

2022 WL 1272243  
Only the Westlaw citation is currently available.  
United States District Court, C.D. California.  
[ConsumerDirect, Inc.](#)

v.  
Pentius, LLC et al.

Case No. 8:21-cv-01968-JVS (ADSx)  
|  
Filed 03/25/2022

#### Attorneys and Law Firms

Lisa Bredahl, Deputy Clerk, Attorneys Present for Plaintiffs: Not Present

Not Present, Court Reporter, Attorneys Present for Defendants: Not Present

#### **Proceedings: [IN CHAMBERS] Order Regarding Motion for Preliminary Injunction**

The Honorable James V. Selna, U.S. District Court Judge

\*1 Plaintiff ConsumerDirect, Inc. (“ConsumerDirect”) moves for a preliminary injunction requiring Defendants<sup>1</sup> Pentius LLC (“Pentius”), Array US, Inc. (“Array”), System Admin, LLC (“System Admin”), and CTH Skin Corp. to cease and desist their use of domains and marks that allegedly infringe on ConsumerDirect’s protected marks. Mot., Dkt. 34. Defendant Array filed an opposition (Array Opp’n, Dkt. 41), as did Pentius and System Admin (Pentius and System Admin Opp’n (“Pentius Opp’n”), Dkt. 47).<sup>2</sup> ConsumerDirect replied in support of its motion. Dkt. 51.

<sup>1</sup> ConsumerDirect originally brought this suit and instant motion against Defendants Callandor, LLC and Hotbills, LLC in addition to these Defendants. See FAC, Dkt. 22, at 1; Mot., Dkt. 34, at 1. However, the Court has since granted joint stipulations to dismiss Hotbills (Dkt. 71) and Callandor (Dkt. 65) with prejudice.

<sup>2</sup> Defendant CTH Skin Corp. has failed to file an Answer

or otherwise defend against this action. See Entry of Default by Clerk Against CTH Skin Corp., Dkt. 76. Accordingly, the Clerk entered default against CTH Skin Corp. on March 8, 2022. Id.

For the following reasons, the Court **GRANTS** the motion.

#### **I. BACKGROUND**

##### **A. Factual Background**

The following background is drawn from Plaintiffs’ First Amended Complaint (“FAC”) (Dkt. 22), as well as certain affidavits and exhibits filed in support of the parties’ respective motions.

ConsumerDirect is an industry leader in consumer self-help financial services, including credit management, credit reporting services, credit counseling, and credit monitoring since at least 2009. Coulter Decl., ¶ 2. ConsumerDirect provides these services through numerous of its own websites such as smartcredit.com, idlock.com, and creditmonitoring.com. Id., Exs. 2–4. ConsumerDirect also partners with other financial services companies and creates white labels and co-brands for them, which allows ConsumerDirect’s partners to display and utilize its financial services on the partners’ websites. Id. Among other things, ConsumerDirect’s websites offer memberships that allow customers to view and track their credit scores and reports, receive credit alerts, learn about credit, and use tools to resolve any disputed or fraudulent items that appear on their credit reports. Id. ConsumerDirect also offers identity theft monitoring and financial management tools through its websites. Id.

Since at least 2009, and before Defendants used any similar marks, ConsumerDirect or its predecessor-in-interest has continuously and prominently used the marks: (1) “SMARTCREDIT” and “SMARTCREDIT.COM” (the “SMARTCREDIT Marks”); (2) “IDLOCK” and “IDLOCK.COM” (the “IDLOCK.COM Marks”); and (3) CREDITMONITORING.COM (the “CREDITMONITORING.COM Mark”) (collectively, the “Marks”) to denote the source of its products and services. Id. ¶ 3. ConsumerDirect owns several federal

trademark registrations on the United States Patent and Trademark Office's ("USPTO") Principal Register, including for the SMARTCREDIT Marks. Id. ¶ 21.

\*2 ConsumerDirect has committed significant time, effort, and money (i.e., over \$24 million a year annually in marketing expenses) to developing a widely-respected reputation through with the Marks have acquired secondary meaning indicating ConsumerDirect as the source of its goods and services. Id. ¶ 5. Thus, before the acts complained of in this Complaint, members of the general consumer population, including over four-million consumers who are members of ConsumerDirect's websites, recognized the Marks as exclusive source identifiers for goods and services relating to consumer self-help financial services as originating from, sponsored, or approved by Plaintiff. Id. ¶ 5.

Pentius and Array are competitors of ConsumerDirect who also provide consumer self-help financial services and create white labels and co-brands for other companies to allow them to display and utilize Pentius and Array's financial services on their websites. Id. ¶ 6. ConsumerDirect recently discovered Defendants created and operate the following Allegedly Infringing Domains: (1) smartcreditview.com and smartcreditcollege, which it alleges to be copycats of its website smartcredit.com; (2) theidlock.com, which it alleges to be a copycat of its website idlock.com; and (3) creditmonitoringsolutions.com, propercreditmonitoring.com, credithivemonitor.com, honestcreditmonitoring.com, and creditmonitormaster.com, which it alleges to be copycats of its website creditmonitoring.com. Id. ¶ 7; Usaha Decl., Exs. 23–31, 46–53. Within those websites, Defendants use the Allegedly Infringing Marks "smartcreditview" on smartcreditview.com, "smartcreditcollege" on smartcreditcollege.com, and "theidlock" on theidlock.com, which allegedly infringe on ConsumerDirect's SMARTCREDIT and IDLOCK.COM Marks. Usaha Decl., Ex. 26–31, 66–67; Coulter Decl., Exs. 2–4. ConsumerDirect receives almost daily phone calls and emails from consumers demanding refunds and closing of their accounts, only to discover on further inquiry that they signed up for membership with one of the Allegedly Infringing Domains, not one of ConsumerDirect's websites. Alexander Decl., ¶¶ 2–6, Exs. 61–65, 68.

All of the Allegedly Infringing Domains share ASN and IP addresses tracing back to Defendant System Admin. Pescatore Decl., ¶¶ 2–5, Exs. 13–17; Usaha Decl., Exs. 18, 19, 22.

## B. Procedural Background

ConsumerDirect brought suit alleging eight causes of action against Defendants: (1) Federal Trademark Infringement (15 U.S.C. § 1114); (2) Violation of the Anticybersquatting Consumer Protection Act (15 U.S.C. § 1125(d)); (3) False Designation of Origin and Unfair Competition (15 U.S.C. § 1125(a)); (4) Intentional Interference of Contract; (5) Intentional Interference with Prospective Economic Advantage; (6) Violation of Cal. Bus. and Prof. Code § 17200; (7) Common Law Unfair Competition and Trademark Infringement; and (8) Unjust Enrichment.

ConsumerDirect now moves for a preliminary injunction, pursuant to Rule 65 of the Federal Rules of Civil Procedure and Local Rule 65-1, requiring Defendants to:

- (1) cease and desist their use of the infringing domains smartcreditview.com, smartcreditcollege.com, theidlock.com, creditmonitoringsolutions.com, propercreditmonitoring.com, credithivemonitor.com, honestcreditmonitoring.com, and creditmonitormaster.com (the "Allegedly Infringing Domains"), or any derivatives thereof;
- (2) cease and desist the provision of any and all services that Defendants are providing to the Allegedly Infringing Domains, or any derivatives thereof; and
- (3) cease and desist from marketing, advertising, displaying, or otherwise using the infringing marks smartcreditview, smartcreditcollege, theIDlock (the "Allegedly Infringing Marks"), or any derivative thereof, or any mark that infringes on Plaintiff's trademarks, in connection with the sale, advertising, marketing and promotion of their financial self-help goods and services.

## II. LEGAL STANDARD

\*3 On an application for a preliminary injunction, the plaintiff has the burden to establish that (1) he is likely to succeed on the merits, (2) he is likely to suffer irreparable harm if the preliminary relief is not granted, (3) the balance of equities favors the plaintiff, and (4) the injunction is in the public interest. Winter v. Natural Res. Def. Council, Inc., 555 U.S. 5, 20 (2008).

In the Ninth Circuit, the Winter factors may be evaluated on a sliding scale: "serious questions going to the merits,

and a balance of hardships that tips sharply toward the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest.” [Alliance for the Wild Rockies v. Cottrell](#), 632 F.3d 1127, 1134–35 (9th Cir. 2011).

### III. DISCUSSION

#### A. Evidentiary Considerations

At the outset, the Court acknowledges certain evidentiary issues raised by both parties.

“[A] preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits.” [Univ. of Texas v. Camenisch](#), 451 U.S. 390, 395 (1981). Therefore, the Federal Rules of Evidence do not strictly apply to preliminary injunction proceedings. *See, e.g., Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1363 (9th Cir. 1988) (*en banc*); [Flynt Distrib. Co. v. Harvey](#), 734 F.2d 1389, 1394 (9th Cir. 1984). The Court is permitted to consider inadmissible evidence in deciding a motion for a preliminary injunction. *Id.* This flexibility exists because “[t]he urgency of obtaining a preliminary injunction necessitates a prompt determination” and makes it difficult for a party to procure supporting evidence in a form that would be admissible at trial. *Id.* “While district courts may consider inadmissible evidence in the context of a preliminary injunction, this does not mean that evidentiary issues have no relevance to this proceeding. Such issues, however, properly go to weight rather than admissibility.” [Am. Hotel & Lodging Ass’n v. City of Los Angeles](#), 119 F. Supp. 3d 1177, 1185 (C.D. Cal. 2015).

The Court will consider the evidence presented—both in the declarations of the parties and via their exhibits—in light of the aforementioned standard.

#### B. Likelihood of Success on the Merits

ConsumerDirect contends that it is likely to succeed on its claims for (a) federal trademark infringement, (b) false designation of origin and unfair competition, and (c) violation of the Anticybersquatting Consumer Protection

Act. Mot., Dkt. 34, at 7–13. However, Defendants argue that all of these claims lack merit. *See* Array Opp’n, Dkt. 41, at 12; Pentius Opp’n, Dkt. 47, at 6.

#### *1. Whether Defendants Use the Domains or Marks at Issue*

Defendants argue that ConsumerDirect’s federal trademark infringement, false designation of origin and unfair competition, and ACPA claims fail because ConsumerDirect has not shown that Array, Pentius, or System Admin actually use the domains and marks at issue. Pentius Opp’n, Dkt. 47, at 6–7.

To prevail on claims for federal trademark infringement, false designation of origin and unfair competition, and violation of the ACPA, ConsumerDirect must show that Defendants in fact used the domains and marks at issue.

Defendants assert that none of the Allegedly Infringing Domains are actually owned, operated, or controlled by Array, Pentius, or System Admin. Array Opp’n, Dkt. 41, at 10; Pentius Opp’n, Dkt. 47, at 5. In fact, they argue that “[o]nly three of the Allegedly Infringing [Domains] are actually owned by any of the Defendants: CTH owns smartcreditview.com, Hotbills owns thetheidlock.com, and Callandor owns creditmonitoringsolutions.com.” Pentius Opp’n, Dkt. 47, at 2; Array Opp’n, Dkt. 41, at 10.

#### *a. System Admin*

\*4 However, the publically-available records presented by ConsumerDirect, show all of the Allegedly Infringing Domains sharing ASN and IP addresses registered to System Admin. Pescatore Decl., ¶¶ 2–5; Exs. 13–17; Usaha Decl., Exs. 18, 19, 22. Further, Pentius and System Admin submitted a declaration in which Pentius’s Chief Executive Officer declared that System Admin “owns the IP addresses to which [the Allegedly Infringing Websites] are or were directed.” Ertel Decl., ¶ 12.

An internet service provider may be liable for contributory trademark infringement for hosting websites containing infringing material. *See Vuitton Malletier, S.,A. v. Akanoc Solutions, Inc.*, 591 F. Supp. 2d 1098, 1111 (N.D. Cal. 2008). Courts “ ‘consider the extent of control exercised by the defendant over the third party’s means of infringement’ to determine if actual or constructive knowledge of the third party’s infringement

would give rise to contributory liability.” *Id.* at 1111–12. Defendants argue that they did not exercise sufficient control over the domains to be held liable for contributory infringement. Dkt. 83, at 5–6. However, ConsumerDirect does not allege that Defendants were aware of the content of the domains. Rather, ConsumerDirect alleges that the domain names themselves are infringing, and because the domain names are hosted directly on Defendants’ ASN and IP addresses, ConsumerDirect has shown a likelihood of succeeding on the merits of this point. The evidence is sufficient to demonstrate that System Admin hosts the Allegedly Infringing Domains. *See* *Pescatore Decl.*, ¶¶ 2–5; Exs. 13–17; *Usaha Decl.*, Exs. 18, 19, 22; *Ertel Decl.*, ¶ 12. Thus, System Admin can be held liable for contributory trademark infringement if it had knowledge and “[d]irect control and monitoring” of the infringing websites. *Id.* (quoting *Lockheed Martin Corp. v. Natwork Solutions, Inc.*, 194 F.3d 980, 983 (9th Cir. 1999)).

Defendants argue that the Court cannot consider ConsumerDirect’s contributory trademark infringement theory because it did not plead it as a separate cause of action. But ConsumerDirect’s contributory liability theory may be considered even though it did not plead it as a separate cause of action. *See* *Free Kick Master LLC v. Apple Inc.*, 140 F. Supp. 3d 975, 982 (N.D. Cal. 2015) (considering a claim for contributory trademark infringement even though it was not pleaded as a separate claim). It is sufficient that ConsumerDirect pleaded facts sufficient to state a claim for contributory trademark infringement. *See id.*

Further, System Admin can be held liable for cybersquatting as the registered owners of the Allegedly Infringing Domains. *See* *CrossFit, Inc. v. Paraise*, 2014 WL 12508598, at \*1 (S.D. Cal. Mar. 26, 2014) (explaining that “liability for cybersquatting attaches when the plaintiff proves ... the defendant registered, trafficked in, or used a domain name”).

#### *b. Pentius*

System Admin is a wholly-owned subsidiary of Pentius. *See* *Ertel Decl.*, ¶ 3. Further, Pentius asserts that it provides “technology platform management services to Array, including data center co-location, internet connectivity for the data center, software and hardware, domain hosting and IT security management services” and that it fulfills these services “through Pentius’ wholly owned subsidiary, System Admin.” *Ertel Decl.*, ¶ 10. Moreover, “Pentius invoices Array for the costs of and fees associated with those services, including fees for

services fulfilled through ... System Admin.” *Id.* This is sufficient to demonstrate that ConsumerDirect is likely to succeed in showing that Pentius is also liable for contributory trademark infringement and cybersquatting for the same reasons as System Admin.

#### *c. Array*

\*5 Array admits that it provides services to Callandor, CTH Skin, and Hotbills—the same companies that it alleges own the Allegedly Infringing Domains. *Mapou Decl.*, Exs. 1A–1C. Array has also admitted to providing the Application Programming Interface (“API”) for the websites. *Cortes Decl.*, Ex. 1; *Usaha Decl.*, ¶ 43. Further, Pentius admits that it has a contractual relationship with Array. *Ertel Decl.*, ¶ 10. In fact, Array produced agreements showing that, upon a customer’s request and payment of a fee, Array can provide custom URLs to the customer. *Mapou Decl.*, Ex. 1A, Sec. 2.3. The agreements also state that Array’s platform “will be hosted by the Company (or its designated hosting service provider).” *Id.*, Ex. 1B, Sec. 3.3. And moreover, Pentius, Array, and the allegedly infringing websites all share identical privacy policies. *Usaha Decl.*, Exs. 25, 28, 31, 35, 37, 40, 43, 45, 47, 49, 53, 59, 60, 67. There are also other similarities between the websites, including nearly identical footers, “contact us” pages, and member services, and the use of false business addresses. *Id.*, Exs. 23–31, 34–58, 66–67.

Accordingly, ConsumerDirect argues that the evidence actually suggests “that Array, through its contractual relationship with Pentius and Pentius’ wholly owned subsidiary System Admin, created the [Allegedly Infringing] Domains and Pentius/System Admin host those domains. Reply, Dkt. 50, at 20. Given that the Allegedly Infringing Domains are all hosted by System Admin, and that the Defendants claim that Array’s customers own the Domains, the Court agrees that ConsumerDirect has established that it is likely to succeed in establishing this.

#### *2. Trademark Infringement*

To state a claim for trademark infringement, a plaintiff must allege two elements. First, that the plaintiff owns a valid and protectable trademark; and second, that a defendant used, in commerce, a similar mark without authorization in a manner that is likely to cause consumer

mistake, confusion, or deception. So. Cal. Darts Ass'n v. Zaffina, 762 F.3d 921, 929 (9th Cir. 2014); see also Applied Information Sciences Corp. v. eBay, Inc., 511 F.3d 966, 969 (9th Cir. 2007) (same standard for preliminary injunction).

ConsumerDirect satisfies the first element, because it has federally-registered trademarks for “SMARTCREDIT” and “SMARTCREDIT.COM.” “Federal registration of a trademark constitutes prima facie evidence of the validity of the registered mark.” See Samick Music Corp. v. Gordon, 2020 WL 3210613, at \*4 (C.D. Cal. Mar.26, 2020) (citing Brookfield Commun., Inc. v. W. Coast Entm't Corp., 174 F.3d 1036, 1047 (9th Cir. 1999)).

As for the second element, courts consider eight factors to determine whether there is a likelihood of confusion: (1) strength of the mark; (2) proximity or relatedness of the goods; (3) similarity of the sight, sound and meaning of the marks; (4) evidence of actual confusion; (5) degree to which the marketing channels converge; (6) types of goods and degree of care consumers are likely to exercise when purchasing them; (7) intent of defendants in selecting the infringing mark; and (8) likelihood that the parties will expand their product lines. AMF Inc. v. Sleekcraft Boats, 599 F.2d 341, 348 (9th Cir. 1979), abrogation in part on other grounds recognized by Mattel, Inc. v. Walking Mountain Prods., 353 F.3d 792, 810 n.19 (9th Cir. 2003). This list is neither exhaustive nor exclusive. Id. at 348 n.11. It should be applied flexibly. JL Beverage Co., LLC v. Jim Beam Brands Co., 828 F.3d 1098, 1106 (9th Cir. 2016).

#### *i. Strength of Mark*

A mark’s strength determines the scope of its trademark protection. Id. As the mark’s distinctiveness increases, “so too does the degree of protection.” Id. A mark has both conceptual and commercial strength. Id.

The strength of a mark is determined with a two-part test. GoTo.com, Inc. v. Walt Disney Co., 2020 F.3d 1199, 1207 (9th Cir. 2000). The first is conceptual strength. See id. A mark’s conceptual strength “depends largely on the obviousness of its connection to the good or service to which it refers.” Id. (quoting Fortune Dynamic, Inc. v. Victoria’s Secret Stores Brand Mgmt., Inc., 618 F.3d 1025, 1032–33 (9th Cir. 2010)). Courts classify “a mark along a spectrum of five categories ranging from strongest to weakest: arbitrary, fanciful, suggestive, descriptive, and generic.” Id. Arbitrary, fanciful and suggestive marks are “deemed inherently distinctive and are automatically

entitled to protection because they naturally serve to identify a particular source of a product.” Quiksilver, Inc. v. Kymsta Corp., 466 F.3d 749, 760 (9th Cir. 2006).

\*6 Here, the parties agree that “SMARTCREDIT” and “SMARTCREDIT.COM” are suggestive marks—i.e., marks that “subtly connote something about the products.” See Mot., Dkt. 34, at 8; Array Opp’n, Dkt. 41, at 13; See also United Artists Corp. v. United Artists Studios LLC, 2019 WL 3293650, at \*10 (C.D. Cal. June 3, 2019) (defining suggestive marks). However, they disagree as to their strength. While ConsumerDirect asserts that the Marks are “commercially strong,” (Mot., Dkt. 34, at 8), Defendants contend that they are “weak” (Array Opp’n, Dkt. 41, at 12–13). Defendants argue that the Marks are weak because they “combine the generic term CREDIT with the common term SMART.” Array Opp’n, Dkt. 41, at 13. But the Ninth Circuit has rejected such “breaking down of such terms into their individual (and often generic) parts” and explained that a mark should be evaluated as a “composite,” and may be a “distinguishing mark even though its components individually [are not].” Filipino Yellow Pages, Inc. v. Asian J. Publications, Inc., 198 F.3d 1143, 1148–50 (9th Cir. 1999).

The second part of the test to determine a mark’s strength is its commercial strength. GoTo.com, Inc. v. Walt Disney Co., 2020 F.3d 1199, 1207 (9th Cir. 2000). A mark’s commercial strength depends on “actual marketplace recognition.” JL Beverage, 828 F.3d at 1107. Advertising shows commercial strength because it increases marketplace recognition. Id. ConsumerDirect presented evidence that it annually spends millions of dollars advertising the SMARTCREDIT Marks and conducts millions in related sales. See Coulter Decl., ¶ 5.

Defendants argue that the SMARTCREDIT Marks are weak because third parties use the words “smart” and “credit” in domains and websites demonstrates a crowded field of similar marks. For example, Array lists the following third-party uses<sup>3</sup>:

1. “SMART Credit Check” for credit reporting services at [https://www.uvacreditunion.org/content/smart\\_credit\\_check](https://www.uvacreditunion.org/content/smart_credit_check);
2. “Smart Credit” for credit information and repair services at <https://www.thinksmartcredit.com>;
3. “Smart Credit” for information on credit information at <https://www.gocollegeny.org/smart-credit>;

4. “Smart Credit Solutions” for credit reporting and repair services at <https://smartcreditsolutionscorp.com/index.html>;

5. “Smart Credit Management” for a credit self-help study workbook at <https://www.channingbete.com/human-services/parenting/personal-finanaces/smart-credit-management-a-n-individual-and-family-handbook/p-CBC-732>;

6. “Smart Credit Check Resources” for links to websites with information on credit education at <https://www.vacul.org/smart-credit-check>;

7. “Nationwide Smart Credit” for lines of credit at <https://www.nationwide.com/lc/resources/personal-finance/articles/what-is-nationwide-smart-credit>;

8. “Davidson SmartCredit” for financial services, namely money lending at <https://dadavison.com/WHAT-WE-DO/Wealth-Management/Products-Services/Saving-Spending-Solution> and registered under U.S. Reg. No. 4,106,773;

9. “Farmers Smart Credit” for credit processing services at <https://www.farmershomefurniture.com/css/50009/flyers/Pop%20Drop%20SAVE%20small%20with%20links.pdf> and registered under U.S. Reg. No. 4,125,014;

10. “Enova Decisions Smart Credit” for financial consulting for credit operations and collections at [https://ir.enova.com/download/Enova+Investor+Presentation+%28June%202021%29\\_FINAL.pdf](https://ir.enova.com/download/Enova+Investor+Presentation+%28June%202021%29_FINAL.pdf) and registered under U.S. Reg. No. 5,251,899;

11. “Credit Card Smarts” for information on services for financial self-help services at <https://www.advantagepublications.com/creditcardsmarts> and registered under U.S. Reg. No. 5,793,049;

12. “Get Smart About Credit” for financial education services at <https://www.aba.com/advocacy/community-program/s/get-smart-about-credit> and registered under U.S. Reg. Nos. 5,226,348 and 5,226,347; and

13. “Credit Smart” for consumer credit education at <https://sf.freddiemac.com/working-with-us/creditsmart/overview> and registered under U.S. Reg. No. 2,692,310.

\*7 Array’s Opp’n, Dkt. 41, at 13–14 (citing Starling Decl., ¶¶ 18–51).

<sup>3</sup> These descriptions of the third-party uses are from

Array’s Opposition Brief and are not independent findings of the Court.

Where the market is “replete with products using a particular trademarked word,” consumers “will not likely be confused between any two of the crowd.” Entrepreneur Media, Inc. v. Smith, 279 F.3d 1135, 1144 (9th Cir. 2002). While a mark may be rendered weak by a “crowded field of third-party users,” third-party use does not necessarily weaken a mark. See Lahoti v. Vericheck, Inc., 636 F.3d 501, 508–09 (9th Cir. 2011).

Here, ConsumerDirect argues that these websites offer different goods and services than ConsumerDirect and Defendants offer. See Array Opp’n, Dkt. 41, at 15–17; Reply, Dkt. 50, at 6. Third-party use with regards to unrelated goods and services is irrelevant. See M2 Software, Inc. v. Madacy Entm’t, Corp., 421 F.2d 1073, 1088 (9th Cir. 2005) (holding that the district court properly excluded evidence of third-party uses in unrelated fields); 2 McCarthy on Trademarks and Unfair Competition § 11:88 (5th ed.) (“*The Ninth Circuit View: Unrelated Third Party Uses are Irrelevant*.”). The Ninth Circuit has gone so far as to state that evidence of third party use on unrelated goods is irrelevant.”). Just based on Array’s descriptions of the third-party uses, it is clear that at least some of the products and services are not related to ConsumerDirect’s. For example, “Get Smart About Credit” for financial education services, “Credit Smart” for consumer credit education, “Farmers Smart Credit” for credit processing services, and “Nationwide Smart Credit” for lines of credit are all clearly related to different products and services from the parties’.

However, Defendants argue that “the relevant field is a field which at least broadly would include or be related to the plaintiff’s business” and thus, that the third-party uses they list fall within the relevant field here even though their goods and services are not exactly the same as ConsumerDirect’s. Array Opp’n, Dkt. 41, 15 (quoting BuzzBallz, L.L.C. v. BuzzBoxBeverages, Inc., 2016 WL 7496769, at \*2 (C.D. Cal. Apr. 12, 2016)). Defendants’ examples are insufficient to show a “crowded field” such that the SMARTCREDIT Marks are weak. For example, in Lahoti v. Vericheck, Inc., the Ninth Circuit held that, despite evidence of some prior use of the plaintiff’s mark, the mark had not been rendered weak when there was “no credible evidence” that any third party had used the mark to compete with the plaintiff, the third-party use was “a far cry from the multitude of registrations and uses that might suggest a weak mark,” and plaintiff had a history of longstanding use and promotion of the mark. 636 F.3d 501, 508–09 (9th Cir. 2011). Similarly, here, Defendants

have not presented evidence that any third party has actually used the mark to compete with ConsumerDirect. Further, Defendants' list of five registrations and thirteen websites using the words "smart" and "credit" in combination with other words, does not amount to a multitude of registrations and uses of the mark that could render the mark weak. Cf. Jupiter Hosting, Inc. v. Jupitermedia Corp., 2004 WL 3543299 (N.D. Cal. Nov. 9, 2004) (finding that the mark "Jupiter" was weak with regards to computer, technology, and Internet-related products on the Web when it was used by "several dozen companies in California (where Plaintiff's principal place of business [was] located) and several dozen more in New York"); and Entrepreneur Media, (holding that the trademark "ENTREPRENEUR" was weakened by a crowded field when there were at least six other magazines," "[n]umerous companies," "[o]ver one thousand Web site domain names," and "extensive evidence of the frequent use of the word [ ] as a common noun").

\*8 While Defendants may eventually be able to show that the Mark is weakened by a crowded field, they have not yet presented evidence sufficient to undermine the likelihood that ConsumerDirect will succeed in establishing that its mark is strong.

### *ii. Proximity or Relatedness of Goods*

The more likely that the public will mistakenly assume that the goods at issue are related, "the less similarity in the marks is requisite to a finding of a likelihood of confusion." Sleekcraft, 599 F.2d at 350. Here, ConsumerDirect and Defendants are all using the Marks in connection with the sale of financial self-help goods and services.

### *iii. Similarity of Marks*

Courts examine "appearance, sound, and meaning" to determine whether marks are similar. JL Beverage, 828 F.3d at 1109. In evaluating these, courts must consider the marks "in their entirety and as they appear in the marketplace." Id. Similarities are more significant than differences. Id.

Array claims that the Allegedly Infringing Marks "Smart Credit View" and "Smart Credit College" are not confusingly similar to "SMARTCREDIT." But, as

ConsumerDirect asserts, "[a] side-by-side comparison shows otherwise." Reply, Dkt. 50, at 7.

Tabular or graphical material not displayable at this time.

ConsumerDirect's SMARTCREDIT Mark uses the words "smartcredit," with no space between the component words, in all lowercase letters in blue font, at the top left-hand corner of the webpage. See Coulter Decl., Ex. 2. The allegedly infringing "smartcreditview" mark also has no space between the component words, uses all lowercase letters, and is in a similar blue font. See Usaha Decl., Ex. 26. The allegedly infringing "smartcreditcollege" mark also has no spaces between the component words, is in blue font, and is displayed on the upper left-hand corner of the webpage. See Usaha Decl., Ex. 66.

### *iv. Actual Confusion*

Evidence of actual confusion suggests that future confusion is more likely. Sleekcraft, 599 F.2d at 352.

ConsumerDirect has identified various instances of actual confusion between the Marks. See Alexander Decl., Exs. 63, 64 65, and 68. For example, Exhibit 68 is transaction activity showing inquiries from customers of smartcreditview.com who called ConsumerDirect believing they had signed up for smartcredit.com. Alexander Decl., Ex. 68 Dkt. 64-72. Further, Rachele Alexander, ConsumerDirect's VP of Customer Service declared that,

Recently, [ConsumerDirect] began receiving a substantial number of customer service inquiries from [its] three main websites from customers who were not signed up as members through those websites. Most of them contacted [ConsumerDirect] regarding complaints about the services they received (or did not receive), were very unhappy about their memberships, and wanted to cancel their memberships, but upon further investigation [ConsumerDirect] discovered that they did not actually have memberships with [its] websites and instead had memberships with various websites they had confused with [its] three websites.

Defendants argue that this amounts to "de minimus" or "insignificant" evidence of confusion and argues that ConsumerDirect must make "[a] substantial showing of actual confusion." Array Opp'n, Dkt. 41, at 17-18. But because it is difficult to gather such evidence, failure to show actual confusion is not dispositive. Pom Wonderful, 775 F.3d at 1131. For the same reason, such evidence is

less important at the preliminary injunction stage. [Wells Fargo & Co. v. ABD Ins. & Fin. Servs., Inc.](#), 758 F.3d 1069, 1073 (9th Cir. 2014). Accordingly, the evidence that ConsumerDirect presented bolsters its claim that it is likely to show a likelihood of confusion.

*v. Marketing Channels and Types of Goods*

\*9 Convergent marketing channels increase the likelihood of confusion.” [Sleekcraft](#), 599 F.2d at 353. To assess convergence, “courts consider whether the parties’ customer bases overlap and how the parties advertise and market their products.” [Pom Wonderful](#), 775 F.3d at 1130. The Court also examines whether the types of goods overlap from the perspective of a “typical buyer exercising ordinary caution.” [Sleekcraft](#), 599 F.2d at 353.

The Internet, as a marketing channel, “is ‘particularly susceptible to a likelihood for confusion,’ in large part because it allows for competing marks to be displayed at the same time on the same screen.” [Jupiter Hosting](#) (quoting [GoTo.com](#), 202 F.3d at 1207).

*vi. Intent*

If the defendant knowingly adopts an infringing mark to deceive the public, courts presume that such confusion will occur. [Sleekcraft](#), 599 F.2d at 354. But courts do not require evidence of intent to determine that confusion is likely. [Pom Wonderful](#), 775 F.3d at 1131. This factor favors the plaintiff “where the alleged infringer adopted his mark with knowledge, actual or constructive, that it was another’s trademark.” [JL Beverage](#), 828 F.3d at 1111 (quoting [Brookfield Comnc’ns, Inc. v. W. Coast Entm’t Corp.](#), 174 F.3d 1036, 1059 (9th Cir. 1999)).

Here, ConsumerDirect contends that “Defendants targeted [ConsumerDirect’s] customers by making numerous copycat websites of all three of [its] main websites, took substantial measures to cover up their involvement, and continued using the [Allegedly] Infringing Marks even after [ConsumerDirect’s] cease and desist demands.” Mot., Dkt. 34, at 9. Defendants argue that there is no evidence that they knew of ConsumerDirect’s trademarks when they allegedly infringed upon them. *See* Array Opp’n, Dkt. 41, at 18. However, that is unlikely given that the Allegedly Infringing Domains are competitive with ConsumerDirect’s (Coulter Decl., ¶ ), ConsumerDirect is a market leader (*id.* ¶ 2), ConsumerDirect has consistently

used the marks since 2009 (*id.* ¶ 3), ConsumerDirect spends a significant amount of money marketing the marks (*id.* ¶ 5), and the Allegedly Infringing Domains are substantially similar to ConsumerDirect’s (*see* III.B.2.iii *supra*). This is further substantiated by the fact that Defendants created and operate, or have operated, other websites that appear to be copycat websites of others in the industry, including: (1) [wisecreditkarma.com](#), an apparent copycat of Credit Karma’s [creditkarma.com](#); (2) [myficrofuture.com](#), an apparent copycat of Fico’s [myfico.com](#); (3) [mycreditbliss.com](#), an apparent copycat of Credit Bliss’ [creditbliss.com](#); (4) [myfreecreditscoresnow.com](#), an apparent copycat of MyFreeScoreNow, Inc.’s [myfreescorenw.com](#); (5) [creditleflock.com](#), an apparent copycat of Norton’s [lifelock.com](#); and (6) [truecreditview.com](#), an apparent copycat of TransUnion’s [truecredit.com](#). Usaha Decl., Exs. 34-45; Coulter Decl., ¶ 9, Exs. 7-12. Therefore this factor weighs in ConsumerDirect’s favor.

*vii. Likelihood of Expansion*

Finally, courts examine the likelihood that “either party may expand his business to compete with the other.” However, given that the parties goods and services already compete, “evidence of product expansion is not required for a finding of likelihood of confusion.” [Lahoti v. Vericheck, Inc.](#), 636 F.3d 501, 509 (9th Cir. 2011).

Having considered all of the above factors, the Court finds that ConsumerDirect has demonstrated a likelihood of success on its Trademark Infringement claim.

*2. False Designation of Origin and Unfair Competition*

\*10 ConsumerDirect’s Third Claim for False Designation of Origin and Unfair Competition under 15 U.S.C. § 1125(a) is based on infringement of its SMARTCREDIT Marks and IDLOCK.COM Marks. To prevail on an unfair competition claim sounding in infringement, a plaintiff must establish: (1) a valid and protectable mark; and (2) a likelihood of confusion stemming from another’s use of a similar mark. [S. Cal. Darts Ass’n v. Zaffina](#), 762 F.3d 921, 929 (9th Cir. 2014). For the reasons explained above, ConsumerDirect has shown that it is likely to succeed on its claims related to the SMARTCREDIT Marks. The Court now turns to ConsumerDirect’s claims with regards to its unregistered IDLOCK.COM Marks.

Unlike its SMARTCREDIT Marks, ConsumerDirect's IDLOCK.COM Marks are not registered with the USPTO. "Whereas section 32 provides protection only to registered marks, section 43(a) protects against infringement of unregistered marks and trade dress[.]" [Brookfield Communs., Inc. v. W. Coast Entm't Corp.](#), 174 F.3d 1036, 1046 n.8 (9th Cir. 1999) (citing [Kendall-Jackson Winery, Ltd. v. E. & J. Gallo Winery](#), 150 F.3d 1042, 1046 (9th Cir. 1998)). ConsumerDirect argues that the IDLOCK Marks are "arbitrary, or at least suggestive" and are "commercially strong and have acquired strong secondary meaning because they have become distinctive of [ConsumerDirect's] goods and services, as demonstrated by the exclusivity of [ConsumerDirect's] use since 2015, and the substantial amounts of advertising dollars spent and sales made." Mot., Dkt. 34, at 11 (citing Coulter Decl., ¶ 5).

Like they did with regards to the SMARTCREDIT Marks, Defendants argue that the IDLOCK Mark is weakened by a crowded field of similar marks. Array Opp'n, Dkt. 41, at 22. In support of this argument, Defendants identify three uses of the words "ID" and "Lock" and one of the words "Identity" and "Lock." *Id.* However, this showing is even weaker than Defendants' insufficient showing with regards to the SMARTCREDIT Marks. Again, these uses are arguably unrelated to ConsumerDirect's products and services (e.g., the use of "ID Lock" for a folding card case that physically shields personal information encoded on credit cards, passports, and other forms of ID). Accordingly, Defendants have not established that "IDLOCK" exists in a crowded field of similar marks.

Further, the IDLOCK and THEIDLOCK marks are substantially similar because Defendants' theidlock.com features a logo using a capital "ID" with a picture of a lock displayed prominently on the top left corner of the website, much like ConsumerDirect's idlock.com that also features a logo using a capital "ID" with a picture of a lock displayed prominently on the top left corner of the website. *See* Coulter Decl., Ex. 3; Usaha Decl., Ex. 29.

Moreover, ConsumerDirect has presented evidence that there have been many instances of actual confusion. Specifically, between June 1 and December 22, 2021, ConsumerDirect received nearly 200 inquiries from theidlock.com thinking it was associated with ConsumerDirect's idlock.com. *See* Alexander Decl., Exs. 61–62.

Overall, this is sufficient to demonstrate that ConsumerDirect has a likelihood of success on this claim.

### 3. Cybersquatting

To prevail on a claim under the Anticybersquatting Consumer Protection Act (ACPA), 15 U.S.C. § 1125(d), a plaintiff must show that: "(1) the defendant registered, trafficked in, or used a domain name; (2) the domain name is identical or confusingly similar to a protected mark owned by the plaintiff; and (3) the defendant acts with 'bad faith intent to profit from that mark.'" [DSPT Int'l, Inc. v. Nahum](#), 624 F.3d 1213, 1218–19 (9th Cir. 2010) (quoting 15 U.S.C. § 1125(d)(1)(A)). Section 1125(d)(1)(B)(i) lists various factors that a court may consider in determining whether a person has a bad faith intent.

\*11 Array argues that ConsumerDirect's ACPA claim "fails because (a) the 'ID Lock' and 'Credit Monitoring' designations are not protectable, (b) the Domain Names are not confusingly similar to [ConsumerDirect's] purported marks, and (c) there is no evidence of bad faith." Array Opp'n, Dkt. 41, at 23–24. However, as discussed above, the SMARTCREDIT.COM and IDLOCK.COM Marks are protectable and the Domain Names are confusingly similar.

As for ConsumerDirect's CREDITMONITORING.COM Mark, the same is true. A domain name such as "Booking.com" can be a protected mark if the domain, taken as a whole, signifies to consumers an association with a particular website," even if it is a generic word attached to ".com." [United States Pat. & Trademark Off. v. Booking.com B.V.](#), 140 S. Ct. 2298, 2304–06 (2020). In fact, "[b]ecause domain names are one of a kind, a significant portion of the public will always understand a generic '.com' term to refer to a specific business[.]" *Id.* at 2306. ConsumerDirect provided evidence that its CREDITMONITORING.COM domain has gained secondary meaning, including evidence of its exclusive use of the domain since 2015 and it "has committed significant amounts of time, effort, and money from the time it first started using these Marks to the present to developing a nationwide reputation through the Marks," including through "radio, television, online marketing, other various direct to consumer marketing, and indirect marketing." Coulter Decl., ¶¶ 2–5. ConsumerDirect's CEO also declared that "members of Plaintiff's websites recognize the Marks as exclusive source identifiers for goods and services ... originating from, sponsored, or approved by [ConsumerDirect.]" *Id.* ¶ 5. Defendants have not presented any evidence to refute that customers associate "Creditmonitoring.com" with ConsumerDirect's website.

Finally, Defendants' various "creditmonitoring" domain names are confusingly similar to ConsumerDirect's CREDITMONITORING Mark, as shown by the evidence of actual confusion that ConsumerDirect presents. See Alexander Decl., ¶ 6, Exs. 64–65.

For these reasons, ConsumerDirect has established its likelihood of success on the merits of its ACPA claim.

## 2. Irreparable Harm

A plaintiff seeking a temporary injunction must show more than the "possibility" of irreparable injury; he must demonstrate that irreparable injury is "likely" in the absence of preliminary relief. Winter, 555 U.S. at 22.

Under the Trademark Modernization Act of 2020, upon the showing of a likelihood of success on the merits on a trademark infringement claim, a plaintiff is entitled to a presumption of irreparable harm. Nintendo of Am., Inc. v. Storman, 2021 WL 4780329, at \*8 (C.D. Cal. Aug. 5, 2021).

Moreover, "[h]arm to business goodwill and reputation is unquantifiable and considered irreparable." MySpace, Inc. v. Wallace, 498 F. Supp. 2d 1293, 1305 (C.D. Cal. 2007); eBay, Inc. v. Bidder's Edge, Inc., 100 F. Supp. 2d 1058, 1066 (N.D. Cal. 2000) ("Harm resulting from lost profits and lost customer goodwill is irreparable because it is neither easily calculable, nor easily compensable[.]"). Here, ConsumerDirect argues that "Defendants' conduct, particularly its use of unlawful practices in connection with the copycat websites and infringing marks, has caused and is continuing to cause damage to Plaintiff's goodwill and reputation because, among other things, customers that would have signed up for Plaintiff's websites ended up signing up for Defendants' websites, had complaints with Defendants' websites, and are now unlikely to sign up for Plaintiff's websites as a result." Mot., Dkt. 34, at 14 (citing Coulter Decl., ¶¶ 7–8; Alexander Decl., ¶¶ 2–6, Exs. 61–65). The Court agrees. The evidence that ConsumerDirect has presented that potential customers were confused by the Allegedly Infringing Marks and Domains and inadvertently signed up for them instead of ConsumerDirect's products, is sufficient to show irreparable harm. See, e.g., See Alexander Decl., Exs. 61–62, 68.

\*12 Defendants argue that there is no irreparable harm because two of the websites at issue (www.theidlock.com and www.smartcreditview.com) were made inactive after ConsumerDirect filed this Motion. However, Defendants

could reactivate those websites at any time absent an injunction. And ConsumerDirect continues to be harmed by the other Domains that remain active. Accordingly, Defendants have not rebutted the presumption of irreparable harm.

Therefore, the Court finds that ConsumerDirect has demonstrated irreparable harm.

## 3. Balance of Equities

A party seeking injunctive relief "must establish ... that the balance of equities tips in his favor." Winter, 555 U.S. at 20. In assessing whether a party has met this burden, the district court has a "duty ... to balance the interests of all parties and weigh the damage to each." L.A. Mem'l Coliseum Comm'n v. Nat'l Football League, 634 F.2d 1197, 1203 (9th Cir.1980).

As explained above, ConsumerDirect has been harmed and will face irreparable harm absent an injunction. In contrast, Defendants have not presented any evidence that they would suffer harm from the injunction. In fact, Defendants already deactivated two of the websites when they learned of this Motion.

## 4. Public Interest

"In trademark cases, [the public interest] factor is often addressed in terms of the public's right 'not to be deceived or confused.'" Moroccanoil, Inc. v. Moroccan Gold, LLC, 2008 WL 11411416, at \*7 (C.D. Cal. Dec. 23, 2008) (quoting Opticians Ass'n of Am. v. Indep. Opticians of Am., 920 F.2d 187, 198 (3d Cir. 1990)). ConsumerDirect argues that the public interest is served by an injunction because "Defendants have deliberately capitalized on [ConsumerDirect's] protected marks and good will and have actually misled the public." Dkt. 34, at 15. ConsumerDirect has shown that it has spent significant time, energy, and money to have the public associate its products with its Marks. By using confusingly similar marks, Defendants are depriving consumers of their ability to distinguish the provider of competing goods. "As the public has a right not to be deceived or confused, the public interest ... favor[s] an injunction in this case." See id.

**IV. CONCLUSION**

For the foregoing reasons, the Court **GRANTS** the motion.

**All Citations**

Slip Copy, 2022 WL 1272243

**IT IS SO ORDERED.**

---

End of Document

© 2022 Thomson Reuters. No claim to original U.S. Government Works.