ 3.) See Rearden, 683 F.3d at 1212 (finding
fact that defendant referred to itself as simply “Rearden” weighed in
favor of likely confusion). This claim is based entirely on a

(continued...)

1 confusion.

2 Sight. As the marks are used in the marketplace, they most often
3 appear dissimilar to consumers. Chroma's marks include CHROMA, CHROMA
4 COLOUR, CHROMA MAKEUP STUDIO, and CHROMA MAKEUP STUDIO along with a
5 "C" design, and Chroma's CHROMA is written with some letters larger
6 than others, whereas Boldface's KHROMA is written with uniformly sized
7 letters in a distinctive font and Boldface's products all bear the
8 full mark KHROMA BEAUTY BY KOURTNEY, KIM AND KHLOE, and appear
9 alongside the Kardashians' names, images, and likenesses. See
10 Entrepreneur, 279 F.3d at 1145 (finding that "Entrepreneur" and
11 "Entrepreneur Illustrated" appeared different in text given the
12 addition of "an entire four-syllable word" that made one mark "twice
13 as long – to the eye and the ear" as the other). On the other hand,
14 as noted supra n.17, sometimes the marks are referred to in writing
15 simply as "KHROMA" and some retailers occasionally use the word
16 "KHROMA" to identify Boldface's products online without referring to
17 the Kardashians or showing Boldface's entire logo. (Sobiesczyk Decl.
18 ¶¶ 22–25, Exs. 11–13.)

19 Chroma argues that the Court should strip away generic and
20 descriptive words from the parties' marks, such as MAKEUP STUDIO,
21 BEAUTY, and KOURTNEY, KIM AND KHLOE, and examine only the "dominant"
22 words CHROMA and KHROMA for visual similarity. That approach is

23 _____
24 ¹⁷(...continued)
25 paralegal's declaration, which is in turn based upon only written
26 evidence, i.e., websites where KHROMA BEAUTY products are sold,
27 comments on KHROMA BEAUTY's facebook page, Kim Kardashian's blog
28 entries, and written press coverage. Although this is not direct
evidence of how the marks "sound," the Court may infer from the use of
the word "KHROMA" in writing that the Kardashians and the public
likely use the word "KHROMA" alone when speaking about Boldface's
products.

1 contrary to the Ninth Circuit's dictate to look at the marks as a
2 whole and as they appear in the marketplace. See GoTo.com, 202 F.3d
3 at 1206. Even if the Court stripped away all other words except
4 CHROMA and KHROMA or considered only those instances in which
5 Boldface's products are simply referred to as "KHROMA," the two words
6 are still spelled differently, with Boldface replacing the "C" with a
7 "K" to associate the brand with the Kardashians, who tend to create
8 brands by replacing "C" words with a "K." (Mot. 15.) But see
9 Dreamwerks, 142 F.3d at 1131 (expressing uncertainty that
10 "substituting one vowel for another and capitalizing a middle
11 consonant dispels the similarity between the marks.") That spelling
12 change also appears with the Kardashian's names, images, and
13 likenesses on all packaging.¹⁸

14 In some reverse confusion cases, the addition of a "house mark"
15 may aggravate, rather than mitigate, confusion by enhancing the risk
16 that consumers would associate the plaintiff's products with the
17 defendant. See Glow, 252 F. Supp. 2d at 995. But see Cohn, 281 F.3d
18 at 842 (noting in reverse confusion case that the "emphasis on []
19 housemarks 'has the potential to reduce or eliminate likelihood of
20 confusion.'"). At this stage, there is no evidence to suggest that
21 consumers would more likely associate Chroma's products with Boldface

23 ¹⁸Chroma claims that Boldface undermined its argument that the
24 marks in this case are visually dissimilar because, in the Lee
25 Tillett, Inc., complaint, Boldface alleged that KROMA "is simply a
26 phonetic and misspelled equivalent of the term CHROMA." (Tillett
27 Compl. ¶ 41.) But that allegation was made in the context of
28 Boldface's allegations that KROMA was a descriptive or generic term
meaning "color," and Tillett's misspelling of it still meant "color."
(Id. ¶ 44.) Therefore, Boldface's position in that lawsuit is not
necessarily inconsistent with its position here in the context of
likelihood of confusion.

1 through the addition of the Kardashians' names and images on
2 Boldface's products. At most, then, the use of the Kardashians' names
3 and images is inconclusive on the issue of visual similarity. Thus,
4 given that the word "KHROMA" occasionally appears standing alone, the
5 visual similarity subfactor weighs slightly in favor of a likelihood
6 of confusion.

7 In sum, the overall similarity factor weighs slightly in favor of
8 finding a likelihood of confusion – the marks sound identical and have
9 the same meaning, and they sometimes appear similar in the
10 marketplace.

11 d. Actual Confusion

12 Although not required, "actual confusion among significant
13 numbers of consumers provides strong support for the likelihood of
14 confusion.'" Network Automation, 638 F.3d at 1151. Chroma cites more
15 than 50 purported instances of actual confusion. As explained below,
16 at most, seven of those instances demonstrate actual confusion, which
17 still strongly supports finding likely confusion.¹⁹

18 The vast majority of Chroma's evidence of actual confusion does
19

20 ¹⁹The Court can quickly dispose of several of Boldface's
21 arguments under this factor. First, statements by customers that they
22 were confused are not barred as hearsay because they fall within the
23 state-of-mind exception to the hearsay rule. See Lahoti v. Vericheck,
24 Inc., 636 F.3d 501, 509 (9th Cir. 2011). Second, Boldface points out
25 that all but 11 instances of actual confusion occurred after October
26 29, 2012, when Chroma posted a notice on its website that it was not
27 related to the Kardashians' products and urging customers to "voice
28 your support for Chroma Makeup Studio's defense of its reputation and
primary brand by spreading this message through social media." (Opp.
18–19.) Boldface argues that this message "invited" the comments
Chroma offers as evidence of actual confusion and the Court should
discount the evidence for that reason. But there is nothing to
suggest that the seven customer comments the Court considers probative
of actual confusion came in response to Chroma's message or were
otherwise invited by Chroma.

1 not show any confusion at all; to the contrary, these comments reflect
2 a clear understanding of the difference between the sources of
3 Chroma's and Boldface's products. For example, many comments by
4 current customers expressed concern that non-purchasers may be
5 confused into believing that the customers use Boldface's makeup and
6 not Chroma's makeup. (Rey Decl., Ex. 2, Entry Nos. 3, 11, 18–20, 24,
7 27, 29, 30, 32, 37, 38, 41, 43–47; Rey Reply Decl., Ex. 3.) Not only
8 do these customers understand the difference between the parties'
9 products, but they are simply stating their own opinions on the legal
10 issue in this case – whether there is a likelihood of confusion –
11 which are not probative for that purpose. Chroma also cites comments
12 by customers it claims show confusion as to source or affiliation, but
13 those comments also demonstrate that the individuals understood that
14 the products were not affiliated and came from different sources.
15 (Rey Decl., Ex. 2, Entry Nos. 42, 48; Rey Reply Decl., Ex. 5.) The
16 Court has reviewed the rest of the comments cited by Chroma and, with
17 the exception of the instances discussed below, they do not show
18 actual confusion. (Rey Decl., Ex. 2, Entry Nos. 1, 2, 4–7, 9, 10,
19 12–16, 21, 22, 25, 26, 28, 31, 33, 36, 39; Rey Reply Decl., Exs. 2,
20 4.)

21 Chroma cites seven comments that show actual consumer confusion
22 between the source or affiliation of the parties' products:

- 23 • A user commented on Chroma's Facebook page, "I am
24 embarrassed to say I was channel surfing and I saw the
25 episode where they were talking about their make up line and
26 I thought, 'Wow, Lisa is in business with them?'" (Rey
27 Decl., Ex. 2, Entry No. 17.)
- 28 • A customer said in an email, "So I heard from a friend of a
friend that Chroma was coming out with a line of products at
CVS? Is that true? I am so confused – that doesn't really
seem like your/Michael's style . . . Is the line going to
have all the same products?" (Id., Entry No. 23.)

- 1 • A customer said she was "very upset at the confusion" and
2 she "had hoped it was something good happening for Chroma
3 when she heard what she thought was that Chroma expanding
4 into so many new stores. She found out from Lisa Casino
5 today that it is not CHROMA but actually KHROMA products
6 that are going to be carried by all of those stores." (Id.,
7 Entry No. 34.)
- 8 • A customer commented that she saw the news about KHROMA and
9 thought "there must be some mistake"; she said she was "very
10 confused." (Id., Entry No. 35.)
- 11 • Two people contacted Chroma asking whether Chroma carried
12 KHROMA faux eyelashes. (Id., Entry Nos. 49, 50.)
- 13 • A customer commented on Chroma's Facebook page, "Are you
14 working now with the Kardashians and the Khroma line? It
15 seems to be a lower end line perhaps? I'm confused . . .
16 did not know you were doing this??" (Rey Reply Decl., Ex.
17 2.)²⁰

18 Boldface's KHROMA BEAUTY product launch is in its early stages,
19 and yet Chroma has been able to show actual confusion has already
20 occurred in the marketplace. Given that the Ninth Circuit has
21 completely discounted the lack of evidence of actual confusion at the
22 preliminary injunction stage, a showing of actual confusion here
23 weighs heavily in favor of finding a likelihood of confusion. See

24 ²⁰Chroma cites three other comments that arguably show actual
25 confusion: a customer said her daughter told her she had heard that
26 Chroma was going into a lot of stores like CVS and that she thought
27 maybe she could get the Lip Veneer she loves, but did not realize that
28 the products being offered at CVS are KHROMA BEAUTY products (Rey
Decl., Ex. 2, Entry No. 40); a hairstylist said to Chroma, "My clients
that we share are tripping out and a little confused about the
Kardashians makeup line. They think it[']s yours, and it's so cheap."
(Rey Reply Decl., Ex. 1); and someone commented on Kim Kardashian's
Facebook page, "you STOLE the brand name and got my mom confused from
the good one in BEVERLY HILLS!" (Rey Reply Decl., Ex. 6). These
comments are hearsay not within the state-of-mind exception because
they are being offered to prove the facts asserted – that the
customer, the hairdresser, and the individual commenting on Facebook
observed others being confused about the parties' products. Although
the Court can consider hearsay evidence at the preliminary injunction
stage, Flynt Distrib. Co. v. Harvey, 734 F.2d 1389, 1394 (9th Cir.
1984), these hearsay statements have little probative value without
other indicia of reliability.

1 Network Automation, 638 F.3d at 1151; GoTo.com, 202 F.3d at 1208.

2 e. Overlapping Marketing Channels

3 “Convergent marketing channels increase the likelihood of
4 confusion.” Network Automation, 638 F.3d at 1151. Here, there is
5 some overlap between the parties’ marketing channels, which weighs
6 somewhat in favor of a likelihood of confusion. Although the parties
7 target different segments of the cosmetics market – Chroma’s higher-
8 end products are sold through its stores and through its own website,
9 while Boldface’s products are lower-priced and sold in retail store
10 chains – both parties’ products have been featured in the same fashion
11 magazines. The fact that both parties sell products online adds
12 little weight to this factor. See id. (noting that “the shared use of
13 a ubiquitous marketing channel” like the internet “does not shed much
14 light on the likelihood of consumer confusion”).

15 f. Degree of Customer Care

16 Low consumer care increases the likelihood of confusion. Id. at
17 1152. This factor focuses on the nature, cost, and marketing channels
18 of the goods at issue. Id. As touched on above, this factor weighs
19 against a likelihood of confusion because, as Chroma admits, its
20 clients are “sophisticated and exercise care” in selecting Chroma’s
21 elite, higher-priced products and services. (Reply 19.) While Chroma
22 argues that the sophistication of its clients has no bearing on the
23 sophistication of non-purchasers, it cites nothing to support this
24 point. To the contrary, “[i]n assessing the likelihood of confusion
25 to the public, the standard used by the courts is the typical buyer
26 exercising ordinary caution[.]” Network Automation, 638 F.3d at 1152
27 (emphasis added). For cosmetics, the typical buyer would likely take
28 great care when choosing between higher-priced, elite cosmetics like

1 Chroma's and lower-priced mass-marketing retail cosmetics like
2 Boldface's.

3 g. Intent

4 The intent factor carries only minimal weight because "'an intent
5 to confuse customers is not required for a finding of trademark
6 infringement.'" GoTo.com, 202 F.3d at 1208. Boldface's principals
7 identified the mark KHROMA BEAUTY and then their attorneys conducted a
8 search revealing Chroma's use of the word "chroma" on cosmetics among
9 many third-party uses. Boldface believed that these uses rendered the
10 mark generic or merely descriptive, leaving Boldface free to use it on
11 their KHROMA BEAUTY products. Although the Court has found that
12 Chroma's marks are suggestive on cosmetics, Boldface's position was at
13 least arguable. Given that Boldface's intent appears to be innocent,
14 this factor is neutral. See id. (finding the lack of intent to copy
15 "prove[d] nothing since no such intent is necessary to demonstrate a
16 likelihood of confusion"); M2 Software, Inc. v. Madacy Entm't Corp.,
17 421 F.3d 1073, 1085 (9th Cir. 2005) (finding no ill intent from
18 knowledge of mark and attempt to "carve out" a non-infringing mark).

19 h. Expansion of Product Lines

20 The expansion of product lines factor does not carry much weight
21 here because the parties already directly compete to some extent. See
22 Network Automation, 638 F.3d at 1153 (finding expansion factor
23 "unimportant" because parties already directly competed). To the
24 extent Chroma argues that Boldface has thwarted its opportunities to
25 branch into upscale mass retailers, which might result in further
26 direct competition, the evidence does not support this conclusion.
27 Chroma has not offered evidence of any concrete efforts over the last
28 twelve years to significantly expand its business into mass retailers,

1 other than recent discussions with one potential licensing partner.
2 That is not sufficient to show a "strong possibility of expansion
3 into competing markets.'" M2 Software, 421 F.3d at 1085 (emphasis in
4 original); Surfvivor, 406 F.3d at 634 (finding speculation of
5 expansion insufficient to support likely confusion). Therefore, this
6 factor has little impact on the likelihood of confusion.

7 i. Summary of Sleekcraft Factors

8 An overall evaluation of the Sleekcraft factors in this case
9 demonstrates that a factfinder would likely find a likelihood of
10 confusion here. Seven of the eight factors, including the three most
11 important factors in the reverse confusion context, do not
12 significantly assist Chroma: the strength of the mark factor is
13 neutral; the relatedness of the goods and similarity of the marks
14 factors weigh only slightly in Chroma's favor; the overlapping
15 marketing channels factor weighs only slightly in favor of Chroma; the
16 expansion of product lines factor has little impact; and the degree of
17 customer care factor weighs against Chroma. But the final factor –
18 actual confusion – supports finding likely confusion, given that
19 Boldface's products have only been on the market for a short time,
20 which is enough to tip the balance in Chroma's favor.

21 3. Scope of Chroma's Rights

22 As part of the merits analysis of a common law trademark
23 infringement claim, a court must also consider the territorial scope
24 of the plaintiff's common law rights. See Glow, 252 F. Supp. 2d at
25 983. The scope of the plaintiff's rights is measured by "legally
26 sufficient market penetration," which is determined by looking at "the
27 trademark user's volume of sales and growth trends, the number of
28 persons buying the trademarked product in relation to the number of

1 potential purchasers, and the amount of advertising." Id. (citing,
2 inter alia, Adray v. Adry-Mart, Inc., 76 F.3d 984, 989 (9th Cir. 1996)
3 and Natural Footwear, Ltd. v. Hart, Schaffner & Marx, 760 F.2d 1383,
4 1398–99 (3d Cir. 1985)).²¹

5 To establish trademark rights, market penetration must be more
6 than de minimus, but it need not be overwhelming; it is enough to show
7 "market penetration that is significant enough to pose the real
8 likelihood of confusion among consumers in that area." Lucent Info.
9 Mgmt., Inc. v. Lucent Techs., Inc., 186 F.3d 311, 317 (3d Cir. 1999)
10 (internal quotation marks omitted). In Glow, for example, the court
11 held that the plaintiff had not established common law rights in any
12 territory because it offered no specific evidence of sales volume or
13 advertising in any location. Glow, 252 F. Supp. 2d at 985. Likewise,
14 in Lucent, the court found insufficient market penetration in any
15 market based on one sale of \$323.50; the absence of evidence of growth
16 trends; the "minute" ratio of existing and potential customers; the
17 lack of advertising; and the small number of sales presentations.
18 Lucent, 186 F.3d at 317.

19 Here, as the parties have framed the issue, the scope of
20

21 ²¹The Court agrees with the parties that the Tea Rose–Rectanus
22 doctrine does not apply because this case does not involve two
23 geographically remote users of a mark expanding into each other's
24 territory. See 5 J. Thomas McCarthy, McCarthy On Trademarks & Unfair
25 Competition § 26:1 (4th ed. 2012). However, the Court disagrees with
26 Chroma's assertion that the "market penetration" test does not apply –
27 that inquiry creates the territorial boundaries of Chroma's common law
28 rights, as in this case, where the claimed senior user (Chroma)
asserts common law rights against a junior user with rights stemming
from a federal application for registration (Boldface). See Lucent
Info. Mgmt., Inc. v. Lucent Techs., Inc., 186 F.3d 311, 316 (3d Cir.
1999) (internal quotation marks omitted); Allard Enters., Inc. v.
Advanced Programming Resources, Inc., 249 F.3d 564, 573–75 (6th Cir.
2001).

1 Chroma's territorial rights is properly defined by three possible
2 areas: nationwide; Los Angeles County; or nowhere. At oral argument,
3 the Court tentatively decided that, based on Chroma's evidence, none
4 of these formulations was correct, and that Chroma had shown that it
5 had established common law rights at most in only three zip codes in
6 Beverly Hills and one zip code in Encino, all of which surround
7 Chroma's two physical locations. The Court permitted Chroma to submit
8 additional evidence that might support an expanded area of market
9 penetration. Chroma submitted a list of customers divided by zip code
10 and argued for market penetration in all zip codes in Los Angeles
11 County in which it had more than six customers. (Pl.'s Supp. Mem. 3;
12 Casino 2d Supp. Decl., Ex. 1.) Upon review of the record, the Court
13 concludes that Chroma has not achieved nationwide or county-wide
14 market penetration, but that it has established common law rights in
15 the geographic areas surrounding Beverly Hills and Encino identified
16 below.

17 Volume of Sales and Customers. In assessing the volume of sales
18 and growth trends, the Court must look at each area individually.
19 Natural Footwear, 760 F.2d at 1399. The Court must also consider the
20 price of the products because revenue from lower-priced products has
21 more significant market impact than the same revenue from higher-
22 priced goods. See id. at 1399 n.35 ("Sales of \$10,000 in a given area
23 are likely to represent more significant market penetration in that
24 area if the product is candy, than if the product is an automobile.").
25 Moreover, "the proper evaluation of market penetration should normally
26 include a comparison of the number of actual customers of the
27 trademarked product with the number of people in the market for the
28 product, rather than with the population of a given area." Id. at

1 1399.

2 Chroma has submitted only generalized evidence of sales and
3 customers. Chroma's annual product sales were roughly 40% of its
4 total sales, or \$160,000 to \$220,000 per year²², but Chroma only
5 segregates those numbers at the state level, and even then it only
6 notes that 97.5% of those sales took place in California. The average
7 price of Chroma's products is \$44 (Sobiesczyk Decl. ¶ 26), so Chroma
8 has sold roughly between 3600 and 5000 units, almost exclusively in
9 California.

10 As for customers, Chroma submits evidence that it serves
11 approximately 1,000 customers per month at its retail locations (900
12 in Beverly Hills and 100 in Encino (Casino Supp. Decl. ¶ 3)), and
13 although Chroma does not indicate what portion of those customers buy
14 products, Chroma suggests that customers for services typically
15 purchase products as well. (Rey Reply Decl. ¶ 15.) Moreover, Chroma
16 has submitted its mailing lists, indicating that it has customers for
17 its products in 44 states. (Casino Supp. Decl., Ex. 3.) Of those,
18 967, or 71.6%, are in California; the next closest is New York, with
19 76, and the other 42 states range from one to 24. (Id. ¶ 7.) Of the
20 customers in California, 77.8%, or 754, are located in Los Angeles
21 County, 72 in Orange County, 35 in Ventura County, 21 in San Diego
22 County, and no more than 8 in other counties. (Id. ¶ 7, Ex. 2.)
23 Using these proportions to calculate product sales in Los Angeles
24 County, it appears that Chroma's sales in Los Angeles County may be
25 roughly between \$124,480 and \$171,160, and between 2829 and 3890 units

26
27 ²²As noted previously, see supra n.5, Chroma presented
28 inconsistent numbers in its supplemental brief and in Rey's Reply
Declaration. The Court accepts the numbers set forth in Rey's Reply
Declaration.

1 (77.8% of California sales).²³

2 Chroma has further segregated its mailing list by zip code,
3 providing the number of clients in each zip code area of Los Angeles
4 County to argue that it has achieved market penetration in at least
5 the areas in Los Angeles County in which it has six or more customers.
6 (Pl.'s Supp. Mem. 1-2.) Chroma further notes that these numbers
7 underestimate its total customers by about 35% because Chroma does not
8 have address data for all its customers, although that assertion is
9 not supported by any evidence. (Casino 2d Supp. Decl. ¶ 2.)
10 Moreover, Chroma does not identify what proportion of those clients
11 purchase services only, as opposed to products or both products and
12 services.

13 Despite these limitations, the Court has set forth in Appendix C
14 the zip codes in which Chroma claims six or more clients. Using those
15 numbers as a proxy for sales, the Court has extrapolated the
16 proportion of sales in dollars and units per zip code. The result is
17 that no one zip code area contains more than 10% of Chroma's clients;
18 for Brentwood, which has the highest number of clients at 71, the
19 proportionate sales volume is 9.42% of all sales in Los Angeles
20 County, or between \$11,721.59 and \$16,117.19, and between 266 and 366
21 units. Every other zip contains a lesser proportion from 8.22%
22 (Pacific Palisades with 62 clients) to .80% (areas with 6 clients).

23 Boldface attacks Chroma's customer evidence by comparing the
24 number of customers in each zip code to the total population of that
25 zip code, which unsurprisingly results in very low proportions of
26

27 ²³Obviously the number of clients is not a perfect proxy for
28 product sales, given that only 71.6% of Chroma's clients are in
California but 97.5% of its sales occur here.

1 customers to population (between .01% and .34%). (Fairfax Decl.,
2 Ex. 1.) But in determining market penetration, the proper approach
3 is not to compare the number of customers to the total population in
4 a given area, but to compare the number of actual customers of
5 Chroma's products to the number of people in the market for that
6 product. See Natural Footwear, 760 F.2d at 1399.

7 Chroma has not provided specific evidence of the number of
8 people in the market for its products in any area, whether
9 nationwide, in all of Los Angeles County, or in any area of Los
10 Angeles County. The Court does not necessarily expect Chroma to
11 have that evidence at this early stage of the litigation. The Court
12 generally agrees with Chroma that the market for high-end cosmetics
13 is probably relatively small, but that market could still be large
14 if considered nationwide or over a territory as large as Los Angeles
15 County. In the areas surrounding the retail stores in Beverly Hills
16 and Encino, the market for high-end cosmetics is likely concentrated
17 and competitive, as shown by the existence of Chroma's four direct
18 competitors in Beverly Hills, suggesting that even in the localized
19 market of high-end cosmetics, Chroma's share of potential customers
20 may be limited. (Casino Supp. Decl. ¶ 4.)²⁴

21
22 ²⁴As purely a hypothetical exercise, if the Court were to assume
23 that 10% of the population in any zip code area is the relevant
24 market, then Chroma's market penetration based on customers in any
25 single zip code area is less than 3%; if 5% of the population is the
26 relevant market, then Chroma's market penetration in any single area
27 is less than 7%; and if 1% of the population is the relevant market,
28 then Chroma's market penetration in some zip codes is as high as 34%.
(See Appendix D for a chart of these calculations.) These
calculations, of course, are arbitrary, given that Chroma has offered
no evidence as to the actual size of the high-end cosmetics market.
They also probably understate Chroma's market share by about half
because the relevant market is likely comprised of almost all women,

(continued...)

1 The Court has also considered not only the numbers of Chroma's
2 customers in each zip code, but also the geographic distribution of
3 those customers, which reveals that Chroma's customers – and as a
4 result, Chroma's market recognition – are geographically
5 concentrated in the contiguous areas of Beverly Hills, Encino, Santa
6 Monica, Pacific Palisades, and the surrounding areas, identified by
7 the following zip codes: 90049; 90272; 90024; 90064; 90046; 90210;
8 90025; 90402; 90066; 90048; 90035; 90405; 90069; 90077; 90292;
9 90212; 90403; 90036; 91356; 91604; 91403; 91423; 91436; 90067;
10 91316; 90211; and 90292.²⁵ As set forth in Appendix C, the Court
11 has calculated that over 93% of Chroma's total customers, and
12 extrapolated from that number, 93% of Chroma's total product sales,
13 are concentrated in these areas. Given that the market is generally
14 relatively small and Chroma has a credible number of customers in
15 this contiguous area, this evidence supports market penetration in
16 these locations.

17 Growth Trends. Chroma has also shown an inconsistent but
18 rising growth trend: from the years 2000 to 2007, Chroma's revenue
19 increased from \$61,000 to over \$550,000, then decreased by more than
20 \$100,000 by 2009, and has begun increasing again through 2012,
21 albeit still not to its peak in 2007. (Casino Supp. Decl., Ex. 1.)
22 But again, Chroma has not identified any growth trend specific to

23
24 ²⁴(...continued)
which would be roughly half of the total population in any given area.

25
26 ²⁵Chroma does not have more than six clients in four other small
zip code areas that fall entirely within this geographic area: 90095
27 (0 clients), 90401 (3 clients), 90404 (4 clients), and 90291 (0
clients). Even so, Chroma's market penetration has likely reached
28 into these areas, given that they are each completely surrounded by
other areas with concentrations of Chroma's clients.

1 Los Angeles County. Without contextual evidence, the growth trends
2 factor does not demonstrate market penetration in any particular
3 area.

4 Advertising. While Chroma's products and services have been
5 featured in some national and local magazines, Chroma relies
6 exclusively on word-of-mouth promotion. Even assuming word-of-mouth
7 promotion generally creates recognition among consumers, Chroma has
8 only offered evidence that it has assisted in penetrating the market
9 in the Los Angeles area. (Rae Russell Supp. Decl. ¶ 3.)

10 Importantly, Los Angeles County is comprised of 4,084 square miles
11 with a population of more than ten million. See www.lacounty.gov
12 (Government tab, Geography tab, LAC Geography & Statistics Details
13 tab). There is no specific evidence that Chroma's word-of-mouth
14 promotion has reached into areas as far north as Lancaster, as far
15 south as Long Beach, or as far east as Pomona; the Court cannot
16 conclude consumers in all areas of Los Angeles County have even been
17 exposed to Chroma's products, let alone that they would likely be
18 confused between Chroma's and Boldface's products. Thus, word-of-
19 mouth promotion might have helped create some localized market
20 penetration surrounding Chroma's retail locations, but it does not
21 demonstrate market penetration beyond those areas.

22 In sum, Chroma has shown a likelihood of establishing common
23 law rights in Beverly Hills and Encino and the surrounding areas,
24 including the following zip codes: 90049; 90272; 90024; 90064;
25 90046; 90210; 90025; 90402; 90066; 90048; 90035; 90405; 90069;
26 90077; 90292; 90212; 90403; 90036; 91356; 91604; 91403; 91423;
27 91436; 90067; 91316; 90211; and 90292; as well as in 90095, 90401,
28 90404, and 90291.

1 4. Conclusion on the Merits

2 Under the circumstances, Chroma has demonstrated a likelihood
3 of prevailing on the merits: it will likely prevail on the issues of
4 validity and likelihood of confusion and that it has common law
5 trademark rights in Beverly Hills and Encino and the surrounding
6 areas as identified supra.

7 **B. Likelihood of Irreparable Harm**

8 Chroma argues that irreparable harm may be presumed from its
9 showing of likelihood of success on its trademark infringement
10 claims. That proposition is doubtful following the Supreme Court's
11 decisions in eBay inc. v. MercExchange, L.L.C., 547 U.S. 388 (2006)
12 and Winter v. Natural Resources Defense Council, Inc., 555 U.S. 7
13 (2008). Cf. Flexible Lifeline Sys., Inc. v. Precision Lift, Inc.,
14 654 F.3d 989, 994-95 (9th Cir. 2011) (per curiam) (rejecting long-
15 standing rule presuming irreparable harm from a likelihood of
16 prevailing on the merits of a copyright infringement claim in light
17 of eBay and Winter). But see Marlyn Nutraceuticals, Inc. v. Mucos
18 Pharma GmbH & Co., 571 F.3d 873, 877 (9th Cir. 2009) (accepting the
19 presumption of irreparable harm upon a showing of trademark
20 infringement without analysis). The Court need not decide whether a
21 presumption of irreparable harm still exists in trademark cases
22 because Chroma has shown actual irreparable harm here.

23 Chroma has demonstrated that it has lost business and goodwill
24 due to Boldface's use of the KHROMA BEAUTY mark and that it is at
25 significant risk of being overwhelmed as Boldface rolls out the
26 KHROMA BEAUTY product line. See Stuhlberg Int'l Sales Co. v. John
27 D. Brush & Co., 240 F.3d 832, 841 (9th Cir. 2001) (finding loss of
28 customers and goodwill created irreparable harm). As the Court

1 found above, customers are already confused and will likely continue
2 to be confused as to whether Chroma's products are associated with
3 Boldface's products; customers and employees are fearful that others
4 might associate their use of Chroma's products with the Kardashians,
5 which may result in loss of business to Chroma; and Chroma has lost
6 some customer referrals from a prominent branding consultant due to
7 the association between Chroma and the Kardashians. There is a
8 significant risk of likely irreparable harm to Chroma's reputation
9 and goodwill.

10 **C. Public Interest**

11 The public interest favors a limited injunction to prevent
12 likely confusion in the geographically limited areas outlined above.
13 See Mattel, Inc. v. MCA Records, Inc., 296 F.3d 894, 905 (9th Cir.
14 2002). This is particularly true in this case because Chroma has
15 presented evidence that confusion is already occurring, suggesting
16 it will continue to occur absent an injunction.

17 **D. Balance of Hardships**

18 Even if Chroma has shown it will likely prevail on the merits
19 of its claim, "an injunction is a matter of equitable discretion; it
20 does not follow from success on the merits as a matter of course."
21 Winter, 555 U.S. at 32. Instead, "[a] preliminary injunction is an
22 extraordinary remedy never awarded as of right" and the Court "'must
23 balance the competing claims of injury and must consider the effect
24 on each party of the granting or withholding of the requested
25 relief.'" Id. at 24. In trademark infringement cases, "a court
26 must consider the impact granting or denying a motion for a
27 preliminary injunction will have on the respective enterprises.
28 Thus the relative size and strength of each enterprise may be

1 pertinent to this inquiry." Int'l Jensen, Inc. v. Metrosound
2 U.S.A., Inc., 4 F.3d 819, 827 (9th Cir. 1993).

3 This case presents a unique challenge in assessing the harms at
4 stake: Chroma has demonstrated a likelihood that it will prove it
5 has a valid trademark that has been infringed, that it will be
6 irreparably harmed absent an injunction, and that the public
7 interest weighs in its favor, but all of those considerations are
8 limited by the fact that Chroma's rights only extend to a
9 circumscribed geographic area in metropolitan Los Angeles. As a
10 result, any injunction must be tailored to protect those rights.
11 See Stormans, Inc. v. Selecky, 586 F.3d 1109, 1119 (9th Cir. 2009).
12 On the other hand, Boldface has offered substantial evidence that
13 enjoining infringement in the area in which Chroma has shown common
14 law rights will have a devastating impact on the nationwide roll-out
15 of the KHROMA BEAUTY products, far beyond the area in which Chroma
16 has common law trademark rights. On balance, the equities strongly
17 tip against any injunction in this case.

18 Boldface offered evidence that it has already placed
19 substantial amounts of KHROMA BEAUTY products with national mass
20 retailers, and those retailers have already transmitted "planograms"
21 to their stores to ensure that each store's display has the same
22 look and feel. (Ostoya Supp. Decl. ¶ 2.) Yet, should even a
23 limited injunction issue, Boldface's factoring and inventory
24 financing partner has stated that it may continue to hold funds or
25 refuse to fund the inventory needed to fulfill Boldface's retail
26 orders, which is in the millions of dollars. (Ostoya 2d Supp. Decl.
27 ¶ 10.) QVC has indicated that it would likely not accept KHROMA
28 BEAUTY products at all if any injunction issues, depriving it of a

1 business opportunity worth millions of dollars. (Id. ¶ 11.) And
2 Boldface offers evidence that CVS, Ulta, and other retail partners,
3 will decline to distribute KHROMA BEAUTY products entirely if even a
4 limited injunction issues because those retailers would rather
5 cancel sales than risk a negative perception among their customers.
6 (Crames Decl. ¶ 7–10.)

7 Moreover, although at oral argument the Court suggested terms
8 for an injunction similar to the terms proposed by Chroma, upon
9 further briefing from the parties, it is clear that those terms are
10 unworkable. For example, the Court proposed that Boldface include a
11 disclaimer on all nationwide printed material clarifying that Chroma
12 is not associated with Boldface. The utility of that disclaimer for
13 dispelling confusion in the areas identified above would be
14 significantly discounted by the confusion it would engender in
15 significant parts of California and in the rest of the country,
16 where the public has never heard of Chroma or its products.
17 Furthermore, Boldface has pointed out that it would cancel its
18 national advertising at a significant cost, rather than include such
19 a disclaimer, which would provide, in its view, nationwide free
20 advertising for Chroma. If it does cancel its advertising, Boldface
21 claims that it would breach agreements with retailers to undertake
22 national print advertising. (Ostoya 2d Supp. Decl. ¶ 12.) The
23 Court therefore will not order such a disclaimer, which would be a
24 mandatory injunction that is generally disfavored absent a showing
25 that “the facts and law clearly favor the moving party.” Stanley v.
26 Univ. of S. Cal., 13 F.3d 1313, 1320 (9th Cir. 1994) (internal
27 quotation marks omitted).

28 Similarly, the Court proposed enjoining internet sales from

1 retailers to customers in the areas surrounding Beverly Hills and
2 Encino. However, Boldface offered evidence that implementing a
3 system to segregate sales by zip code would be costly and that
4 retailers would probably refuse to sell the KHROMA BEAUTY products
5 through their websites, rather than implement the software necessary
6 to block shipments to certain zip codes. (Id. ¶ 9.) Indeed, as
7 pointed out by Robert Crames, the Chief Executive Officer of Horizon
8 Beauty Group, LLC, which is assisting Boldface in the rollout of the
9 KHROMA BEAUTY products, "there is no reason for Boldface's internet
10 retail partners to incur any extra burden that may be associated
11 with distributing the KHROMA BEAUTY products if they have to abide
12 by the terms of an injunction and refrain from shipping to certain
13 zip codes when they are selling many other SKUs of directly
14 competitive products that do not carry the same burden." (Crames
15 Decl. ¶ 9.)

16 Finally, the Court also proposed enjoining sales in retail
17 stores, as well as advertising or marketing efforts, in the areas
18 surrounding Beverly Hills and Encino. But without a disclaimer on
19 national advertising or an injunction preventing internet sales, an
20 injunction barring sales and advertising locally would do little to
21 prevent consumer confusion, as local customers would still be
22 exposed to the KHROMA BEAUTY products in national advertising and
23 nearby stores, and be able to buy KHROMA BEAUTY products online.

24 Given that an injunction protecting Chroma's limited rights
25 would have an unacceptable impact far beyond its intended scope, the
26 equities in this case tip so strongly in Boldface's favor that no
27 injunction is warranted.

28

CONCLUSION

1
2 Although Chroma has shown that three of the four preliminary
3 injunction factors tip in its favor, Chroma's common law trademark
4 rights are limited to areas surrounding Beverly Hills and Encino.
5 As a result, the significant nationwide harm to Boldface from an
6 injunction tips the balance of equities strongly against issuing an
7 injunction. Therefore, Chroma's motion is DENIED.

Audrey B. Collins

8
9 **DATED:** 1/23/13 _____

AUDREY B. COLLINS

UNITED STATES DISTRICT JUDGE

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APPENDIX A



APPENDIX B



APPENDIX C

Zip Code	Number of Clients	Area	% of L.A. County Sales	Sales \$	Sales Units		
90049	71	Brentwood	9.42%	\$11,721.59	266		
90272	62	Pacific Palisades	8.22%	\$10,235.76	233		
90024	47	Westwood	6.23%	\$7,759.36	176		
90064	41	Rancho Park/Cheviot Hills	5.44%	\$6,768.81	154		
90046	41	West Hollywood	5.44%	\$6,768.81	154		
90210	37	Beverly Hills	4.91%	\$6,108.44	139		
90025	37	West LA	4.91%	\$6,108.44	139		
90402	32	Santa Monica	4.24%	\$5,282.97	120		
90066	26	Mar Vista	3.45%	\$4,292.41	98		
90048	25	Meirose/Beverly Center	3.32%	\$4,127.32	94		
90035	25	Beverlywood	3.32%	\$4,127.32	94		
90405	24	Santa Monica	3.18%	\$3,962.23	90		
90069	23	West Hollywood	3.05%	\$3,797.14	86		
90077	23	Bel Air	3.05%	\$3,797.14	86		
90292	22	Marina Del Rey	2.92%	\$3,632.04	83		
90212	20	Beverly Hills	2.65%	\$3,301.86	75		
90403	20	Santa Monica	2.65%	\$3,301.86	75		
90036	19	Miracle Mile/ La Brea	2.52%	\$3,136.76	71		
90266	18	Manhattan Beach	2.39%	\$2,971.67	68		
91356	18	Tarzana	2.39%	\$2,971.67	68		
91604	16	Studio City	2.12%	\$2,641.49	60		
91302	15	Calabasas	1.99%	\$2,476.39	56		
91403	15	Sherman Oaks	1.99%	\$2,476.39	56		
90265	14	Malibu	1.86%	\$2,311.30	53		
90254	13	Hermosa Beach	1.72%	\$2,146.21	49		
91423	13	Sherman Oaks	1.72%	\$2,146.21	49		
91436	13	Encino	1.72%	\$2,146.21	49		
90067	12	Century City	1.59%	\$1,981.11	45		
90068	12	Hollywood	1.59%	\$1,981.11	45		
90004	11	Hancock Park	1.46%	\$1,816.02	41		
90007	11	USC	1.46%	\$1,816.02	41		
91367	10	Woodland Hills	1.33%	\$1,650.93	38		
90034	9	Palms	1.19%	\$1,485.84	34		
91316	9	Encino	1.19%	\$1,485.84	34		
90019	8	Mid City	1.06%	\$1,320.74	30		

Court's Proposed Injunction Area (bolded zip codes)

Sales \$
 \$116,060.27 \$159,582.86
 93.24% 93.24%

Sales Units
 2,638 3,627

93.24% 93.24%

Customers
 703

93.24%

APPENDIX C

Zip Code	Number of Clients	Area	% of L.A. County Sales	Sales \$	Sales Units			
90274	8	Palos Verdes	1.06%	\$1,320.74	30	\$1,816.02		41
91362	8	Thousand Oaks	1.06%	\$1,320.74	30	\$1,816.02		41
91364	8	Woodland Hills	1.06%	\$1,320.74	30	\$1,816.02		41
90232	7	Culver City	0.93%	\$1,155.65	26	\$1,589.02		36
90045	7	Westchester	0.93%	\$1,155.65	26	\$1,589.02		36
90277	7	Redondo Beach	0.93%	\$1,155.65	26	\$1,589.02		36
90026	6	Silverlake	0.80%	\$990.56	23	\$1,362.02		31
90027	6	Griffith Park	0.80%	\$990.56	23	\$1,362.02		31
90211	6	Beverly Hills	0.80%	\$990.56	23	\$1,362.02		31
90230	6	Culver City	0.80%	\$990.56	23	\$1,362.02		31
90292	6	Venice	0.80%	\$990.56	23	\$1,362.02		31
91301	6	Agoura	0.80%	\$990.56	23	\$1,362.02		31
91326	6	Northridge	0.80%	\$990.56	23	\$1,362.02		31
92037	6	La Jolla	0.80%	\$990.56	23	\$1,362.02		31

APPENDIX D

Zip Code	Number of Clients	Area	L.A. County Population	10% Market Assumption	5% Market Assumption	1% Market Assumption	% of Market (10%)	% of Market (5%)	% of Market (1%)
90049	71	Brentwood	37,906	3,791	1,895	379	1.87%	3.75%	18.73%
90272	62	Pacific Palisades	19,745	1,975	987	197	2.38%	6.28%	31.40%
90024	47	Westwood	43,300	4,330	2,165	433	0.95%	2.17%	10.85%
90064	41	Rancho Park/ Cheviot Hills	31,613	3,161	1,581	316	1.30%	2.59%	12.97%
90046	41	West Hollywood	48,792	4,879	2,440	488	0.76%	1.68%	8.40%
90210	37	Beverly Hills	24,465	2,447	1,223	245	1.51%	3.02%	15.12%
90025	37	West LA	45,338	4,534	2,267	453	0.71%	1.63%	8.16%
90402	32	Santa Monica	9,458	946	473	95	2.75%	6.77%	33.83%
90066	26	Mar Vista	54,233	5,423	2,712	542	0.46%	0.96%	4.79%
90048	25	Melrose/Beverly Center	22,084	2,208	1,104	221	1.13%	2.26%	11.32%
90035	25	Beverlywood	28,930	2,893	1,447	289	0.83%	1.73%	8.64%
90405	24	Santa Monica	24,942	2,494	1,247	249	0.92%	1.92%	9.62%
90069	23	West Hollywood	21,101	2,110	1,055	211	1.09%	2.18%	10.90%
90077	23	Bel Air	11,308	1,131	565	113	1.95%	4.07%	20.34%
90292	22	Marina Del Rey	19,790	1,979	990	198	1.01%	2.22%	11.12%
90212	20	Beverly Hills	11,902	1,190	595	119	1.68%	3.36%	16.80%
90403	20	Santa Monica	23,084	2,308	1,154	231	0.82%	1.73%	8.66%
90036	19	Miracle Mile/ La Brea	35,551	3,555	1,778	356	0.51%	1.07%	5.34%
90266	18	Manhattan Beach	34,651	3,465	1,733	347	0.52%	1.04%	5.19%
91356	18	Tarzana	28,236	2,824	1,412	282	0.57%	1.27%	6.37%
91604	16	Studio City	28,041	2,804	1,402	280	0.53%	1.14%	5.71%
91302	15	Calabasas	25,153	2,515	1,258	252	0.60%	1.19%	5.96%
91403	15	Sherman Oaks	22,610	2,261	1,131	226	0.62%	1.33%	6.63%
90265	14	Malibu	12,970	1,297	649	130	1.00%	2.16%	10.79%
90254	13	Hermosa Beach	19,045	1,905	952	190	0.68%	1.37%	6.83%
91423	13	Sherman Oaks	31,009	3,101	1,550	310	0.42%	0.84%	4.19%
91436	13	Encino	14,507	1,451	725	145	0.83%	1.79%	8.96%
90067	12	Century City	3,505	351	175	35	3.42%	6.85%	34.24%
90068	12	Hollywood	28,777	2,878	1,439	288	0.38%	0.83%	4.17%
90004	11	Hancock Park	65,103	6,510	3,255	651	0.17%	0.34%	1.69%
90007	11	USC	54,908	5,491	2,745	549	0.18%	0.40%	2.00%
91367	10	Woodland Hills	36,370	3,637	1,819	364	0.25%	0.55%	2.75%
90034	9	Palms	58,639	5,864	2,932	586	0.15%	0.31%	1.53%
91316	9	Encino	22,423	2,242	1,121	224	0.36%	0.80%	4.01%

APPENDIX D

Zip Code	Number of Clients	Area	50% Women	10% Market Assumption	5% Market Assumption	1% Market Assumption	% of Market (10%)	% of Market (5%)	% of Market (1%)
90049	71	Brentwood	18,953	1,895	948	190	3.75%	7.49%	37.46%
90272	62	Pacific Palisades	9,873	987	494	99	6.28%	12.56%	62.80%
90024	47	Westwood	21,650	2,165	1,083	217	2.17%	4.34%	21.71%
90064	41	Rancho Park/ Cheviot Hills	15,807	1,581	790	158	2.59%	5.19%	25.94%
90046	41	West Hollywood	24,396	2,440	1,220	244	1.68%	3.36%	16.81%
90210	37	Beverly Hills	12,233	1,223	612	122	3.02%	6.05%	30.25%
90025	37	West LA	22,669	2,267	1,133	227	1.63%	3.26%	16.32%
90402	32	Santa Monica	4,729	473	236	47	6.77%	13.53%	67.67%
90066	26	Mar Vista	27,117	2,712	1,356	271	0.96%	1.92%	9.59%
90048	25	Melrose/Beverly Center	11,042	1,104	552	110	2.26%	4.53%	22.64%
90035	25	Beverlywood	14,465	1,447	723	145	1.73%	3.46%	17.28%
90405	24	Santa Monica	12,471	1,247	624	125	1.92%	3.85%	19.24%
90069	23	West Hollywood	10,551	1,055	528	106	2.18%	4.36%	21.80%
90077	23	Bel Air	5,654	565	283	57	4.07%	8.14%	40.68%
90292	22	Marina Del Rey	9,895	990	495	99	2.22%	4.45%	22.23%
90212	20	Beverly Hills	5,951	595	298	60	3.36%	6.72%	33.61%
90403	20	Santa Monica	11,542	1,154	577	115	1.73%	3.47%	17.33%
90036	19	Miracle Mile/ La Brea	17,776	1,778	889	178	1.07%	2.14%	10.69%
90266	18	Manhattan Beach	17,326	1,733	866	173	1.04%	2.08%	10.39%
91356	18	Tarzana	14,118	1,412	706	141	1.27%	2.55%	12.75%
91604	16	Studio City	14,021	1,402	701	140	1.14%	2.28%	11.41%
91302	15	Calabasas	12,577	1,258	629	126	1.19%	2.39%	11.93%
91403	15	Sherman Oaks	11,305	1,131	565	113	1.33%	2.65%	13.27%
90265	14	Malibu	6,485	649	324	65	2.16%	4.32%	21.59%
90254	13	Hermosa Beach	9,523	952	476	95	1.37%	2.73%	13.65%
91423	13	Sherman Oaks	15,505	1,550	775	155	0.84%	1.68%	8.38%
91436	13	Encino	7,254	725	363	73	1.79%	3.58%	17.92%
90067	12	Century City	1,753	175	88	18	6.85%	13.69%	68.47%
90068	12	Hollywood	14,389	1,439	719	144	0.83%	1.67%	8.34%
90004	11	Hancock Park	32,552	3,255	1,628	326	0.34%	0.68%	3.38%
90007	11	USC	27,454	2,745	1,373	275	0.40%	0.80%	4.01%
91367	10	Woodland Hills	18,185	1,819	909	182	0.55%	1.10%	5.50%
90034	9	Palms	29,320	2,932	1,466	293	0.31%	0.61%	3.07%
91316	9	Encino	11,212	1,121	561	112	0.80%	1.61%	8.03%

APPENDIX D

Zip Code	Number of Clients	Area	50% Women	10% Market Assumption	5% Market Assumption	1% Market Assumption	% of Market (10%)	% of Market (5%)	% of Market (1%)
90019	8	Mid City	32,586	3,259	1,629	326	0.25%	0.49%	2.46%
90274	8	Palos Verdes	9,873	987	494	99	0.81%	1.62%	8.10%
91362	8	Thousand Oaks	17,919	1,792	896	179	0.45%	0.89%	4.46%
91364	8	Woodland Hills	13,025	1,302	651	130	0.61%	1.23%	6.14%
90232	7	Culver City	8,328	833	416	83	0.84%	1.68%	8.41%
90045	7	Westchester	21,771	2,177	1,089	218	0.32%	0.64%	3.22%
90277	7	Redondo Beach	14,602	1,460	730	146	0.48%	0.96%	4.79%
90026	6	Silverlake	34,051	3,405	1,703	341	0.18%	0.35%	1.76%
90027	6	Griffith Park	61,367	6,137	3,068	614	0.10%	0.20%	0.98%
90211	6	Beverly Hills	4,659	466	233	47	1.29%	2.58%	12.88%
90230	6	Culver City	16,464	1,646	823	165	0.36%	0.73%	3.64%
90292	6	Venice	9,895	990	495	99	0.61%	1.21%	6.06%
91301	6	Agoura	13,995	1,400	700	140	0.43%	0.86%	4.29%
91326	6	Northridge	13,621	1,362	681	136	0.44%	0.88%	4.41%
92037	6	La Jolla	22,733	2,273	1,137	227	0.26%	0.53%	2.64%
		Court's Proposed Injunction Area (bolded zip codes)							
		% of Market (10%)	% of Market (5%)	% of Market (1%)					
		2.03%	4.06%	20.29%					