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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DEREK ANDREW, INC.,
Plaintiff,
v.
VITAL PHARMACEUTICALS, INC.,
Defendant.

CASE NO. CV07-1364JLR
ORDER GRANTING
PRELIMINARY INJUNCTION

I. INTRODUCTION

This matter comes before the court on Plaintiff Derek Andrew, Inc.’s (“Andrew”) motion for a preliminary injunction (Dkt. # 11). Having read the papers filed in connection with the motion, and having heard oral argument, the court GRANTS in part, and DENIES in part, Andrew’s preliminary injunction motion.

Andrew, the owner of the trademark RED LINE for apparel and related products, filed this lawsuit against Vital Pharmaceuticals, Inc., doing business as VPX Sports, (“VPX”) for its use of a similar mark on clothing it distributes to advertise its Redline energy drink. Andrew claims VPX is liable for: (1) false designation of origin in violation of the Lanham Act; (2) trademark infringement; and (3) unfair and deceptive acts in violation of the Washington Consumer Protection Act (“CPA”). Am. Compl. ¶¶ 12-24. VPX asserts a single counterclaim seeking a declaratory judgment that (1) VPX

1 has not infringed Andrew’s trademark and (2) Andrew’s trademark is invalid because it
2 abandoned its rights in the trademark without an intent to revive use. Answer at
3 Counterclaims ¶¶ 32-33. Andrew seeks to enjoin VPX from using the REDLINE mark
4 and “any other marks and names containing the designation REDLINE with respect to
5 clothing and related products” Proposed Order at 1. The court GRANTS the
6 motion in part (Dkt. # 11) and enjoins VPX from using the REDLINE trademark, by
7 itself, on clothing and related products.
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9 **II. FINDINGS OF FACT**

- 10 1. Derek Andrew is a Washington corporation with its principal place of business in
11 Bellevue, Washington. Federman Decl. (Dkt. # 13) ¶ 2. Derek Andrew Federman
12 is the President and CEO for Derek Andrew the company. Supp. Federman Decl.
13 (Dkt. # 35) ¶ 1.
- 14 2. VPX is a Florida corporation with its principal place of business in Broward
15 County, Florida. Answer (Dkt. # 36) ¶ 3. VPX sells its products to residents of
16 Washington. *Id.*
- 17 3. Andrew is in the business of designing, manufacturing, promoting, and selling
18 clothing and related products, including t-shirts, shirts, pants, tops, tank tops,
19 sweatshirts, sweat pants, hats, caps, shoes, and slippers. Federman Decl. ¶ 2.
20 Andrew’s market includes the United States and other countries. *Id.*
- 21 4. Andrew sells a number of its products under its registered trademark: RED LINE.
22 *Id.* Andrew owns Registration No. 817,040 relating to the use of RED LINE on
23 men’s coats and trousers – this trademark was first used in 1926. *Id.* at ¶ 4. It also
24 owns Registration No. 2,405,031 for the use of RED LINE on women’s clothing,
25 namely pants, sweatshirts, sweat pants, t-shirts, knit shirts and skirts, and jackets.
26 *Id.* at ¶ 5.
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- 1 5. Andrew has displayed the RED LINE trademark on clothing since 1997. *Id.* at ¶
2 3. Over the past ten years, sales of Andrew’s RED LINE brand of clothing have
3 totaled more than \$17 million. Supp. Federman Decl. ¶ 2.
- 4 6. Although Andrew concedes that the market for its RED LINE clothing is waning
5 and is being replaced by other Andrew brands, Andrew cites to the cyclical nature
6 of fashion to support its contention that it is likely to market clothing bearing the
7 RED LINE mark again in the future. Nevertheless, Andrew continues to use its
8 RED LINE mark on upscale women’s and men’s clothing in high-end boutiques in
9 the United States, including at the Derek Andrew boutique in Bellevue,
10 Washington. *Id.* At the hearing on this motion, counsel for Andrew approximated
11 sales of the RED LINE brand to be in the neighborhood of \$30-\$50,000 in the last
12 two years.
- 13 7. VPX is the owner of Registration No. 2,857,015 for use of the trademark
14 REDLINE in connection with nutritional supplements and energy drinks. Deits
15 Decl. (Dkt. # 12) ¶ 2.
- 16 8. VPX is not in the business of selling or distributing clothing. Santamaria Decl.
17 (Dkt. # 25) ¶ 2. VPX is a manufacturer and seller of a line of nutritional
18 supplements and beverages, including the Redline energy drink. *Id.*
- 19 9. VPX adopted the trademark REDLINE for its energy drinks based on the redline
20 portion of an engine tachometer. *Id.* That is, redline is defined as the “maximum
21 engine speed at which an internal combustion engine or traction motor and its
22 components are designed to operate without causing damage to the components
23 themselves or other parts of the engine.” *Id.*
- 24 10. VPX’s Redline energy drink is sold in mass quantities to fitness enthusiasts and is
25 distributed through retail outlets such as Wal-Mart, GNC, Vitamin Shoppe, gyms
26 and health clubs, and convenience stores. *Id.* at ¶ 4.
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- 1 11. VPX promotes its Redline energy drink through promotional items such as athletic
2 clothing, including hats, t-shirts, tank tops, and sweat pants. *Id.* at ¶ 5. While
3 VPX admits that it previously offered these items for sale at various fitness
4 venues, it asserts that these items are no longer available for sale to the general
5 public. *Id.* VPX only distributes its athletic clothing bearing the REDLINE mark
6 through its headquarters in Davie, Florida and at fitness shows throughout the
7 country. *Id.* at ¶ 10. It does not charge for these products, but offers them solely
8 for promotional purposes. Today, VPX’s use of the REDLINE trademark on
9 clothing is always accompanied by the slogan “The Ultimate Energy Rush.” *Id.* at
10 ¶ 6.
- 11 12. VPX admits that in the past it has sold athletic clothing prominently bearing
12 REDLINE without any accompanying tag line. *Id.*
- 13 13. On April 13, 2007, VPX filed an application to register with the United States
14 Patent and Trademark Office (“USPTO”) the REDLINE trademark for t-shirts,
15 pants, crop tops, halter tops, muscle tops, tank tops, hats, shoes, and other athletic
16 clothing. Deits Decl. ¶ 3. Of note, in its trademark application, VPX requests
17 protection for the REDLINE mark without any additional slogans or tag lines. *Id.*
18 VPX also asserts in its application that it has used the REDLINE trademark for its
19 line of clothing since December 18, 2003. Deits Decl., Ex. B.
- 20 14. The USPTO examining attorney refused to register VPX’s REDLINE trademark
21 for clothing because “it is likely to be confused with the marks” in Andrew’s
22 registered trademarks, along with two other unrelated marks. Deits Decl., Ex. C at
23 25. The examining attorney specifically found that “[t]he dominant portion of all
24 of the marks is ‘REDLINE’ or ‘RED LINE,’ and all identifying clothing [sic].
25 Therefore, confusion as to source is likely between VPX’s pending mark and the
26 registered marks.” *Id.*
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1 15. On July 30, 2007, Dave Deits, attorney for Andrew, notified VPX by letter that its
2 use of REDLINE on clothing and related products infringed Andrew’s RED LINE
3 trademark. *Id.* at ¶ 5, Ex. D. The letter demanded that VPX cease and desist
4 using the REDLINE mark on clothing and related products and that VPX
5 withdraw its April application for trademark protection on the REDLINE mark for
6 clothing, headwear, and footwear. *Id.*

7 16. VPX denied any infringing use of Andrew’s RED LINE trademark. In an August
8 20, 2007 letter, VPX’s general counsel, Erica Stump, agreed to withdraw the
9 application for trademark protection of REDLINE on clothing and related items.
10 Diets Decl., Ex. F at 3. Ms. Stump also agreed “not to use REDLINE as ‘words
11 only’ in conjunction with clothing.” *Id.* The parties were unable to agree on a
12 solution and this suit followed.¹

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14 **III. CONCLUSIONS OF LAW**

15 1. The court has jurisdiction over the federal claims in this matter pursuant to 28
16 U.S.C. §§ 1331 and 1338(a). The court exercises its supplemental jurisdiction
17 over the state law claims in this matter. 28 U.S.C. § 1367.

18 2. Andrew seeks a preliminary injunction to enjoin VPX from using the REDLINE
19 mark and any other marks and names containing the designation REDLINE with
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22 ¹Although Ms. Stump represented in her August 20, 2007 letter that VPX sought an
23 “amicable means of resolving the issues,” and would like to “avoid the expense of litigation,” on
24 that same day, VPX filed an action for declaratory judgment in the Southern District of Florida
25 against Andrew. Deits Decl., Exs. E & F. In a strongly worded opinion, the Florida court
26 dismissed VPX’s declaratory judgment action stating: “the Court is disturbed by VPX’s
27 underhandedness in entering into negotiation withholding crucial information, that is, the filing of
28 the present lawsuit. This behavior preempted the natural plaintiff’s [Andrew’s] ability to file their
lawsuit first.” *Vital Pharm. Ind. v. Derek Andrew, Inc.*, 07-61177-CIV-JIC at 11 (E.D. Fl.
December 18, 2007 (Dkt. # 23)). The case thereafter proceeded in this jurisdiction. The venue
battle delayed Andrew’s motion for preliminary injunction, however, because the court stayed this
case pending the Florida court’s determination on venue.

1 respect to clothing and related products during the pendency of this action.

2 Proposed Order at 1.

- 3 3. In a trademark case, a plaintiff is entitled to a preliminary injunction “when it
4 demonstrates either (1) a combination of ‘probable success on the merits’ and ‘the
5 possibility of irreparable injury’ or (2) the existence of ‘serious questions going to
6 the merits’ and that ‘the balance of hardships tips sharply in his favor.’”
7 *GoTo.com, Inc. v. Walt Disney Co.*, 202 F.3d 1199, 1205 (9th Cir. 2000) (quoting
8 *Sardi’s Rest. Corp. v. Sardie*, 755 F.2d 719, 723 (9th Cir. 1985)). These standards
9 “are not separate tests but the outer reaches of a single continuum.” *Int’l Jenson,*
10 *Inc. v. Metrosound U.S.A.*, 4 F.3d 819, 822 (9th Cir. 1997) (citation omitted).

11 **A. Conclusions on Probable Success on the Merits**

- 12 4. To prevail on a claim under the Lanham Act, Andrew must establish that VPX is
13 using a mark confusingly similar to its mark. *See AMF Inc. v. Sleekcraft Boats*,
14 599 F.2d 341, 348 (9th Cir. 1979). Likelihood of confusion concerns whether “the
15 similarity of the marks is likely to confuse customers about the source of the
16 products.” *GoTo.com*, 202 F.3d at 1205 (citations omitted). At the preliminary
17 injunction stage, likelihood of confusion is the central element of a trademark
18 claim. *Id.* at 1205 n.5.
- 19 5. Andrew argues, inter alia, that it is likely to prove that VPX violated the Lanham
20 Act because the trade names VPX uses on its athletic clothing, including
21 “REDLINE,” and “REDLINE - The Ultimate Energy Rush,” constitute misleading
22 or false designations of origin pursuant to 15 U.S.C. § 1125(a)(1) and trademark
23 infringement pursuant to 15 U.S.C. § 1114(1)(a).
- 24 6. To establish a trademark infringement claim under section 32 of the Lanham Act
25 or an unfair competition claim under section 43(a) of the Lanham Act, Andrew
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1 must establish that VPX is using a mark confusingly similar to a valid, protectable
2 trademark of Andrew's. *See Sleekcraft*, 599 F.2d at 348.²

- 3 7. Section 32(1) of the Lanham Act applies to federally registered marks and
4 provides in pertinent part:

5 Any person who shall, without the consent of the registrant-

6 (a) use in commerce any reproduction, counterfeit, copy, or
7 colorable imitation of a registered mark in connection with the
8 sale, offering for sale, distribution, or advertising of any goods or
9 services on or in connection with which such use is likely to cause
confusion, or to cause mistake, or to deceive; . . .

10 shall be liable in a civil action by the registrant for the remedies
hereinafter provided.

11 15 U.S.C. § 1114(1)(a).

- 12 8. The same standard is embodied in section 43(a)(1) of the Lanham Act, false
13 designation of origin, which applies to both registered and unregistered trademarks:

14 Any person who, on or in connection with any goods or services,
15 . . . uses in commerce any word, term, name, symbol, or device, or
16 any combination thereof, or any false designation of origin, false
or misleading description of fact, or false or misleading
17 representation of fact, which-

18 (a) is likely to cause confusion, or to cause mistake, or to deceive
19 as to the affiliation, connection, or association of such person with
another person, or as to the origin, sponsorship, or approval of his
20 or her goods, services, or commercial activities by another person,
. . .

21 shall be liable in a civil action by any person who believes that he
or she is or is likely to be damaged by such act.

22 15 U.S.C. § 1125(a)(1).

- 23 9. Eight factors guide the court's analysis of likelihood of confusion. *Sleekcraft*, 599
24 F.2d at 348. Applied to this case, they are: (1) similarity of the marks; (2)
25 proximity of the goods; (3) marketing channels used; (4) strength of Andrew's
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27 ² Section 43(a) prohibits a broader range of practices than does section 32, which applies
28 only to registered marks. *See Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844,
858 (1982).

1 mark; (5) VPX's intent in selecting its mark; (6) evidence of actual confusion; (7)
2 likelihood of expansion into other markets; and (8) degree of care likely to be
3 exercised by purchasers. *See id.* at 348-49. The eight-factor test is a "pliant" one;
4 no single factor is determinative. *Brookfield Commc'ns Inc. v. W. Coast Entm't*
5 *Corp.*, 174 F.3d 1036, 1054 n.16 (9th Cir. 1999).

6 10. The court finds that Andrew has demonstrated a likelihood of confusion as to
7 VPX's prior use of the REDLINE mark absent the slogan "The Ultimate Energy
8 Rush," or other distinguishing tag line. The court does not find any likelihood of
9 confusion when VPX uses REDLINE with the slogan "The Ultimate Energy Rush."
10 *See, e.g., Michael Caruso & Co., Inc. v. Estefan Enter., Inc.*, 994 F. Supp. 1454,
11 1461 (S.D. Fla. 1998) (finding no confusion between BONGOS CUBAN CAFÉ on
12 restaurant's clothing products and BONGO for retail clothing). The court finds
13 that the latter iteration sufficiently identifies VPX's attempts to advertise its energy
14 drink on clothing and other apparel so as to avoid confusion with Andrew's RED
15 LINE clothing.
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17 11. Evidence produced by Andrew shows that VPX's use of the REDLINE mark,
18 standing alone, is not only similar, but in some instances, depending on font,
19 appears nearly identical to Andrew's mark, RED LINE. *Cf. Deits Decl., Ex. G* at
20 1-2 *with Ex. G.* at 7-9. Variations in font make no appreciable difference. *See E.*
21 *& J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1291 (9th Cir. 1992) ("The
22 key elements of the marks are their sight, sound, and meaning and these similarities
23 in characteristics 'weigh more heavily than differences.'") (quoting *Sleekcraft*, 599
24 F.2d at 351).

25 12. The scope of trademark protection given to a mark depends on the strength of the
26 mark, with stronger marks receiving greater protection than weak ones.
27 *Entrepreneur Media, Inc. v. Smith*, 279 F.3d 1135, 1140 (9th Cir. 1998). The
28 strength of Andrew's mark is evidenced by its continuous use on athletic clothing

1 for the past ten years (and since 1926 on men’s clothing). *See E. & J. Gallo*, 967
2 F.2d at 1291 (affirming finding that plaintiff’s trademark was strong, based on long
3 continuous use). The evidence in the record contradicts VPX’s contention that
4 Andrew has abandoned the RED LINE trademark because it no longer distributes
5 the line of clothing bearing the mark. Indeed, Mr. Federman, Derek Andrew’s
6 President and CEO, filed a declaration stating that Andrew continues to sell its
7 RED LINE mark in high-end boutiques in the United States, including at the Derek
8 Andrew boutique in Bellevue, Washington. Supp. Federman Decl. ¶ 3.

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10 13. In addition to continuous use, the strength of the mark also depends on whether it is
11 “generic, descriptive, suggestive, arbitrary, or fanciful.” *Brookfield*, 174 F.3d at
12 1058; *see also M2 Software, Inc. v. Madacy Entm’t*, 421 F.3d 1073, 1080 (9th Cir.
13 2005). The level of protection is highest for marks that are arbitrary or fanciful.
14 *Id.* According to VPX, the RED LINE trademark was developed by Andrew
15 because its clothing line was all red, which tends to weaken the mark because it is a
16 descriptive or suggestive. Andrew responds that RED LINE is a simply an
17 arbitrary term. Supp. Federman Decl. ¶ 6 (“From its inception, Derek Andrew’s
18 RED LINE brand product line has always been designed and marketed in a wide
19 array of colors The RED LINE brand of clothing is not, nor has it ever been,
20 either designed or marketed exclusively in the color red.”). Because VPX’s
21 assertion is not supported by the record and Andrew’s assertion is supported by the
22 Federman declaration, the court finds the RED LINE mark arbitrary or fanciful. As
23 a strong mark it is entitled to greater protection.

24 14. As to proximity of the goods, the parties are not direct competitors in the clothing
25 business but both offer athletic clothing, including tank tops, sweatshirts, and t-
26 shirts, bearing the trademark RED LINE or REDLINE. The similarity of marks
27 alone, as explained by the Ninth Circuit, does not necessarily lead to consumer
28 confusion, however. *See Brookfield*, 174 F.3d at 1054. The court must consider

1 the relatedness of the products and services offered. *Id.* Related goods are
2 generally more likely than unrelated goods to confuse the public as to the producers
3 of the goods. *Id.*

4 15. Even in cases, such as this one, where there is a notable difference in the parties’
5 principal lines of business, i.e., Andrew is in the clothing business and VPX is in
6 the nutritional supplement business, “the relatedness of each company’s prime
7 directive isn’t relevant” to the *Sleekcraft* analysis. *See Dreamwerks v. SKG*
8 *Studio*, 142 F.3d 1127, 1131 (9th Cir. 1998). Rather, the focus is on whether the
9 consuming public is likely to associate Andrew’s clothing line with VPX’s
10 promotional clothing. *See id.* Here, both parties provide athletic clothing to
11 consumers and thus there is the potential for consumer confusion – albeit Andrew
12 targets the high-end consumer with its designer sweat pants and sweatshirts while
13 VPX targets the fitness enthusiasts with its similar apparel. The court is persuaded
14 that a consumer buying high-end athletic gear is likely to attend a fitness trade
15 show or convention where VPX sells its energy drink and distributes its athletic
16 apparel bearing the drink’s name.³

18 16. There is no evidence in the record relating to whether VPX is likely to expand its
19 use of REDLINE on clothing. The court therefore declines to evaluate this issue.

20 17. The court further finds that there is no evidence that VPX intended to adopt
21 Andrew’s trademark. There is un rebutted evidence that VPX adopted the
22 REDLINE mark for its energy drink and intended to use it on clothing for only
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25 ³ VPX points to other companies that use the RED LINE name in promotional material.
26 These companies are not in similar businesses as Andrew. The court is not persuaded that a
27 consumer will be confused by “Red Line Oil” for use on Red Line Synthetic Oil promotional
28 items. *See Santamaria Decl., Ex. I.* Nor is a consumer likely to be confused by Redline Marine
Engine Servicing Inc.’s use of the phrase “Redline Marine Engine Servicing, Inc.” and a
tachometer on a white t-shirt. *Id., Ex. J.* VPX’s use of REDLINE alone on athletic clothing is
significantly more related to Andrew’s line of business than oil and engine repair.

1 promotional purposes. The court is satisfied that VPX did not set out to confuse
2 consumers with its REDLINE mark.

3 18. Andrew produces no evidence of actual confusion.

4 19. The degree of care exercised by purchasers sheds little light on this case. The court
5 only notes that “the more expensive the product or service, and the more
6 sophisticated the consumer, the less likely there is to be confusion.” *Brookfield*,
7 174 F.3d at 1060. There is no evidence in the record as to the actual cost of
8 Andrew’s “high-end” clothing or the relative sophistication of consumers of either
9 Andrew’s or VPX’s clothing line.

10 20. Although the *Sleekcraft* test does not take into account the USPTO decision – and
11 the decision is not determinative on the issue of confusion in the Ninth Circuit – it
12 is a factor that the court may consider. *See Carter-Wallace, Inc. v. Procter &*
13 *Gamble Co.*, 434 F.2d 794, 802 (9th Cir. 1970) (noting that the degree of deference
14 given to USPTO decisions depends on the completeness of the record and the level
15 of agency decision).⁴ Here, the examining attorney for the USPTO determined that
16 the trademark, REDLINE, standing alone, was confusingly similar to Andrew’s
17 mark. *Id.* Given that the two marks are substantially the same except for a space
18 between “RED” and “LINE” in Andrew’s mark, the court finds the examining
19 attorney’s decision persuasive.

20 21. In sum, the court relies on the following factors in coming to its preliminary
21 conclusion that VPX’s use of the mark REDLINE, standing alone, on clothing
22 constitutes a violation of sections 43(a) and 32(1)(a) of the Lanham Act: (1) the
23 Andrew trademark is a strong mark; (2) the two marks are nearly identical with
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28 ⁴ The eight-factor *Sleekcraft* test is not exhaustive and non-listed variables may often be quite important. *Brookfield*, 174 F.3d at 1054.

1 only spacing and font distinguishing the two; (3) the USPTO’s determination that
2 the marks were confusingly similar; and (4) the relatedness of the products.

3 **B. Conclusions on Irreparable Harm**

4 22. Once a plaintiff establishes a likelihood of confusion under the Lanham Act, as
5 here, a court may presume irreparable harm from prospective injury to a business’s
6 goodwill and reputation. *See Brookfield*, 174 F.3d at 1066.

7 23. VPX attempts to rebut this presumption by arguing that Andrew has unreasonably
8 delayed in asserting its exclusive right to use RED LINE. Delay in seeking relief
9 may undercut the possibility of irreparable harm: “[a] preliminary injunction is
10 sought upon the theory that there is an urgent need for speedy action to protect the
11 plaintiff’s rights. By sleeping on its rights, a plaintiff demonstrates the lack of need
12 for speedy action” *Lydo Enters., Inc. v. City of Las Vegas*, 745 F.2d 1211,
13 1213 (9th Cir. 1984) (citation omitted).

14 24. As described above, Andrew learned of VPX’s attempt to register the REDLINE
15 mark for athletic clothing and sent a cease and desist letter on July 30, 2007, giving
16 VPX 20 days to discontinue use of the REDLINE trademark. Deits Decl., Ex. D.
17 VPX responded to Andrew’s letter on August 30, 2007, and Andrew filed the
18 instant suit a day later. Andrew then moved for injunctive relief approximately 45
19 days after filing the instant law suit. The court does not find that this amounts to
20 an unreasonable delay.

21 25. Even assuming, as Defendants contend, that Plaintiff acted less than swiftly to
22 enforce its rights, courts are “loath to withhold relief solely on that ground.” *Lydo*,
23 745 F.2d at 1214. In *Lydo*, for instance, the court’s denial of a preliminary
24 injunction was based not only on the plaintiff’s 5 year delay in seeking relief, *but*
25 *also* because the singular threat of financial loss did not constitute irreparable harm.
26 *Id.*
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1 26. On the evidence before the court, VPX fails to cast serious doubt on the
2 presumption that Andrew will suffer irreparable injury to its reputation and
3 goodwill arising from VPX’s future use of the trademark REDLINE.

4 **C. Conclusions on Scope of Injunctive Relief**

5 27. Although neither party addressed the issue of mootness, given that VPX no
6 longer markets clothing with the REDLINE trademark displayed on it without
7 some accompanying slogan, i.e., “REDLINE - The Ultimate Energy Rush,” the
8 court nevertheless finds an injunction appropriate here. The voluntary cessation
9 of allegedly illegal conduct does not render an injunction moot, unless “the
10 reform of the defendant [is] irrefutably demonstrated and total.” *Polo Fashions,*
11 *Inc. v. Dick Bruhn, Inc.*, 793 F.2d 1132, 1135-36 (9th Cir. 1986). In *Polo*
12 *Fashions*, the Ninth Circuit held that plaintiffs are not required to present
13 specific evidence demonstrating that defendants will continue infringing in the
14 future. *Id.* at 1132. Rather, “[i]f the defendants sincerely intend not to infringe,
15 the injunction harms them little; if they do, it gives [the plaintiff] substantial
16 protection of its trademark.” *Id.* at 1135-36.

18 28. Although VPX is no longer using Andrew’s mark on clothing in an infringing
19 manner, the court concludes that, under *Polo Fashions*, an injunction is
20 warranted to protect against future use – especially where VPX has not
21 affirmatively agreed to discontinue use of the REDLINE mark without some
22 additional qualifying language identifying its connection to the energy drink.
23 Moreover, the court finds that VPX’s April 2007 application for trademark
24 protection on the REDLINE mark indicates a possible future intent to market a
25 competing line of clothing bearing the REDLINE mark. *Id.*

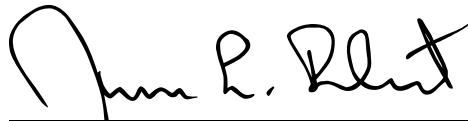
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IV. PRELIMINARY INJUNCTION

For the foregoing reasons, the court ORDERS as follows:

1. VPX is enjoined from using the REDLINE trademark, by itself, on any form of clothing and related products, such as t-shirts, shirts, pants, tops, tank tops, sweatshirts, sweat pants, hats, caps, shoes, and slippers;
2. VPX may continue to advertise on clothing and related products using the slogan “REDLINE - The Ultimate Energy Rush,” and other similar iterations of this slogan;
3. Andrew shall deposit a \$5,000 bond with the clerk of this court, conditioned to pay VPX’s reasonable costs and damages should it be found that VPX was wrongfully enjoined. *See* Fed. R. Civ. P. 65(c); *see also Jorgensen v. Cassidy*, 320 F.3d 906, 919 (9th Cir. 2003) (bond may be dispensed with entirely - or only a nominal bond required - where the court determines there is no realistic likelihood of harm to defendant from enjoining the conduct); and
4. This order shall not take effect until Andrew deposits such bond with the court.

DATED this 5th day of February, 2008.



JAMES L. ROBART
United States District Judge