

UNITED STATES DISTRICT COURT
XXXXXXX DISTRICT OF XXXXXXXX

CHRYSLER GROUP LLC,)
)
 Plaintiff,)
)
 v.)
)
 MODA GROUP, LLC, dba PURE)
 DETROIT, KEVIN BORSAY, and)
 SHAWN SANTO,)
)
 Defendants.)

**MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFF CHRYSLER GROUP LLC'S
MOTION FOR PRELIMINARY INJUNCTION***

* Edited by Fenwick & West LLP for the Berkeley Center for Law & Technology/Federal Judicial Center Intellectual Property Conference, Berkeley, California, May 21-24, 2013

Plaintiff Chrysler Group LLC (“Chrysler”) respectfully submits this memorandum in support of its Motion for Preliminary Injunction against Defendants.

I. FACTUAL BACKGROUND

A. Chrysler Group LLC

Since 1925, Chrysler and its assignors have been based in the Detroit area and have long been closely associated in the public’s mind with the city of Detroit. Garlick Decl. ¶ 3. Like other Detroit-based auto manufacturers in recent years, Chrysler’s sales experienced a decline in the face of the economic recession in this country and the increased popularity of foreign-made vehicles. *Id.*

However, as it emerged from the shadow of bankruptcy and experienced a turn-around, Chrysler wanted to boost its brand image and re-commit to the original vision of its founder, Walter P. Chrysler, to provide quality and luxury at an affordable price. *Id.* ¶ 4. To communicate this to consumers, at great expense, Chrysler engaged a marketing agency to develop a “repositioning campaign.” *Id.* In developing this campaign, Chrysler and its outside agency decided the linchpin of the new brand strategy would be the tagline IMPORTED FROM DETROIT™, which fancifully and creatively combines inconsistent terms to connote the concept that consumers can find quality and luxury in Chrysler automobiles without having to turn to imports from foreign manufacturers. *Id.*

Chrysler promptly applied to the United States Patent and Trademark Office (the “PTO”) to register the trademark for automotive vehicles (Ser. No. 85/183,477) on November 23, 2010, *id.* Ex. A, and set about to introduce its powerful new tagline to consumers.

B. Chrysler’s Launch of Its IMPORTED FROM DETROIT™ Mark

To achieve maximum impact, Chrysler decided to introduce its new campaign and IMPORTED FROM DETROIT™ trademark through a television commercial during the

February 6, 2011 NFL Super Bowl, perennially the most watched television program of the year. *Id.* ¶ 6. Chrysler decided to communicate its rededication to the quality, pride, and hard work inherent in the American Spirit—as well as the grit, determination, and resurgence of the great City of Detroit—through an unprecedented two minute Super Bowl commercial. *Id.* ¶¶ 6-7.

To highlight the city, Chrysler filmed the commercial in Detroit, used all local figures in the ad, licensed music from Eminem, the famed rapper from Detroit, and engaged Eminem himself to appear. *Id.* ¶ 6. During the third quarter of the Super Bowl, Chrysler’s compelling advertisement and IMPORTED FROM DETROIT™ tagline were revealed. *Id.* ¶ 8.

Consumer reactions to Chrysler’s Super Bowl ad and IMPORTED FROM DETROIT™ trademark have been overwhelmingly positive. The commercial and trademark were seen by over 94 million viewers during the Super Bowl, and the ad, including a shortened version, and the IMPORTED FROM DETROIT™ trademark have, in just a few short weeks, had over 3 billion commercial impressions. *Id.* ¶ 9. Immediately following the Super Bowl launch, traffic to Chrysler’s website, www.Chrysler.com, spiked from fewer than 500 requests per second to 13,244 per second. *Id.* In the weeks following the Super Bowl, the ad and tagline have been hailed widely for bringing pride back to Detroit and the U.S. automotive industry. *Id.* ¶ 10. The tagline has been touted in hundreds of press articles, and the Detroit City Council has specifically “saluted” Chrysler for “coining” “IMPORTED FROM DETROIT.” *Id.*, Exs. D-E.

The ad has a strong impact on consumers: a single view lifted awareness for the Chrysler 200 vehicle an astounding 7%, meaning that it is extremely effective in embedding its detail and connection with the Chrysler® brand in consumer memory. White Decl. ¶ 6. Moreover, the IMPORTED FROM DETROIT™ slogan is extremely powerful because it taps into today’s American cultural context: the desire to cheer for one making a comeback and, as the country

emerges from recession, to take pride in American goods and in particular in an industry and city that fell on the hardest of times. Joachimsthaler Decl. ¶ 24.

To date, Chrysler has invested tens of millions of dollars in the IMPORTED FROM DETROIT™ campaign. Garlick Decl. ¶ 15. The mark has been promoted at automobile trade shows and featured in a shortened version of the commercial, print ads, radio, billboard, digital media, model catalog, and direct mail and e-mail campaigns. *Id.* The excitement it has generated for Chrysler and the Chrysler 200 Model is an invaluable asset for Chrysler. *Id.* As a slogan that has become a rallying cry, it is an asset for the Chrysler® brand of a nature comparable to JUST DO IT® for the Nike® brand. Joachimsthaler Decl. ¶¶ 32-33.

C. Chrysler's Use of the IMPORTED FROM DETROIT™ Mark on Apparel

Beyond buying automobiles, consumers show their allegiance and enthusiasm for Chrysler and its vehicles through branded clothing. Garlick Decl. ¶ 13. Each year, Chrysler sells, directly and through licensees, on the Internet and through retail outlets, hundreds of thousands of dollars worth of clothing branded with its vehicle and model brand names, logos, and slogans. *Id.* Chrysler also sells a variety of other “lifestyle” products displaying its trademarks. Accordingly, before the launch of the tagline, Chrysler applied to register the IMPORTED FROM DETROIT™ mark for clothing, and other goods, under Application Serial Number 85,219,920, filed January 18, 2011. *Id.*, Ex. F.

Recognizing the power of the tagline, Chrysler began selling t-shirts bearing the IMPORTED FROM DETROIT™ mark a few days after the Super Bowl. *Id.* ¶ 14. As Chrysler became further aware of the magnitude of the public excitement about the IMPORTED FROM DETROIT™ clothing line, it decided to use the opportunity to give back to Detroit and made arrangements with local Detroit charities to receive a portion of the proceeds from the IMPORTED FROM DETROIT™ t-shirt sales. *Id.* ¶ 15. Chrysler has sold thousands of the t-

shirts, which have been the most popular item bearing the mark. *Id.* ¶¶ 14-16. Given that t-shirts are self-expressive goods that consumers use to communicate their values to others, this is not surprising. Joachimsthaler Decl. ¶¶ 27-31.

D. Pure Detroit's Unauthorized Use of Chrysler's Mark

There is no evidence that Defendants had ever used the term IMPORTED FROM DETROIT before the Super Bowl. Within days after, however, Defendants began selling t-shirts boldly featuring Chrysler's IMPORTED FROM DETROIT™ mark. According to one article, Defendants admitted they began ordering t-shirts the day after the Super Bowl. Venet Decl. ¶ 10, Ex. D.

Defendants' marketing of the shirts indicated Defendants knew they were trading on Chrysler's tagline. For example, Defendants touted the women's t-shirt as follows:

Imported From Detroit – Women's – Black: A *tagline* that is making headlines across America! Get your very own Imported From Detroit T-Shirt today. Grey Letters on a Ladies Black Tee. A Pure Detroit Exclusive!

Id. ¶ 5 (emphasis added). Defendants apparently rapidly began selling large quantities of the IMPORTED FROM DETROIT™ t-shirts because Defendants' sales representative described the sales of the products as Pure Detroit's "best ever." *Id.* ¶ 8.

When Chrysler discovered Defendants' online sales of the infringing t-shirts on February 10, 2011, it promptly notified Defendants of Chrysler's rights and requested that Defendants stop using the mark. They refused. Instead, Defendants changed their website to remove the reference to the "tagline," seeking to hide the evidence of their clear recognition of Chrysler's rights. Powell Decl. ¶ 5. Defendants also began marketing additional products, including tote bags and additional t-shirts with a new IMPORTED FROM DETROIT™ design. *Id.*; Venet Decl. ¶ 3.

After communications between counsel, on February 23, Defendants’ counsel informed Chrysler’s counsel that Defendants were “in the process of” ceasing sales of the infringing products. Powell Decl. ¶ 5. However, knowing that Chrysler had understood that they were ceasing sales of the infringing products—and contrary to their counsel’s representations to that effect—Defendants continued selling t-shirts and tote bags bearing the IMPORTED FROM DETROIT™ mark at all of their retail locations. Venet Decl. ¶ 7. When Chrysler discovered these sales on March 1 and confronted Defendants, Defendants’ counsel responded that Pure Detroit had “ceased its cessation activities.” Powell Decl. ¶ 6. Before filing suit, Chrysler made several more attempts to reach an agreement for Defendants to cease, to no avail. *Id.* ¶ 7.

II. ARGUMENT

A. Chrysler is Entitled to a Preliminary Injunction

The Federal Trademark Act (the “Lanham Act”) expressly authorizes injunctive relief in cases of trademark infringement and unfair competition. *See* 15 U.S.C. §§ 1116, 1125(a). In the Sixth Circuit, a party is entitled to preliminary injunctive relief where it establishes that:

(1) there is a substantial likelihood the movant will prevail on the merits; (2) the movant will suffer irreparable harm unless the injunction issues; (3) an injunction will not cause substantial harm to the defendant or to others; and (4) the injunction, if issued, would be in the public interest. *See Lorillard Tobacco Co. v. Amouri’s Grand Foods, Inc.*, 453 F.3d 377, 380 (6th Cir. 2006) (citing *Six Clinics Holding Corp., II v. Cafcomp Sys., Inc.*, 119 F.3d 393, 399 (6th Cir. 1997)). As demonstrated below, each of the factors favors entry of a preliminary injunction in this case.

B. Chrysler Is Substantially Likely to Succeed on the Merits of Its Claims

Chrysler is likely to prevail on its claims against Defendants under Section 43(a) of the Lanham Act. *See* 15 U.S.C. § 1125(a); *Tumblebus Inc. v. Cranmer*, 399 F.3d 754, 760-61

(6th Cir. 2005) (citations omitted). To succeed under Section 43(a), Chrysler must show that (1) the IMPORTED FROM DETROIT™ mark is protectable and (2) Defendants' unauthorized use of the mark on its products is likely to cause consumer confusion. *See id.* at 761.

1. Chrysler's IMPORTED FROM DETROIT™ Mark is Protectable

To be protectable, a mark must be distinctive. A mark is distinctive if it either (1) is inherently distinctive or (2) has acquired distinctiveness through secondary meaning. *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 769 (1992); *Tumblebus*, 300 F.3d at 761. Marks are classified in categories of increasing distinctiveness: (1) generic; (2) descriptive; (3) suggestive; (4) arbitrary; or (5) fanciful. *See Two Pesos, Inc.*, 505 U.S. at 769. Marks that are suggestive, arbitrary, or fanciful are "inherently distinctive." Marks that are merely descriptive are not inherently distinctive, but may acquire distinctiveness through secondary meaning. Generic terms are not protectable. *See id.*; *Tumblebus*, 300 F.3d at 761-62. Accordingly, Chrysler's IMPORTED FROM DETROIT™ mark is entitled to trademark protection unless it is (1) generic or (2) merely descriptive and lacking secondary meaning. It is neither. Chrysler's IMPORTED FROM DETROIT™ mark is protectable because it is inherently distinctive. Moreover, even in the short time since Chrysler unveiled the mark during February's Super Bowl, it has acquired substantial secondary meaning.

a. Chrysler's Mark is Inherently Distinctive

Although the distinction between a "descriptive" and a "suggestive" mark is thinly drawn, *see Tumblebus*, 399 F.3d at 763, the IMPORTED FROM DETROIT™ mark falls distinctly on the "suggestive" side of the line. The Sixth Circuit has explained that "[a] merely descriptive term specifically describes a characteristic or ingredient of an article" while a suggestive mark "suggests rather than describes an ingredient or characteristic of the goods and requires the observer or listener to use imagination and perception to determine the nature of the

goods.” *Champions Golf Club, Inc. v. The Champions Golf Club, Inc.*, 78 F.3d 1111, 1117 (6th Cir. 1996) (internal citations omitted).

Thus, determining whether a mark is suggestive turns on “the degree of inferential reasoning necessary for a consumer to discern” the goods or services provided in connection with the mark. *Tumblebus*, 399 F.3d at 763 (affirming the district court’s finding, at the preliminary injunction stage, that TUMBLEBUS was suggestive for mobile-gymnastics instruction). Inferential reasoning is required if a consumer seeing a mark in isolation would not necessarily identify the goods offered. *See id.* In analyzing the mark TUMBLEBUS, the Sixth Circuit explained:

Although the word ‘tumble’ does describe a subset of the activities which occur inside Tumblebus, Inc.’s ‘bus,’ the connection between ‘tumble’ and ‘bus’ is not so obvious that a consumer seeing TUMBLEBUS in isolation would know that the term refers to mobile-gymnastics instruction, and not for instance, a mobile laundry service using tumble-dryers.

Id.

Like the services offered in connection with the mark in *Tumblebus*, the goods offered under the IMPORTED FROM DETROIT™ mark would not be readily identifiable to a consumer viewing the mark in isolation. The IMPORTED FROM DETROIT™ mark does not describe the vehicles or the t-shirts offered by Chrysler because the vehicles and t-shirts are not imported from a foreign point of origin. The mark also cannot fairly be characterized as “descriptive” given that it is impossible for an American consumer to “import” a vehicle from “Detroit.” Indeed, the tagline represents a creative and fanciful play on the combination of those two inconsistent concepts. The mark was designed such that the clever commentary underlying the play on words—*i.e.*, that Americans seeking luxury and quality vehicles need look no further than Chrysler and they can get from Detroit the same level of quality expected in an import—would resonate with the American public. *See* Garlick Decl. ¶ 4.

To the extent Defendants may argue the mark is geographically descriptive because of the mark's inclusion of the word "Detroit," the inclusion of a geographic location does not necessarily render a mark merely descriptive and unprotectable. For example, this Court granted a preliminary injunction for infringement against the MIDWEST GUARANTY mark, despite defendant's argument that including the term "Midwest" rendered the mark merely descriptive, where the "Guaranty" portion of the mark was used suggestively to connote the feeling that customers' money was secure. *See Midwest Guaranty Bank*, 270 F. Supp. 2d at 911. Moreover, any such argument advanced by Defendants is belied by their own trademark registration, Reg. No. 3,164,890 for PURE DETROIT, which includes the very same word.¹

Based on the necessity to use one's imagination to understand the mark and to make the mental leap required to identify the underlying goods, the IMPORTED FROM DETROIT™ mark is suggestive. *See e.g., Tumblebus*, 399 F.3d at 763 (finding TUMBLEBUS suggestive for mobile-gymnastics instruction); *Express Welding, Inc. v. Superior Trailers, LLC*, 700 F. Supp. 2d 789 (E.D. Mich. 2010) (finding the NITRO SPREADER and NITRO STINGER marks suggestive for nitrogen-powered semi-trailers because they "do not immediately suggest trailers and features of trailers"). Thus, the mark is inherently distinctive.

b. Chrysler's Mark Has Acquired Secondary Meaning

Even if the Court finds the IMPORTED FROM DETROIT™ mark is not inherently distinctive, it has acquired distinctiveness through secondary meaning because it identifies the source of the product rather than the product itself. *See Gen. Motors Corp. v. Lanard Toys, Inc.*,

¹ During the course of the parties' communications, Defendants' counsel has referred to trademark applications, which never matured into registrations, for the marks IMPORTED FROM PHILADELPHIA and IMPORTED DAILY FROM CANADA as purported evidence that the IMPORTED FROM DETROIT™ mark is not protectable. The fate of those applications is irrelevant here. Neither was pursued long enough for the U.S.P.T.O. to reach a final decision on the substantive issues involved in their registration. Instead, the applicants chose to abandon their applications. *See* file histories for IMPORTED FROM PHILADELPHIA (App. No. 74/631,448) and IMPORTED DAILY FROM CANADA (App. No. 78/805,355).

468 F.3d 405, 418 (6th Cir. 2007) (“To demonstrate secondary meaning, the evidence must show that in the minds of the public, the primary significance of the trade dress is to identify the source of the product rather than the product itself.” (citing *Ives Labs., Inc. v. Inwood Labs., Inc.*, 456 U.S. 844, 851 n.11 (1982))). Secondary meaning is determined by analyzing seven factors: (1) direct consumer testimony; (2) consumer surveys; (3) exclusivity, length, and manner of use; (4) amount and manner of advertising; (5) amount of sales and number of customers; (6) established place in the market; and (7) proof of intentional copying. *Id.* No single factor is determinative of secondary meaning and every one need not be proven. *See Midwest Guaranty Bank*, 270 F. Supp. 2d at 911-12. Although only a short time has passed since Chrysler unveiled the IMPORTED FROM DETROIT™ mark, the result of its instantaneous popularity is that the mark has acquired secondary meaning.

As is evident from the fact that Defendants never before had used IMPORTED FROM DETROIT™, but immediately began selling products featuring that mark following Chrysler’s Super Bowl ad, Venet Decl. ¶ 3, Defendants intentionally copied Chrysler’s mark; and this “[i]ntentional copying may be used to show secondary meaning.” *See Gen. Motors*, 468 F.3d at 419. Chrysler’s established place in the market, its sales and number of customers also indicate that the IMPORTED FROM DETROIT™ mark was positioned to become instantly well-known and Chrysler’s expenditure of tens of millions of dollars on the IMPORTED FROM DETROIT™ ad campaign has ensured that the mark has become extremely well-known virtually instantaneously. Garlick Decl. ¶¶ 4-5, 10. A finding of secondary meaning further is empirically supported by the facts that over 94 million viewers saw Chrysler’s ad during the Super Bowl, Chrysler’s website traffic spiked immediately following the ad, the IMPORTED FROM DETROIT™ mark has, in a matter of weeks, had over three billion commercial impressions, and the tagline has been featured in hundreds of articles and millions of online references, *Id.* ¶¶ 9-12;

Joachimsthaler Decl. ¶ 20.

As a result of Chrysler's intensive advertising of the mark and the popularity it generated, Chrysler sold more than 1,750 t-shirts bearing the mark in a few hours. Garlick Decl. ¶ 14. Since then, Chrysler has sold an additional 5800 items of merchandise bearing the mark. *Id.* ¶¶ 15-16.

Considering all of the factors above, Chrysler's IMPORTED FROM DETROIT™ mark has acquired secondary meaning for automobiles, t-shirts, and other lifestyle products.²

2. Consumers are Likely to be Confused by Defendants' Infringing Use of the IMPORTED FROM DETROIT™ Mark

Section 43(a) of the Lanham Act protects against likelihood of consumer confusion. *See* 15 U.S.C. §§ 1125(a). It protects not only against source confusion, but also against confusion as to "affiliation, connection, or association" or the "origin, sponsorship, or approval" of the goods. *See id.*; 4 J. Thomas McCarthy, *McCarthy on Trademarks & Unfair Competition* § 23:5 (4th ed. 2008). Accordingly, the touchstone in assessing a trademark infringement or unfair competition claim under Section 43(a) of the Lanham Act is "likelihood of confusion." *Champions Golf Club*, 78 F.3d at 1123; *Midwest Guaranty Bank*, 270 F. Supp. 2d at 909.

In the Sixth Circuit, the "likelihood of confusion" factors are: (1) strength of the plaintiff's mark; (2) relatedness of the goods; (3) similarity of the marks; (4) evidence of actual confusion; (5) marketing channels used; (6) likely degree of purchaser care; (7) defendant's intent in selecting the mark; and (8) likelihood of expansion of the product lines. *Daddy's Junky Music Stores, Inc. v. Big Daddy's Family Music Center*, 109 F.3d 275, 280 (6th Cir. 1997). A review of the factors in this case indicates that confusion is likely.

² Direct consumer testimony and consumer surveys are not required to find secondary meaning, and thus their absence does not weigh heavily in the analysis in this case.

a. Chrysler's Mark is Strong

The stronger the mark, the broader the scope of protection to which it is entitled. *Champions Golf Club*, 78 F.3d at 1117. Three factors generally inform the strength of the mark inquiry: (1) the mark's unique nature; (2) the owner's "intensive advertising efforts"; and (3) which of the categories the mark occupies (generic, descriptive, suggestive, arbitrary, or fanciful). See *Express Welding, Inc. v. Superior Trailers, LLC*, 700 F. Supp. 2d 789 (E.D. Mich. 2010) (citation omitted).

As described above, the IMPORTED FROM DETROIT™ mark is unique because it combines inconsistent concepts. See Garlick Decl. ¶ 4. Accordingly, the mark is suggestive and entitled to a broad scope of protection. The tens of millions of dollars that Chrysler has invested in advertising the mark—including the creation of an unprecedented two-minute Super Bowl commercial and making billions of commercial impressions of the mark on consumers within a matter of weeks—evinced "intensive advertising efforts" further supporting a finding of strength. *Id.* ¶¶ 6-12, 17. The mark is particularly powerful because of its expression of a belief system and connection to the notions of pride, dedication, effort, and hard work inherent in the American spirit. Joachimsthaler Decl. ¶ 20. This weighs decidedly in Chrysler's favor.

b. Defendants Are Using a Mark Identical to Chrysler's

Defendants' products are exact imitations of Chrysler's mark. Where the marks are identical, this factor weighs substantially in favor of a likelihood of confusion, *Frisch's Rests.*, 670 F.2d at 648, and so favors Chrysler.

c. Chrysler and Defendants Offer Identical Goods to Overlapping Consumers Through Similar Channels of Trade and Using Similar Marketing Channels

Chrysler, directly and through its licensees, makes substantial sales of apparel and accessories branded with its vehicle and model brand names, logos, and slogans. Garlick Decl.

¶¶ 13-14. It sells through the Internet, and licensees sell in retail outlets. These products are significant to Chrysler not only for the revenue they generate, but also because branded clothing provides a means for consumers to demonstrate their enthusiasm for Chrysler's brands. *Id.* ¶ 13. With consumers clamoring for goods bearing the IMPORTED FROM DETROIT™ mark, Chrysler began selling t-shirts bearing the tagline shortly after the Super Bowl. *Id.* ¶ 14. Defendants are selling identical goods using the same channels as Chrysler. The consumers for the parties' goods clearly overlap, and Defendants claimed they were an "exclusive" source.

"Where goods distributed by a defendant are virtually identical to the trademark owner's goods, likelihood of confusion is established." *See Microsoft Corp. v. Compusource Distrib., Inc.*, 115 F. Supp. 2d 800 (E.D. Mich. 2000). The sale of identical goods to overlapping consumers through similar channels of trade supports a finding of a likelihood of confusion. *See WSM, Inc. v. Tennessee Sales Co.*, 709 F.2d 1084, 1086 (6th Cir. 1983) (upholding the district court's grant of summary judgment in favor of plaintiff where "the two designs [were] used on identical, inexpensive goods (T-shirts); . . . the goods [were] sold in the same channels of trade . . .; and . . . to the same classes of purchasers."). As such, these factors weigh strongly in Chrysler's favor.

d. The Likelihood of Expanding Product Lines Provides Further Support for a Finding of a Likelihood of Confusion

Currently the only goods bearing the IMPORTED FROM DETROIT™ mark sold by Defendants are t-shirts and tote bags. Defendants sell a variety of other items, including hoodies, belts, hats, and handbags, Venet Decl. ¶ 3. If Defendants were to expand use of the mark to these products, such an expansion would exacerbate consumer confusion and result in additional harm to Chrysler, who has historically offered similar and related "lifestyle products" bearing its brand names, logos, and slogans. This is especially true where Chrysler already is selling caps,

stickers, sweatshirts, and tank tops bearing the IMPORTED FROM DETROIT™ mark, in addition to t-shirts. Garlick Decl. ¶ 16. This factor favors Chrysler.

e. Defendants' Intent to Trade On Chrysler's Goodwill in Bad Faith Supports a Finding of Likely Confusion

“[T]he intent of a party in adopting another's mark is a critical factor, since if the mark was adopted with the intent of deriving benefit from the reputation of the plaintiff, that fact alone may be sufficient to justify the inference that there is confusing similarity.” *Ferrari v. Roberts*, 944 F.2d 1235 (6th Cir. 1991) (citations and quotation marks omitted). Intentional copying may be presumed when a defendant uses a contested mark with knowledge of the protected mark at issue. *Daddy's Junky Music Stores*, 109 F.3d at 286.

It is clear that Defendants had never used the IMPORTED FROM DETROIT™ mark before the Super Bowl, Powell Decl. ¶ 8, and that they adopted the mark only after the Chrysler commercial and the instantaneous popularity that followed. This factor clearly favors Chrysler.

f. Likely Degree of Purchaser Care

Consumers do not exercise a high degree of care in purchasing relatively inexpensive goods. *See Audi AG v. D'Amato*, 469 F.3d 534, 544 (6th Cir. 2006). Because t-shirts and tote bags are low-priced items, consumers are unlikely to exercise much care. Thus, this factor also favors Chrysler.

g. Actual Confusion is Not Required

Evidence of actual confusion is not required for a finding of likelihood of confusion, and the absence of such evidence does not have a significant impact in making such a finding. *Champions Golf Club*, 78 F.3d at 1119. Thus, the unsurprising absence of actual confusion evidence has no substantial impact on the likelihood of confusion inquiry.

h. Weighing the Factors Indicates that Confusion is Likely

The Sixth Circuit's likelihood of confusion factors favor a finding that Defendants'

unauthorized use of the Chrysler's IMPORTED FROM DETROIT™ mark is likely to cause confusion as to the affiliation, connection, or association of Defendants' products with Chrysler, or as to the source, sponsorship or approval of Defendants' products by Chrysler. Therefore, Chrysler is likely to succeed on the merits of its claims.

C. Chrysler Will Suffer Irreparable Injury

In this Circuit, “no particular finding of likelihood of . . . irreparable harm is necessary for injunctive relief in trademark infringement or unfair competition cases.” *Circuit City Stores, Inc. v. CarMax, Inc.*, 165 F.3d 1047, 1056 (6th Cir. 1999) (internal citations omitted).

Ordinarily, “irreparable injury . . . follows when a likelihood of confusion or possible risk to reputation appears from infringement or unfair competition.” *Id.*; *Lorillard*, 453 F.3d at 381-82 (citations and quotation marks omitted). “Thus, a court need only find that a defendant is liable for infringement or unfair competition for it to award injunctive relief.”³ *See Circuit City Stores*, 165 F.3d at 1056.

As discussed above, Defendants' unauthorized use of Chrysler's IMPORTED FROM DETROIT™ mark is likely to cause confusion. Accordingly, irreparable injury is presumed. Moreover, Defendants' use undermines Chrysler's brand-building efforts centered around the slogan, thus inflicting a harm that cannot be adequately compensated by monetary damages.

D. An Injunction Will Not Cause Substantial Harm to Defendants

Chrysler is suffering and, unless this Court enjoins Defendants, Chrysler will continue to suffer diversion of customers, loss of the ability to control its reputation, and injury to the goodwill built up in its trademark. Any hardship to Defendants stemming from an injunction would be minimal. Defendants have been selling products bearing Chrysler's IMPORTED

³ Beyond a showing of likelihood of confusion, Chrysler also would be irreparably harmed because, absent an injunction, consumers could continue buying items from Pure Detroit instead of buying t-shirts lawfully sold by Chrysler. *See Audi AG v. D'Amato*, 469 F.3d 534, 550 (6th Cir. 2006).

FROM DETROIT™ mark for under two months, and at most, Defendants would be unable to sell through the inventory they already have purchased. Moreover, Defendants sell numerous other products that do *not* bear the IMPORTED FROM DETROIT™ mark, *see* Venet Decl. ¶ 3, such that the requested injunction would impact a small fraction of their business.

As this Court has noted, a “[defendant] cannot place itself in harm[’]s way, and then later claim that an injunction should not issue because of costs which it must incur in order to remedy its own misconduct.” *Midwest Guaranty Bank*, 270 F. Supp. 2d at 924. Likely harm to Chrysler greatly outweighs any minimal harm that would be imposed on Defendants by a preliminary injunction.

E. A Preliminary Injunction Would Serve the Public Interest

One of the fundamental goals animating trademark law is the protection of consumers against confusion. *See Big Boy Rests. v. Cadillac Coffee Co.*, 238 F. Supp. 2d 866, 873 (E.D. Mich. 2002). Preventing further confusion in the marketplace by issuing an injunction would thus be in the public interest.

Because Defendants’ unauthorized use of Chrysler’s mark creates a likelihood of confusion, a preliminary injunction serves the public interest. In addition, Defendants’ sales cannibalize Chrysler’s sales and therefore reduce the amount of revenues that will be donated to charity. The public interest factor, like all others, favors entry of a preliminary injunction.

IV. CONCLUSION

For the foregoing reasons, Chrysler respectfully requests that this Court grant its Motion for Preliminary Injunction.

Dated: March 25, 2011

Respectfully submitted,

Attorneys for Plaintiff Chrysler Group LLC

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* Edited by Harvey Siskind LLP for the Berkeley Center for Law & Technology/Federal Judicial Center Intellectual Property Conference, Berkeley, California, May 21-24, 2013

Defendants Moda Group, LLC d/b/a Pure Detroit, Kevin Borsay, and Shawn Santo (collectively, “Pure Detroit”) submit this Memorandum of Law in Opposition to Plaintiff’s Motion for Preliminary Injunction (“Motion”).

STATEMENT OF FACTS

I. PURE DETROIT

Pure Detroit represents a family-owned business that has grown, and continues to grow, from the ground up thanks to support from the Detroit community. In more than twelve years, the Pure Detroit business has grown from one small store on Woodward Avenue to now three stores each located in landmark Detroit buildings: The Fisher Building, the Guardian Building, and the GM Renaissance Center. Pure Detroit also sells its products on its website and through other targeted and limited promotions.

Pure Detroit’s business is all about Detroit. Pure Detroit’s products – from t-shirts to local foods, unique art, music, books, Pewabic pottery, photography, stationary, and more – are all about being “from Detroit.” Pure Detroit’s growth, success, and recognition result from its mission, which has remained the same since 1998: to contribute to the vitality of Detroit’s history, culture, art, architecture, and politics on the street level by selling products that promote Detroit or are made in Detroit – products that are all about being “from Detroit.” Moreover, Pure Detroit continually reinvests in the city by launching Detroit-based businesses and supporting Detroit-based development projects.

II. CHRYSLER GROUP LLC

Chrysler manufactures automotive vehicles including the Chrysler®, Dodge®, Jeep®, and Ram® brand cars and trucks. Chrysler’s principal place of business is in Auburn Hills, Michigan. Chrysler’s 2011 vehicle lineup under the Chrysler® brand consists of the Chrysler 200, the Chrysler 200 Convertible, the Chrysler Town & Country, and the Chrysler 300. The Chrysler 200 and Chrysler 200 Convertible are produced, manufactured, and assembled at Chrysler’s assembly plant in Sterling Heights, Michigan. The Chrysler Town & Country is produced, manufactured, and assembled at Chrysler’s assembly plant in Windsor, Ontario,

Canada. The Chrysler 300 is produced, manufactured, and assembled in Chrysler's assembly plant in Brampton, Ontario, Canada.

III. CHRYSLER'S ADVERTISING

While Chrysler's two minute February 6, 2011 NFL Super Bowl commercial entitled "Born of Fire" was very exciting and dramatic, taking viewers on a tour of the city of Detroit with music of Eminem playing and views of iconic Detroit landmarks appearing on the screen, the IMPORTED FROM DETROIT phrase ("IFD Phrase") is only seen during the final seven seconds when the screen fades to black and the Chrysler name and Wing Badge appear on the screen. The only Chrysler product featured in the commercial is Chrysler's 200 model vehicle. At no time during the commercial is any product shown bearing the IFD Phrase. Many viewers believed that the "Born of Fire" commercial was more about taking pride in, and the resurgence of, the City of Detroit, itself, than about Chrysler and its products. The commercial resonated strongly within the City of Detroit and elevated all Detroiters' pride in being from Detroit.

IV. PURE DETROIT'S INDEPENDENT DEVELOPMENT OF T-SHIRTS BEARING THE IFD PHRASE

After Chrysler's "Born of Fire" commercial aired, Pure Detroit's customers inquired whether Pure Detroit was going to make t-shirts bearing the IFD Phrase similar to other t-shirts that were already available online on websites such as <http://www.cafepress.com> and <http://www.zazzle.com>. Pure Detroit's customers expressed that they would prefer to purchase a Pure Detroit® brand t-shirt bearing the IFD Phrase to support a business that is actually located in, and is about being from, Detroit.

Pure Detroit understood that Chrysler approved of the larger spirited social movement, or zeitgeist, that resulted from its "Born of Fire" commercial. Pure Detroit developed this understanding, as did many others, from a Chrysler executive's quote in *The Detroit News*. Pure Detroit came to believe that Chrysler intended the IFD Phrase to be descriptive of a zeitgeist movement and that Chrysler intended and approved the public using the IFD Phrase. Out of respect for Chrysler's legitimate intellectual property rights, Pure Detroit did not use the Chrysler

house mark (or any Chrysler logo) in connection with Pure Detroit's goods. On the contrary, consistent with its past practices Pure Detroit noted in its website advertising that Pure Detroit's IFD goods were "a Pure Detroit exclusive" because those specific goods were only available from Pure Detroit retail stores or through the Pure Detroit website. Nevertheless, Chrysler began coercive efforts to keep others from using the IFD Phrase as it backtracked from its public statement and sent Pure Detroit a cease and desist notice.

Chrysler does not own a registered trademark corresponding to the IFD Phrase, though it has claimed otherwise in pre-suit demand letters.

ARGUMENT

I. THE LEGAL STANDARD FOR A PRELIMINARY INJUNCTION

"A preliminary injunction is reserved for only the most egregious case, and should not be extended to cases which are doubtful or do not come within well-established principles of law." *Davenport v. Genesee County*, 737 F.Supp. 2d 809, 812 (E.D. Mich. 2010) (emphasis added). "A preliminary injunction is an *extraordinary* remedy never awarded as of right." *Winter v. Natural Res. Defense Council*, 129 S. Ct. 365, 376 (2008) (emphasis added). Rather, a preliminary injunction "may only be awarded upon a *clear* showing that the plaintiff is entitled to such relief." *Id.* (emphasis added) (citation omitted). The moving party bears the burden to prove (1) that it is likely to succeed on the merits, (2) that it is likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in its favor, and (4) that an injunction is in the public interest. *Id.* at 375 (citation omitted); *Tenneco Automotive Operating Company, Inc. v. Kingdom Auto Parts*, Nos. 08-2276,09-1920, 2010 WL 4365580, at *13 (6th Cir. Oct. 28, 2010). Chrysler's Motion fails to meet the "heavy burden" required to obtain such a "drastic remedy." *Big Time Worldwide Concert & Sport Club at Town Ctr., LLC v. Marriot Int'l, Inc.*, 236 F. Supp. 2d 791, 797 (E.D. Mich. 2003). Chrysler clearly possesses an adequate remedy at law in this action since sales of products by Pure Detroit can be easily quantified, tabulated and reported in response to proper discovery requests.

II. CHRYSLER CANNOT SUCCEED ON THE MERITS OF ITS CLAIMS

Chrysler acknowledges that to succeed on its claims under § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), it must prove: (1) that it has a protectable trademark; and (2) that Pure Detroit's use of the IFD Phrase results in a likelihood of confusion. Chrysler fails to acknowledge, however, that according to Sixth Circuit precedent, this Court must first consider whether the defendant is even using the purported mark (i.e., the IFD Phrase) as a trademark (i.e., to identify and distinguish its goods from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown. See 15 USC §1127). Here, the evidence clearly establishes that Pure Detroit does not use the IFD Phrase as a trademark.

A. Neither Party Uses The IFD Phrase As A Trademark

Pure Detroit's products bearing the IFD Phrase each include a sewn-in, Pure Detroit® label and custom Pure Detroit® hangtags, as does each wearing apparel item that Pure Detroit designs and produces. Pure Detroit never intended to use and does not use the IFD Phrase as a trademark. Instead, Pure Detroit uses its distinctive and registered PURE DETROIT® mark and logo to designate the source of its goods. Pure Detroit used the IFD Phrase on its goods to make a public statement regarding a social movement (zeitgeist) occurring after the Chrysler advertisement in which the wearer takes pride in being "from Detroit" because the products bearing the IFD Phrase come from Detroit. The IFD Phrase on Pure Detroit's goods does not function to identify a particular source of the goods in the way that a trademark functions. See 15 U.S.C. § 1127; see also *Hensley Mfg., Inc. v. Propride, Inc.*, 579 F.3d 603, 610 (6th Cir. 2009); *Rock & Roll Hall of Fame & Museum, Inc. v. Gentile Prods.*, 134 F.3d 749, 753 (6th Cir. 1998) ("[I]t is clear that a plaintiff must show that it has actually used the designation at issue as a *trademark*, and that the defendant has also used the same or a similar designation as a *trademark*."). Moreover, Chrysler itself is not using the slogan IFD Phrase as a trademark. In denying a preliminary injunction motion, one court found that "a slogan can only function as a separate trademark if it creates a separate impression from the house mark." *Genovese Drug*

Stores, Inc. v. TGC Stores, Inc., 939 F. Supp. 340, 346 (D.N.J.1996). Here, Chrysler consistently uses the IFD Phrase in conjunction with Chrysler’s “famous Chrysler Wing Badge.”

Even a cursory review of Chrysler’s claims demonstrates that what the “tens of millions of viewers during the Super Bowl” actually perceived was a visual image from a commercial that included “the famous Chrysler Wing Badge” and no less than four explicit displays of the Chrysler house mark, all of which clearly convey that the source of the commercial is Chrysler. Because neither party uses the slogan IFD Phrase as a mark, trademark laws are inapplicable.

B. “Imported From Detroit” Is Not Protectable As A Trademark

Only trademarks that are “distinctive” as a matter of law are given trademark protection. Purported marks must be “inherently distinctive” or they must “acquire distinctiveness” through secondary meaning. *DeGidio v. West Group Corp.*, 355 F.3d 506, 510 (6th Cir. 2004). Within these two basic categories are subcategories, which include (1) generic, (2) descriptive, (3) suggestive, and (4) arbitrary or fanciful marks. *Id.* Generic terms may never qualify for trademark protection. *DeGidio*, 355 F.3d at 510. Marks that are arbitrary, fanciful, or suggestive are “inherently distinctive” and protectable. *DeGidio*, 355 F.3d at 510. Descriptive terms are not inherently distinctive but may only be protected if they are proven to have acquired distinctiveness through secondary meaning. *DeGidio*, 355 F.3d at 510. “This [distinctiveness] rule applies equally to phrases or terms that are descriptive of the geographic origin of a product.” “The Lanham Act does not protect primarily geographically descriptive marks.” *Burke-Parsons-Bowlby Corp. v. Appalachian Log Homes, Inc.*, 871 F.2d 590, 594 (6th Cir. 1989) (emphasis added).

Here, neither party is arguing that the slogan IFD Phrase, as used, is generic, arbitrary or fanciful. Notably, Chrysler’s Motion completely fails to cite or analyze a single case for a mark that incorporates a geographically descriptive term (i.e., like Detroit). Instead, Chrysler attempts to argue that the IFD Phrase is protectable because it is either (1) inherently distinctive or (2) if it is descriptive, it has acquired secondary meaning. As set forth herein, the IFD Phrase is not

suggestive, but is merely descriptive and primarily geographically descriptive and has not been proven to have acquired secondary meaning. Accordingly, it is not a mark and is not protectable.

1. Chrysler's Putative Mark Is Geographically Descriptive

“Where it is determined that a mark as perceived by potential purchasers describes the geographical origin of the goods the mark is primarily geographically descriptive.” *Burke-Parsons*, 871 F.2d at 595.

Here, there is no doubt that the IFD Phrase, when viewed in its entirety, could only be perceived by potential purchasers as describing the geographical origin of the goods is the city of Detroit. The IFD Phrase requires no “inferential reasoning” since there is only a single likely resulting conclusion, the goods bearing the IFD Phrase come from Detroit. *See Ligotti v. Garofalo*, 562 F.Supp.2d 204, 215 (D.N.H. 2008) (“[THE GUY FROM BOSTON] phrase conveys the salient characteristics of the services, namely the attitudes of a ‘regular guy’ from Boston, without demanding any imaginative leap whatsoever.”).

Chrysler argues that the IFD phrase is distinctive because the term “IMPORTED” only applies to goods from a different country. In this regard, Chrysler admits it is misdescribing its products to the extent they are not “imported” from a different country. Regardless, Chrysler’s argument substantively fails as simple Internet searches reveal that the term “IMPORTED” is regularly used to reference interstate and intrastate commerce and origin from various cities.

2. Chrysler's Putative Mark Has Not Acquired Secondary Meaning

Chrysler argues that if the court finds that the IFD Phrase is not inherently distinctive, it is distinctive because in about a month, it has acquired secondary meaning. To establish that the IFD Phrase has acquired secondary meaning, Chrysler must carry its “substantial” burden to show that “the attitude of the consuming public toward the mark denotes a ‘single thing coming from a single source.’” *Burke-Parsons*, 871 F.2d at 596 (emphasis added); *DeGidio*, 355 F.3d at 513. “A geographically descriptive mark that has acquired secondary meaning no longer causes the public to associate the goods at issue with a particular place but to associate the goods with a particular source.” *Leelanau Wine Cellars, LTD v. Black & Red, Inc.*, 502 F.3d 504, 521 (6th

Cir. 2007). Chrysler's Motion fails to provide the support to meet this "substantial burden." Chrysler's Motion also fails to address the requirement that "secondary meaning *must* be established *prior* to others use of a similar name." *Burke-Parsons*, 871 F.2d at 596 (emphasis added). Here, Pure Detroit began selling t-shirts bearing the IFD Phrase on February 7, 2011, and before Chrysler began selling its IFD apparel. For Chrysler to have any chance of success on the merits, Chrysler must prove that it established secondary meaning for the IFD Phrase for apparel literally overnight. Chrysler has not and cannot do so. As this Court has noted, "to establish secondary meaning, the duration of a mark's use *must* be more than '*a relatively short period.*'" *Citizens Banking Corp., v. Citizens Financial Group, Inc.*, 2008 WL 1995104, at *4 (E.D. Mich. May 6, 2008). Use "overnight" is less than "a relatively short period." *WLWC Centers, Inc. v. Winners Corp.*, 563 F. Supp. 717, 719 (D.Tenn. 1983) (three years too short a time to establish secondary meaning).

Chrysler provides evidence of its advertising expenses for the "Born of Fire" commercial. But "advertising expenses are at most an indication of secondary meaning, and reflect more of an attempt to establish it." *Citizens Banking Corp.*, 2008 WL 1995104, at *4.; *Burke-Parsons*, 871 F.2d at 596 ("Advertising expense also is relevant but will not, standing alone, establish secondary meaning."). Moreover, "where advertising expenditures are required to merely survive in the competitive market, advertising expenditures cannot be used to prove secondary meaning." *Burke Parsons*, 871 F.2d at 596; *Citizens Banking Corp.*, 2008 WL 1995104, at *4 (same, even where plaintiff spent millions of dollars in advertising). Chrysler's "Born of Fire" commercial was one of eighteen automotive commercials shown during the Super Bowl.

Chrysler's assertion that its overnight use of the IFD Phrase has acquired secondary meaning because Pure Detroit allegedly intentionally copied Chrysler's purported mark must also fail. "[M]ere knowledge of the competitor's mark is insufficient *as a matter of law* to prove intentional copying." *DeGidio*, 355 F.3d at 514 (emphasis added). "Intentional copying is not actionable under the Lanham Act absent evidence that the copying was done with the intent to derive a benefit from the reputation of another." *Id.* While Pure Detroit had knowledge of

Chrysler's commercial and the IFD Phrase, Pure Detroit never intended or attempted to derive a benefit from Chrysler's reputation. Chrysler's actions led Pure Detroit to use the IFD Phrase in a functional manner and as speech to express a social movement.

C. There Is No Likelihood Of Confusion

Assuming *arguendo* that the parties' use of the IFD Phrase is found to meet the definition and requirements of a mark use under the Lanham Act and that the IFD Phrase is somehow a protectable mark, Chrysler cannot carry its burden to show that Pure Detroit's use of the IFD Phrase will result in a likelihood of confusion among consumers regarding the origin of Pure Detroit's goods. *Therma-Scan, Inc. v. Thermoscan, Inc.* 295 F.3d 623, 630 (6th Cir. 2002).

1. The IFD Phrase Is A Very Weak Mark At Best

As Chrysler acknowledges, three factors generally inform the strength of the mark inquiry: (1) the mark's unique nature, (2) the owner's intensive advertising efforts, and (3) which of the four categories the mark occupies: generic, descriptive, suggestive, and fanciful or arbitrary. *Therma-Scan*, 295 F.3d at 631. The essence of a mark's strength in a likelihood of confusion analysis is its "distinctiveness." See *Frisch's Restaurant, Inc. v. Shoney's Inc.*, 759 F.2d 1261, 1264 (6th Cir. 1985). As noted, Chrysler's mark is merely descriptive and/or primarily geographically descriptive and has not proven secondary meaning (i.e. acquired distinctiveness). As a result, Chrysler's purported mark is very weak at best.

To the extent that the Court decides that Chrysler's purported mark is inherently distinctive (i.e. suggestive) or has acquired distinctiveness through proven secondary meaning, such a finding should only relate to automobiles and not to the clothing and wearing apparel in question. See *e.g., Anheuser-Busch, Inc. v. Florists Ass'n of Greater Cleveland, Inc.*, 603 F. Supp. 35, 37 (N.D. Ohio 1984) (allowing defendant florist's use of slogan "This Bud's For You" because it had no "strength with respect to fresh-cut flowers"). The strength of the mark factor weighs heavily against any likelihood of confusion.

2. The Parties' Goods Are Not Related

The relatedness of goods inquiry focuses on “whether goods [] with comparable marks that are similarly marketed and appeal to common customers are likely to lead consumers to believe that they come from the same source, or are somehow connected with or sponsored by a common company.” *Therma-Scan*, 295 F.3d at 633. The Sixth Circuit’s decision regarding the relatedness of the parties’ goods in *Kellogg Co. v. Toucan Golf, Inc.*, 337 F.3d 616 (6th Cir.2003) is most instructive to the facts of the present action. In *Kellogg*, the Kellogg cereal company claimed that a golf-equipment manufacturer infringed its registered “Toucan Sam” mark when the golf firm used a mark that featured a toucan alongside the phrase “Toucan Gold.” Kellogg claimed its breakfast cereal products were related to the golf industry because it had offered golf balls and golf shirts featuring Toucan Sam and because Kellogg had run advertisements featuring Toucan Sam on a golf course. The Sixth Circuit rejected Kellogg’s proffered connection and finding confusion was unlikely, stated: “[w]e find that no consumer would associate Kellogg with top-line golf equipment based on Kellogg’s extremely limited licensing of its characters of novelty items.” Here, Chrysler is a manufacturer of automobiles. Pure Detroit sells authentic Detroit apparel and other unique gifts that represent and/or are “from Detroit.” Chrysler’s proffered connection with the clothing and novelty industry is tenuous, as in *Kellogg*. The relatedness of goods factor weighs heavily against any likelihood of confusion.

3. The Parties' Marks Are Distinct

“[I]t is axiomatic in trademark law that ‘side-by-side’ comparison [of the marks] is not the test.” *Homeowners Group, Inc. v. Home Mktg. Specialists, Inc.*, 931 F.2d 1100, 1109 (6th Cir. 1991) (citation omitted). “Instead the marks must be viewed *in their entirety* and in context. A court must determine, *in light of what occurs in the marketplace*, whether the [defendant’s] mark will be confusing to the public when singly presented.” *Id.* (emphasis added) (citation and internal quotation marks omitted). As Chrysler’s own expert opines at length, it is only appropriate and necessary for Chrysler to use its new IFD Phrase as an “element of a strong

brand [i.e., Chrysler].” Chrysler’s First Amended Complaint explicitly sets forth the putative designation at issue in this action as shown below.



While Chrysler is claiming a protectable interest in the IFD Phrase by itself, as a result of a seven second screen-shot of a television commercial for a vehicle, it ignores that Chrysler’s actual use of the IFD Phrase includes the famous Chrysler Wing Badge and no less than four explicit displays of the Chrysler house mark. Chrysler’s conspicuous inclusion of its house marks necessarily impacts and guides any resulting “likelihood of confusion” analysis applied under the Lanham Act. The similarity of marks factor necessarily weighs very heavily against any finding of a likelihood of confusion.

4. There Is No Evidence Of Any Actual Confusion

As Chrysler admits, there is a complete absence of any evidence indicating any actual confusion. Accordingly, the actual confusion factor weighs in Pure Detroit’s favor.

5. The Parties’ Utilize Distinct Marketing Channels

The marketing channels used factor “requires an analysis of the parties’ predominant customers and their marketing approaches.” *Therma-Scan*, 292 F.3d at 636; *Big Time Worldwide*, 236 F.Supp.2d at 803. “Where the parties have different customers and market their goods or services in different ways, the likelihood of confusion decreases.” *Therma-Scan*, 292 F.3d at 636; *Big Time Worldwide*, 236 F.Supp.2d at 804.

There is no dispute that Chrysler is a very large multinational company and has a very large dealership network. Similarly, there is no dispute that Pure Detroit is a very small, local Detroit apparel and novelty product company. There is no dispute that they each serve completely different industries and markets. Their marketing approaches are “quite different.”

6. Probable Degree Of Purchaser Care And Sophistication

The standard for determining whether the ordinary buyer would differentiate between products with similar trademarks is the exercise of ordinary caution. *Therma-Scan*, 295 F.3d at 638. The more careful and attentive a consumer is when purchasing goods, the less likely he or she is to be confused as to their source. Chrysler has described the subject wearing apparel as “self-expressive goods.” Consumers exercise greater care when purchasing such goods, even if inexpensive. Accordingly, this factor is either neutral or weighs in Pure Detroit’s favor.

7. Pure Detroit Had No Intent To Cause Confusion

Also fatal to Chrysler’s Motion is the lack of any intent to confuse consumers. *See AutoZone, Inc. v. Tandy Corp*, 373 F.3d 786, 799 (6th Cir. 2004) (intent inquiry is whether “a party chose a mark *with the intent of causing confusion*”) (emphasis added). Chrysler argues that mere knowledge by Pure Detroit of Chrysler’s use of the IFD Phrase *automatically* translates into intent. Chrysler again is just plain wrong. Rather, the intent factor “looks to whether the defendant adopted its mark with the intention of capitalizing on plaintiff’s reputation and goodwill.” *Lang v. Retirement Living Pub. Co.*, 949 F.2d 576, 582 (2d Cir. 1991); *see also Little Caesar*, 834 F.2d at 571 (denying injunctive relief and noting that there was no evidence of defendant’s “larcenous intent”). Chrysler provides no evidence of any such intent.

8. Likelihood Of Expansion Of The Parties’ Product Lines

It is implausible that Pure Detroit could move into the automobile industry. And, there is no evidence that Chrysler intends to move into the clothing and apparel industry let alone the unique niche that Pure Detroit occupies. The expansion factor also weighs against any finding of a likelihood of confusion.

9. Balancing The Likelihood Of Confusion Factors

All of the above factors clearly weigh in Pure Detroit's favor, with the possible exception of degree of purchaser care and sophistication. Several of the factors weigh very heavily in Pure Detroit's favor. On balance, Chrysler has completely failed to show that consumers will likely be confused, or that a preliminary injunction is warranted.

III. CHRYSLER HAS NOT SHOWN THAT IT WILL BE IRREPARABLY HARMED ABSENT A PRELIMINARY INJUNCTION

A plaintiff seeking the extraordinary relief of a preliminary injunction "must establish" that it "is likely to suffer irreparable harm in the absence of preliminary relief." *Winter*, 129 S. Ct. at 374. "[A]ny claimed irreparable harm must be imminent with a substantial threat of impending injury." *McDonalds Corp. v. Burger King Corp.*, 87 F.Supp.2d 722, 725 (E.D. Mich. 1999) (internal quotations and citations omitted).

Lacking evidence of irreparable harm, Chrysler argues that if it can establish a likelihood of success on the merits, the Court should *presume* irreparable harm. As an initial matter, Chrysler cannot establish likelihood of success on the merits, for reasons discussed above. Moreover, even if Chrysler could establish a likelihood of success on the merits, a presumption of irreparable harm is not warranted, as recent case law makes clear. *See eBay, Inc. v. MercExchange*, 547 U.S. 388 (2006); *see, e.g., Cytosport, Inc. v. Vital Pharmaceuticals, Inc.*, 617 F.Supp.2d at 1065, *aff'd* 348 Fed. Appx. 288, 289 (9th Cir. Oct. 13, 2009) ("Now [after *Winter*], a plaintiff is not granted the presumption of irreparable harm upon a showing of likelihood of success on the merits.").

IV. A PRELIMINARY INJUNCTION WOULD CAUSE PURE DETROIT TO SUFFER SEVERE HARDSHIP

Chrysler must also demonstrate that the "balance of equities tips in [its] favor." *Winter*, 129 S. Ct. at 374. Chrysler has made no such showing and, indeed, the evidence demonstrates that Pure Detroit and the public will suffer severe harm should the injunction issue. Thus, a

preliminary injunction is not appropriate. *See McCarthy on Trademarks and Unfair Competition* § 30.51 (4th ed. 2010) (a preliminary injunction is not appropriate “if the granting of a preliminary injunction would cause defendant financial loss and damage to business reputation which significantly outweighs any damage to plaintiff.”). Also, the purpose of a preliminary injunction is to maintain the status quo. Chrysler is not seeking simply to maintain the status quo but to upset the status quo by requiring Pure Detroit to stop selling its goods that are *truly* “from Detroit,” although an adequate remedy at law exists in the form of possible monetary damages for allegedly infringing sales. This factor weighs against a preliminary injunction.

V. THE PUBLIC INTEREST WOULD NOT BE SERVED BY ISSUANCE OF A PRELIMINARY INJUNCTION

“The public interest would not be served by the issuance of a preliminary injunction in a civil action where ... there is no likelihood of confusion between the two marks at issue and where [the requesting] party, such as plaintiff, is unlikely to prevail on the merits.” *Big Time Worldwide*, 238 F.Supp at 808 (emphasis added). Such is the case here. Also, there is no public need for an injunction. Consumers can distinguish between products branded Chrysler® and those branded Pure Detroit®. An injunction will only deprive the public of choice in the market.

VI. CHRYSLER HAS UNCLEAR HANDS

A preliminary injunction should also be denied because Chrysler has come to this Court with unclean hands. Its purported mark is geographically misdescriptive. None of Chrysler’s 2011 vehicle lineup under the famous Chrysler® brand is manufactured, assembled, and produced in Detroit. Indeed, none of these vehicles is even produced in Wayne County. Yet Chrysler’s slogan says they are “FROM DETROIT.” On this basis alone, the Court should deny Chrysler’s Motion. Chrysler also has made false statements in its cease and desist letters, apparently to others and to Pure Detroit stating that Chrysler has “registered” the IFD Phrase when in fact it isn’t registered. Chrysler’s unclean hands bar any equitable relief, including the requested preliminary injunction. *See Precision Inst. Mfg. Co. v. Auto. Maintenance Mach. Co.*,

324 U.S. 806, 814 (1945) (unclean hands doctrine “closes the door of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief”).

VII. PURE DETROIT’S USE OF THE IFD PHRASE CONSTITUTES FAIR USE

Even if Chrysler’s Motion somehow cleared the hurdle of showing a likelihood of confusion, Pure Detroit’s affirmative defense of fair use bars Chrysler’s claims. “Under the fair use doctrine, the holder of a trademark cannot prevent others from using the word that forms the trademark in its *primary* or *descriptive* sense.” *Hensley*, 579 F.3d at 612. “Fair use permits others to use a protected mark to describe aspects of their own goods provided the use is in good faith and not as mark.” *Id.*

As discussed *supra*, Pure Detroit uses the IFD Phrase in its descriptive sense, not as a mark, and in good faith. Under the Supreme Court’s decision in *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111 (2004), the fair use defense allows for “some possibility of consumer confusion.” *Id.* at 121; *Hensley*, 579 F.3d at 612. As then-Judge Breyer wrote in *WCVB-TV v. Boston Athletic Ass’n*, 926 F.2d 42 (1st Cir. 1991), “[i]f ... a t-shirt maker placed the words “Pure Cotton” ... on his t-shirts merely to describe the material from which the shirts were made, not even a shirt maker who had a registered trademark called “Pure Cotton” could likely enjoin their sale.” *Id.* at 46. Accordingly, even if this Court were to assume that Chrysler has a federally registered trademark for the IFD Phrase for use in connection with clothing, Chrysler could not prevent Pure Detroit from using the words “Imported From Detroit” on t-shirts and tote bags because Pure Detroit’s goods (unlike Chrysler’s) are actually “from Detroit.”

VIII. CONCLUSION

The Court must deny Plaintiff’s Motion for the reasons stated herein.

Respectfully submitted,

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