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6 *for and on behalf of Arizona State University*

7
8 **IN THE UNITED STATES DISTRICT COURT**
9 **FOR THE DISTRICT OF ARIZONA**

10 Arizona Board of Regents, a body
11 corporate, for and on behalf of
Arizona State University,

12 Plaintiff,

13 v.

14 John Doe aka “asu_covid.parties”, an
15 individual, and Facebook, Inc., a
Delaware corporation

16 Defendants.
17

Case No.

**PLAINTIFF’S MOTION FOR
TEMPORARY RESTRAINING
ORDER WITH NOTICE AND
PRELIMINARY INJUNCTION**

18
19 **INTRODUCTION**

20 As the COVID-19 pandemic continues to plague the United States, total confirmed cases
21 have surpassed 5 million and confirmed deaths have exceeded 170,000 people nationwide. As
22 students return to campus, colleges and universities in other parts of the country have experienced
23 significant COVID-19 outbreaks among their student populations and are grappling with the
24 challenges of trying to keep their communities safe. The possibility of large off-campus parties
25 becoming super-spreader events for the virus are of particular concern for colleges, universities,
26 and their surrounding communities.

1 Against that background, Plaintiff Arizona Board of Regents, a body corporate, for and on
2 behalf of Arizona State University (“ASU”) has discovered that its ASU and ARIZONA STATE
3 UNIVERSITY federally registered trademarks (the “ASU Marks”) and school colors trade dress
4 are currently being used without authorization by an Instagram account with the username
5 “asu_covid.parties” to promote a so-called “Hoax-19” COVID party to ASU students. The
6 account owner states this party will be held somewhere in Tempe shortly after fall semester classes
7 resume. Undermining ASU’s genuine efforts to resume the semester in as safe an environment as
8 possible, “asu_covid.parties” is proclaiming that Covid-19 is “a big fat hoax,” and spreading
9 dangerous misinformation about Covid-19 just as students are returning to ASU’s campuses to
10 begin classes. COVID parties have been recognized virtually universally as being very
11 dangerous.¹ Initial indications suggest this account may be controlled by one or more individuals
12 in Russia attempting to sow confusion and conflict and to interfere with the health of the ASU
13 community by trying to worsen the pandemic here. This unauthorized use of ASU’s trademarks
14 and trade dress not only harms ASU, but if not immediately enjoined is also likely to endanger the
15 health and safety of the university community.

16 Because of the serious public health issues involved here, and pursuant to Fed. R. Civ. P.
17 65, ASU seeks a temporary restraining order and preliminary injunction to prohibit the
18 “asu_covid.parties” account holder (i) from using the ASU Marks and the maroon and gold school
19 colors trade dress as part of any account username, profile name, profile picture, and/or bio
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21 ¹ See, e.g., COVID Parties: Yes, They Are Real and Wildly
22 Dangerous <https://theamericannews.com/2020/07/02/covid-parties/>; Here’s Why You
23 Shouldn’t Go To A ‘Covid
24 Party’ <https://www.forbes.com/sites/robertglatzer/2020/07/12/covid-parties-should-you-go-to-one/#1833a7ef2249> ; Texas Hospital Says Man, 30, Died After Attending a ‘Covid Party’
25 <https://www.nytimes.com/2020/07/12/us/30-year-old-covid-party-death.html>; Texas doctor
26 warns against deadly ‘COVID parties’ after patient dies
<https://www.houstonchronicle.com/news/houston-texas/texas/article/texas-doctor-covid-party-death-methodist-hospital-15404836.php>; COVID Parties' Spark Outrage As More
Hospital Beds Go To Youths <https://patch.com/california/los-angeles/covid-parties-spark-outrage-more-hospital-beds-go-youths>.

1 description, and (ii) from using the ASU Marks and the maroon and gold school colors trade dress
2 in connection with the promotion of any parties, events, or other goods and services. ABOR also
3 seeks relief against Facebook, Inc., the owner and operator of the Instagram platform and service,
4 temporarily and preliminarily enjoining it from continuing to provide any services to the
5 “asu_covid.parties” account holder as a means for infringing upon the ASU Marks and school
6 colors trade dress.

7 This Motion is supported by the Verified Complaint (“Verified Complaint”) and the
8 following Memorandum of Facts and Law.

9 MEMORANDUM OF FACTS AND LAW

10 **MATERIAL FACTS**

11 ASU is the State of Arizona’s largest university, with its largest campus located in
12 Tempe, Arizona. (Verified Complaint, ¶1). Founded in 1885, ASU became known as
13 Arizona State University in 1958 and has continuously operated under the ASU and
14 ARIZONA STATE UNIVERSITY trademarks ever since then. (Ver. Comp., ¶9) These
15 trademarks are federally registered for a variety of different goods and services, including
16 but not limited to providing entertainment events. (Ver. Comp., ¶10 and Exhibit 1) The
17 federal registrations for the ASU Marks have become incontestable, which constitutes
18 conclusive proof of ASU’s ownership and exclusive right to use the ASU Marks. (Id.; 15
19 U.S.C. §1115(b). ASU also owns trade dress rights in its maroon and gold school colors,
20 which it has been using extensively since at least as early as 1898. (Ver. Comp., ¶ 11).

21 ASU is one of the largest universities in the country, with more than 48,600 students
22 having applied as incoming first-year students to ASU for the fall 2019 semester. (Ver.
23 Comp., ¶14) ASU accepted 85% of student applicants in fall 2019 and welcomed its largest
24 ever class of 13,168 first year students. (Id.) In total, almost 120,000 students enrolled at
25 ASU in the fall of 2019. (Id.) Total enrollment has continued to increase year over year,
26 exceeding 100,000 students each year since the fall of 2017. (Id.)

1 ASU has received numerous and prestigious honors. U.S. News & World Report
2 rates 98 undergraduate and graduate programs at ASU among the top 50 in the country,
3 including 64 programs in the top 25 and 22 programs in the top 10. (Ver. Comp., ¶ 15)
4 ASU has now held the No. 1 ranking for innovation five years in a row. (Id.)

5 ASU is one of Arizona's largest employers with more than 17,000 employees. (Ver.
6 Comp., ¶16) In 2018, approximately 250,000 ASU graduates worked in Arizona. (Ver.
7 Comp., ¶17) In Fiscal Year 2019, the university generated an economic impact of nearly \$4
8 billion on the state's gross product and 49,278 jobs. (Ver. Comp., ¶18)

9 At the close of its 2019 fiscal year, more than 101,500 individual, corporate and
10 foundation supporters had donated to ASU. (Ver. Comp., ¶ 19) ASU received a record-
11 breaking \$413.7 million in philanthropic support from these donors throughout Arizona and
12 the world in 2019 for its academic programs, research and initiatives. (Id.)

13 ASU has a rich athletic tradition, and the ASU Marks are used prominently to identify
14 the athletics program. ASU's teams and individual student athletes have won hundreds of
15 national titles, and ASU was named the No. 1 college athletic program by Sports Illustrated
16 for 2007-2008. (Ver. Comp., ¶ 20).

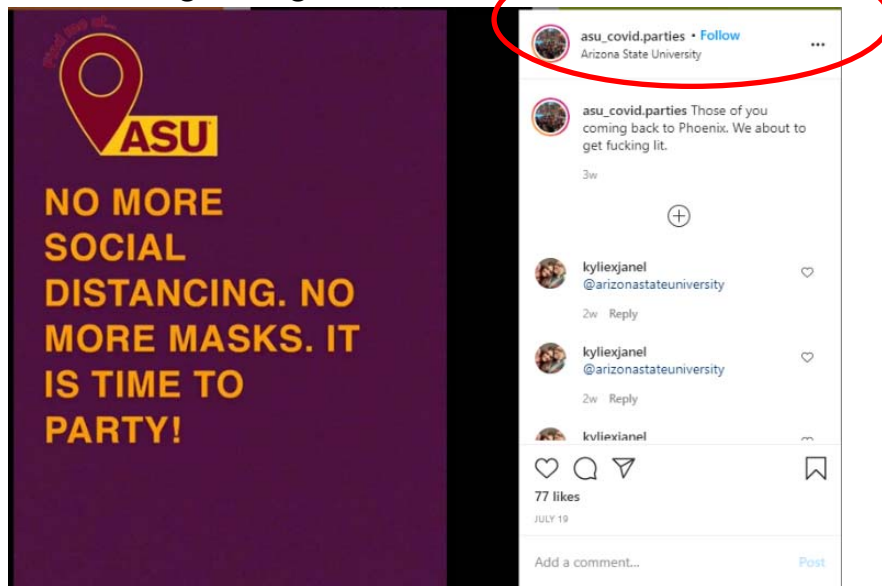
17 ASU plans, holds, sponsors, and promotes numerous events each year on its campuses
18 and within the surrounding communities, including but not limited to events for incoming
19 and returning students. (Ver. Comp., ¶ 21) ASU regularly maintains an events page on its
20 website (<https://asuevents.asu.edu/>) to promote certain of these events. (Ver. Comp., ¶ 22) In
21 the current Covid-19 environment, all events not directly related to the educational or
22 research mission of the university have been canceled. (Id.)

23 ASU receives extensive unsolicited media coverage and invests substantial sums in
24 advertising and promoting its educational programs, services, athletic programs and
25 sponsored events to students, prospective students, alumni and the general public under the
26 ASU Marks and trade dress. (Ver. Comp., ¶ 12)

1 As a result of this longstanding use, exposure and promotion of the ASU Marks, these
2 marks and trade dress have become famous in Arizona and extremely well known and well
3 regarded throughout the United States and the world. (Ver. Comp., ¶ 13)

4 The “asu_covid.parties” infringement

5 On or about July 19, 2020, defendant John Doe, whose true identity and location are
6 currently unknown, created an Instagram account with the username “asu_covid.parties” and
7 posted the following message:



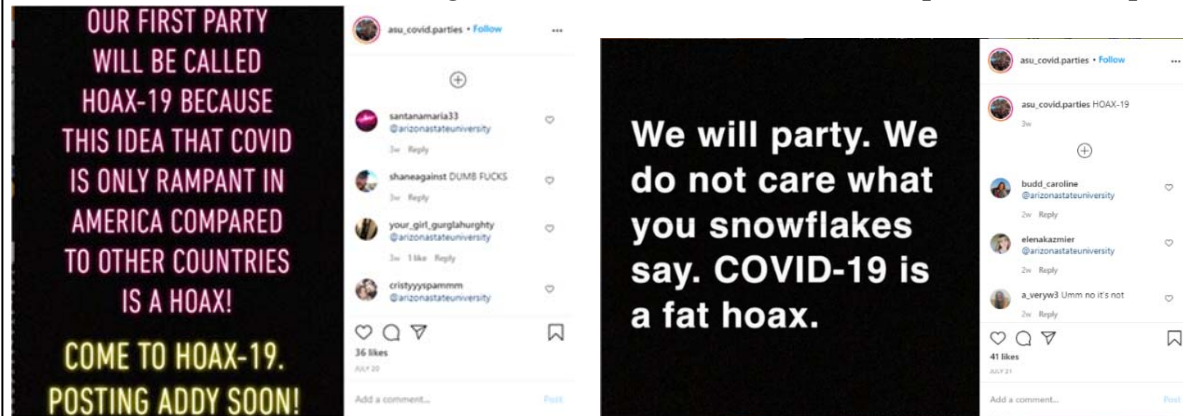
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17 In addition to using the ASU mark as the first part of the account username
18 “asu_covid.parties,” the John Doe defendant included the ARIZONA STATE UNIVERSITY
19 mark immediately below the username on the post (circled above), an ASU logo within the
20 body of the message, and formatted the post in ASU’s maroon and gold school color trade
21 dress. As posted, the message falsely appears to originate from ASU or an account
22 associated with ASU. (Ver. Comp., ¶ 23 and **Exhibit 4**).

23 As shown below, the username and account profile misleadingly suggest that this
24 account is associated with ASU, even though it is not. The profile name is “ASU
25 Coronavirus Parties” and the owner categorizes itself as an “Event Planner” “THROWING
26

1 HUGE PARTIES AT ASU,” which reflects its commercial nature. (Ver. Comp., ¶ 24 and
2 **Exhibit 4**)

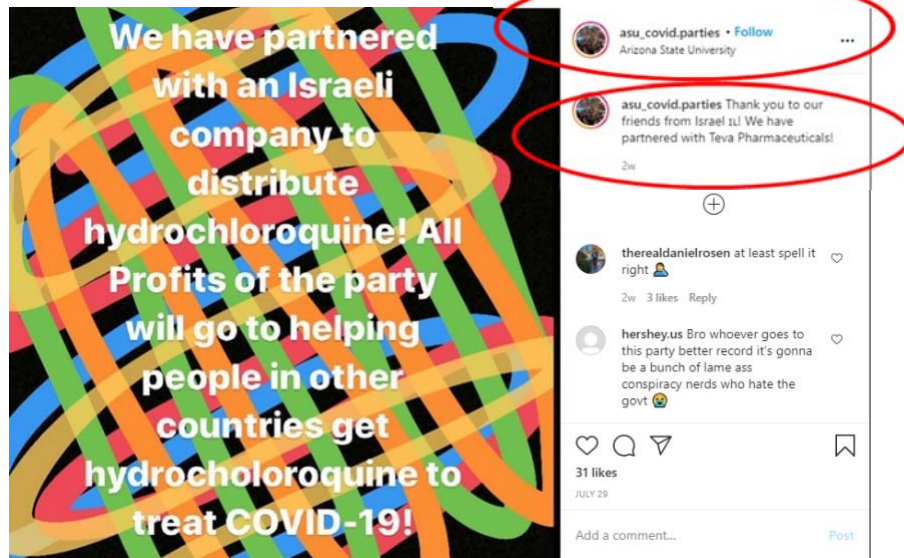


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8 On or about July 20, 2020, the account began promoting “our first party” which it
9 named “Hoax-19,” and claiming “COVID-19 is a fat hoax,” as depicted in the 2 posts below:



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16 (Ver. Comp., ¶ 25-26 and **Exhibit 4**)

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18 Thereafter, “asu_covid.parties” posted another message, again including the
19 ARIZONA STATE UNIVERSITY mark immediately below the username (circled
20 below) and claiming that “We have partnered with an Israeli company to distribute
21 hydrochloroquine! All Profits of the party will go to helping people in other countries get
22 hydrochloroquine to treat COVID-19!” A true and correct copy of this post, which indicates
23 the commercial nature of the advertised “Hoax-19” party and falsely asserts a partnership
24 between ASU or an ASU related entity and an Israeli company identified in the comments as
25 Teva Pharmaceuticals (circled below) to distribute hydrochloroquine, a highly controversial
26 drug, appears below:



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10 (Ver. Comp., ¶ 27 and **Exhibit 4**)

11 Other posts by “asu_covid.parties” discourage wearing masks, which directly
12 contradicts, undermines, and interferes with the actual health related message, consistent
13 with the local law that mandates wearing of masks at this time, that ASU is attempting to
14 provide to its students and the community. (Ver. Comp., ¶ 28 and **Exhibit 4**)

15 As a function of the Instagram platform, every Instagram post may be viewed not
16 only by those who follow the account on which the post has first been published, but every
17 post also can be shared (and thus further distributed) by anyone through a variety of means,
18 including without limitation, by a sending a direct message to another user on Instagram, by
19 sharing it to a Facebook account, by sending it via Facebook messenger, by tweeting the post
20 on Twitter, by sending the post via an e-mail message, and by copying and pasting a
21 hyperlink to the post in any other medium. (Ver. Comp., ¶ 29)

22 As a result, the unauthorized use of the ASU Marks in connection with the
23 “asu_covid.parties” username, profile and posts are likely to cause confusion as to whether
24 ASU is affiliated with, endorses, and/or sponsors this Instagram account, its messaging that
25 could result in dangerous public health consequences if followed by others, and the “Hoax-
26 19” covid party that is being promoted through this account. (Ver. Comp., ¶ 30)

1 “asu_covid.parties” False and Offensive Statements About ASU

2 In addition to the instances of infringement of the ASU Marks, the John Doe
3 defendant has engaged in a series of offensive and false statements about ASU. The account
4 has posted objectively false statements and information about ASU, including, for example,
5 the following post in which it claims that the account owner has “won the battle in court”
6 and that ASU has been ordered to pay its legal fees plus \$500,000 in damages. (Ver. Comp.,
7 ¶ 33 and **Exhibit 4**) No such lawsuit or claim for damages exists. (Ver. Comp., ¶ 34) If that
8 were not enough, in several posts the owner of this account portrays ASU and its leadership
9 as Nazis, referring to ASU’s President Crow as Fuhrer Crow and comparing ASU’s mask
10 requirement to forcing Jews to wear a yellow Star of David. (Ver. Comp., ¶ 35 and Exhibit
11 2) These false and offensive posts appear to be calculated to injure ASU’s reputation and the
12 goodwill associated with the famous ASU Marks. (Ver. Comp., ¶ 36).

13 Facebook/Instagram’s Contributory Infringement

14 Facebook provides its Instagram social media platform and service to the John Doe
15 defendant for the “asu_covid.parties” Instagram account. (Ver. Comp., ¶ 37) In offering the
16 Instagram service, Facebook has implemented a robust set of terms of use, policies and
17 community guidelines governing the use of that service. (Ver. Comp., ¶¶ 38-39 and
18 **Exhibits 5 and 6**). Instagram’s terms of use and community guidelines, which explicitly
19 reference COVID-19, proclaim Instagram’s desire to “protect people from harmful content”
20 to “remove content that has the potential to contribute to real-world harm” and reiterate the
21 right and ability of Facebook to monitor and control the content posted on the Instagram
22 services, including but not limited to changing usernames, deleting posts, and disabling
23 accounts. (Id.)

24 On August 12, 2020, undersigned counsel on behalf of ASU submitted a trademark
25 infringement report using Instagram’s reporting tool and identifying the federally registered
26 ASU Marks as being infringed by the “asu_covid.parties” account. (Ver Comp. ¶ 41 and
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1 **Exhibit 7**). On August 14, 2020, Instagram responded that “the reported party appears to be
2 using your trademark to refer to or comment on your goods and services” and that it would
3 not take any action regarding this account. . (Ver Comp. ¶ 42 and **Exhibit 8**). Instagram’s
4 response mischaracterized the account’s use of the ASU Marks because neither the account
5 profile nor any of the referenced posts refer to or comment on any of ASU’s goods or
6 services. (Id.)

7 That same day, undersigned counsel responded to Instagram highlighting the specific
8 examples of infringement. (Ver. Comp., ¶ 43 and **Exhibit 9**) Furthermore, he pointed out
9 Instagram’s own Community Guidelines, which Instagram claims is intended to “protect
10 people from harmful content and new types of abuse related to Covid-19,” and to prohibit
11 “misinformation that contributes to the risk of . . . physical harm,” as well as hate speech. .
12 (Id.) Despite these specific examples of the infringement of the ASU Marks and violations
13 of Instagram’s own terms of use and community guidelines, Instagram responded on August
14 17, 2020 that it would not act on the report to remove or modify any aspect of the
15 “asu_covid.parties” account. . (Ver Comp. ¶ 44 and **Exhibit 10**). Instead, Facebook
16 continues to provide its Instagram service to “asu_covid.parties” which account is being used
17 for the infringement of ASU rights and, as explained below, is liable for contributing to the
18 ongoing infringement being committed by “asu_covid.parties.” (Ver. Comp., ¶ 45).

19 **LEGAL ARGUMENT**

20 I. LEGAL STANDARD FOR A TRO AND PRELIMINARY INJUNCTION

21 “The standard for issuing a TRO is the same as that for issuing a preliminary injunction.”
22 *Spears v. Arizona Bd. of Regents*, 372 F. Supp. 3d 893, 926 (D. Ariz. 2019); *see also Stuhlberg*
23 *Int’l Sales Co., Inc. v. John D. Brush & Co., Inc.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001) (noting
24 that the analysis for a temporary restraining order is “substantially identical” to the analysis for a
25 preliminary injunction). To obtain a preliminary injunction, the plaintiff must prove “that he is
26 likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of

1 preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the
2 public interest.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). A preliminary
3 injunction is also appropriate when a plaintiff raises “serious questions” as to the merits and “the
4 balance of hardships tips sharply in [plaintiff’s] favor.” *All. for the Wild Rockies v. Cottrell*, 632
5 F. 3d 1127, 1135 (9th Cir. 2011).

6 II. ASU IS LIKELY TO SUCCEED ON THE MERITS

7 A. Federal Trademark Infringement and False Designation of Origin

8 A claim for trademark infringement requires only two elements: (1) ownership of a
9 trademark and (2) a likelihood of confusion caused by the defendant. *Wells Fargo & Co. v. ABD*
10 *Ins. & Fin. Servs., Inc.*, 758 F.3d 1069, 1072 (9th Cir. 2014), as amended (Mar. 11, 2014). A claim
11 for false designation of origin under 15 U.S.C. § 1125(a) requires proof of the same elements as a
12 claim for trademark infringement under 15 U.S.C. § 1114. *See Monster Energy Co. v. BeastUp*
13 *LLC*, 395 F. Supp. 3d 1334, 1349–50 (E.D. Cal. 2019) (citing *Brookfield Commc'ns, Inc. v. W.*
14 *Coast Entm't Corp.*, 174 F.3d 1036, 1046 n. 6 (9th Cir. 1999).

15 Because they are incontestable, the federal registrations of the ASU Marks are conclusive
16 evidence of ASU’s ownership and exclusive right to use the ASU Marks. 15 U.S.C. § 1115(b).
17 These registrations became incontestable long before the John Doe defendant’s creation of the
18 “asu_covid.parties” Instagram account. Furthermore, university school colors constitute
19 protectable trade dress. *See Bd. of Supervisors for Louisiana State Univ. Agric. & Mech. Coll.*
20 *v. Smack Apparel Co.*, 550 F.3d 465, 478 (5th Cir. 2008) (“By associating the color and other
21 indicia with the university, the fans perceive the university as the source or sponsor of the
22 goods because they want to associate with that source.”) Thus, the first element is established.

23 In the Ninth Circuit, likelihood of confusion is evaluated using the following factors: (1)
24 strength of the protected mark; (2) proximity and relatedness of the goods; (3) type of goods and
25 the degree of consumer care; (4) similarity of the protected mark and the allegedly infringing mark;
26 (5) marketing channel convergence; (6) evidence of actual consumer confusion; (7) defendant’s

1 intent in selecting the allegedly infringing mark; and (8) likelihood of product expansion. *Pom*
2 *Wonderful LLC v. Hubbard*, 775 F.3d 1118, 1125 (9th Cir. 2014). Not all factors are relevant in
3 every case. “Because the factors are fluid, a plaintiff need not satisfy every factor, provided
4 that strong showings are made with respect to some of them.” *Id.* (internal quotations and citation
5 omitted). Here, virtually all of the factors weigh heavily in favor of likely confusion.

6 (1) *The ASU Marks and Maroon and Gold School Color Trade Dress are strong*

7 “The stronger a mark—meaning the more likely it is to be remembered and associated in
8 the public mind with the mark's owner—the greater the protection it is accorded by the trademark
9 laws.” *Brookfield*, 174 F.3d at 1058. By virtue of ASU’s longstanding and widespread use and
10 substantial promotion of the ASU Marks and color trade dress, and their widespread exposure and
11 impact on the community, the ASU Marks and trade dress are strong. (Ver. Comp., ¶¶ 11-22)

12 (2) *Proximity and relatedness of the goods*

13 The proximity of goods is measured by whether the products are: (1) complementary; (2)
14 sold to the same class of purchasers; and (3) similar in use and function. *AMF Inc. v. Sleekcraft*
15 *Boats*, 599 F.2d 341, 350 (9th Cir. 1979), *abrogated on other grounds by Mattel, Inc. v. Walking*
16 *Mountain Prods.*, 353 F.3d 792 (9th Cir. 2003). “Related goods are generally more likely than
17 unrelated goods to confuse the public as to the producers of the goods.” *Brookfield*, 174 F.3d at
18 1055. The “asu_covid.parties” account owner is promoting a “Hoax-19” party to ASU students
19 that it claims will take place in Tempe, Arizona, which is also the location of ASU’s largest
20 campus. ASU routinely holds events for its students as part of its educational mission, including
21 social events to welcome students back to campus. Accordingly, this factor weighs in favor of
22 finding a likelihood of confusion.

23 (3) *Similarity of the marks*

24 “[T]he more similar the marks in terms of appearance, sound, and meaning, the greater the
25 likelihood of confusion.” *Brookfield*, 174 F.3d at 1054. The account owner is using the ASU mark
26 in its username (“asu_covid.parties”) and profile (“ASU Covid Parties”) and has repeatedly used

1 the ARIZONA STATE UNIVERSITY mark as its profile name in connection with multiple posts
2 on its Instagram account. Because they are using ASU's exact marks, confusion is more likely.

3 *(4) Marketing channels*

4 "Convergent marketing channels increase the likelihood of confusion." *Sleekcraft*, 599
5 F.2d at 353. Here, the defendant's only marketing channel is Instagram. ASU operates its official
6 Instagram account with the username "arizonastateuniversity" that also prominently features the
7 ASU mark. The marketing channels therefore overlap, which increases the likelihood of
8 confusion. A casual user, upon seeing the "asu_covid.parties" username on Instagram is likely to
9 assume it is somehow associated with ASU.

10 *(5) Evidence of Actual Confusion*

11 Although evidence of actual confusion is not required, where such evidence exists, it is
12 persuasive proof of a likelihood of confusion. *See GoTo.com, Inc. v. Walt Disney Co.*, 202 F.3d
13 1199, 1208 (9th Cir. 2000). ASU is aware of a tweet, which indicates that the "asu_covid.parties"
14 account in causing actual confusion. In it, an alumnus is threatening to surrender his membership
15 because of an apparent belief that ASU is promoting covid parties. (Ver. Comp., ¶ 31) Thus, this
16 factor weighs in favor of a likelihood of confusion.

17 *(6) Defendant's Intent*

18 "When the alleged infringer knowingly adopts a mark similar to another's, reviewing courts
19 presume that the defendant can accomplish his purpose: that is, that the public will be
20 deceived." *Sleekcraft*, 599 F.2d at 354. It is clear from the very first post on the
21 "asu_covid.parties" Instagram account, that the owner used the ASU Marks intentionally to use
22 the goodwill associated with them to sow confusion. As shown on page 5 above, that post was
23 created to give every appearance of a genuine post from ASU, including the use of the ARIZONA
24 STATE UNIVERSITY mark, an ASU logo, and the maroon and gold school colors trade dress.

25 Weighing all the relevant factors, the Court should conclude that a likelihood of confusion
26 exists and that ASU is likely to succeed on the merits of its infringement and false designation of

1 origin claims under 15 U.S.C. §§ 1114 and 1125(a)(1)(A). Furthermore, even if a consumer were
2 to conclude, after reading one or more posts by “asu_covid.parties” that the account is not
3 affiliated with ASU, there is nevertheless actionable initial interest confusion in the sense that
4 “asu_covid.parties” improperly benefits from the goodwill developed in the ASU Marks. *See*
5 *Brookfield*, 174 F.3d at 1062.

6 B False Advertising

7 To prevail on its claim under 15 U.S.C. §1125(a)(1)(B), ASU must prove (1) a false
8 statement of fact by the defendant in a commercial advertisement about its own or another's
9 product; (2) the statement actually deceived or has the tendency to deceive a substantial segment
10 of its audience; (3) the deception is material, in that it is likely to influence the purchasing decision;
11 (4) the defendant caused its false statement to enter interstate commerce; and (5) the plaintiff has
12 been or is likely to be injured as a result of the false statement, either by direct diversion of sales
13 from itself to defendant or by a lessening of the goodwill associated with its products. *See*
14 *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1139 (9th Cir. 1997).

15 On July 29, the John Doe defendant posted an ad for its party falsely asserting a
16 partnership between ASU or an ASU related entity and an Israeli company identified in the
17 comments as Teva Pharmaceuticals to use profits from the party to distribute
18 hydrochloroquine, a highly controversial drug. (Ver. Comp., ¶ 26). Other posts assert this
19 party will be hosted at a consulate in Tempe and registered with the City as a protest, which
20 claims are believed to be false. (Ver. Comp. Exhibit 2). These statements have the tendency
21 to deceive and would be material to persons wanting to attend the party without incurring
22 potential discipline and/or who believe distributing hydrochloroquine has merit. ASU is likely
23 to be injured by these false statements by the negative impact the party would likely have on
24 the goodwill associated with the ASU Marks.

1 C. Arizona Trademark Dilution

2 To prevail on its state law claim for trademark dilution, ASU must prove that (1) the ASU
3 Marks are famous in Arizona; (2) the defendant has engaged in the commercial use of the marks;
4 (3) the defendant's use began after the ASU Marks became famous in Arizona; (4) and the
5 defendant's use of the marks is likely to cause dilution by blurring or dilution by tarnishment. *See*
6 A.R.S. 44-1448.01; *Moab Indus., LLC v. FCA US, LLC* 2016 WL 5859700, at *8 (D. Ariz. Oct. 6,
7 2016). A finding of likely confusion by consumers is not required.

8 The evidence of the longstanding and widespread use of the ASU Marks and trade dress
9 by ASU demonstrates those marks are famous in Arizona and became famous before the John
10 Doe defendant created the "asu_covid.parties" Instagram account. In promoting COVID parties,
11 from which the defendant claims profits will be generated, while otherwise disparaging the
12 University, the defendant has engaged in a commercial use of the ASU Marks that is likely to
13 dilute and tarnish the goodwill associated with the ASU Marks and trade dress.

14 D. Contributory Infringement Against Facebook

15 To prevail on its claim for contributory infringement against Facebook, ASU must
16 demonstrate that Facebook had knowledge of the infringement and direct control and monitoring
17 of the service used by the "asu_covid.parties" account owner to infringe the ASU Marks. *See*
18 *Louis Vuitton Malletier, S.A. v. Akanoc Solutions, Inc.*, 591 F.Supp.2d 1098, 1111 (2008);
19 *Lockheed Martin Corp. v. Network Solutions, Inc.*, 194 F.3d 980, 984 (9th Cir.1999). These
20 elements are easily met here. First, Facebook had knowledge of the infringement because ASU
21 directly provided that knowledge in its trademark infringement reports, which Facebook chose to
22 disregard. Second, Facebook's own terms of use and community guidelines establish its control
23 and monitoring of the Instagram service, including but not limited to where Facebook asserts that

- 24 • If you select a username or similar identifier for your account, we may change it if we
25 believe it is appropriate or necessary (for example, if it infringes someone's
26 intellectual property or impersonates another user).

- 1 • We also have teams and systems that work to combat abuse and violations of our Terms and policies, as well as harmful and deceptive behavior.
- 2 • We're working to remove content that has the potential to contribute to real-world
- 3 harm
- 4 • By using Instagram, you agree to these guidelines and our Terms of Use. We're
- 5 committed to these guidelines and we hope you are too. Overstepping these
- 6 boundaries may result in deleted content, disabled accounts, or other restrictions.

7 Simply put, Facebook could have done the right thing and disabled the "asu_covid.parties"
 8 account when ASU reported the infringement. It chose instead to continue to provide the
 9 Instagram service to this account and allow the infringement to continue. ASU is therefore likely
 10 to prevail on its contributory infringement claim.

11 III. ASU HAS SUFFERED AND WILL CONTINUE TO SUFFER IRREPARABLE HARM

12 Not only is ASU likely to prevail on its claims, but the evidence also demonstrates that
 13 ASU is likely to suffer irreparable harm if the Court does not enjoin the Defendants. "Trademarks
 14 serve as the identity of their owners and in them resides the reputation and goodwill of their
 15 owners." *CytoSport, Inc. v. Vital Pharm., Inc.*, 617 F. Supp. 2d 1051, 1080 (E.D. Cal. 2009), *aff'd*,
 16 348 Fed. Appx. 288 (9th Cir. 2009). It is well settled that the loss of control over one's reputation
 17 and good will is itself an irreparable injury that satisfies the requirements for granting a preliminary
 18 injunction:

19 If Defendant uses Plaintiff's mark, Defendant "borrows the [Plaintiff's] reputation,
 20 whose quality no longer lies within [Plaintiff's] own control. This is an injury, even
 21 though the borrower does not tarnish it, or divert any sales by its use" and "creates
 22 the potential for damage to [Plaintiff's] reputation. Potential damage to reputation
 23 constitutes irreparable injury for the purpose of granting [Plaintiff's request for] a
 24 preliminary injunction . .

25 *Brooklyn Brewery Corp. v. Black Ops Brewing, Inc.*, 156 F.Supp.3d 1173, 1185 (E.D. Cal. 2016)
 26 (quoting *Opticians Ass'n of America v. Independent Opticians of America*, 920 F.2d 187, 195 (3d
 Cir. 1990)); *see also Herb Reed Enterprises, LLC v. Florida Entertainment Management, Inc.*,
 736 F.3d 1239, 1250 (9th Cir.2013) ("Evidence of loss of control over business reputation and
 damage to goodwill could constitute irreparable harm."). ASU's loss of control to prevent the

1 association of its Marks and trade dress with COVID parties and related messaging that
2 undermines the health and safety of the ASU community, as well as to prevent any association
3 with Nazi references or the false implication that tuition money might be used to pay court
4 judgments constitutes irreparable harm.

5 IV. THE BALANCE OF EQUITIES FAVORS AN INJUNCTION

6 Any inconvenience the defendants may experience as a result of the injunction is a matter
7 of their own doing. *See Triad Sys. Corp. v. Se. Express Co.*, 64 F.3d 1330, 1338 (9th Cir. 1995)
8 (a party “cannot complain of the harm that will befall it when properly forced to desist from its
9 infringing activities.”) Whereas the unauthorized and uncontrolled use of the ASU Marks and
10 trade dress puts ASU’s reputation and associated goodwill at risk, requiring the
11 “asu_covid.parties” account owner not to use them poses no hardship at all. Likewise, Facebook
12 can complain of no hardship in light of its own terms of use and community guidelines, which
13 give it the right to delete content, change usernames, and disable accounts. It is what Facebook
14 should have done voluntarily in the first instance. The balance of hardships clearly favors the
15 entry of a TRO and preliminary injunction.

16 V. THE PUBLIC INTEREST FAVORS AN INJUNCTION

17 “The ‘public interest favors elimination of consumer confusion’ caused by trademark
18 infringement.” *TMC Franchise Corp. v. Millennium Vision, LLC*, 2011 U.S. Dist. LEXIS 3849,
19 *4 (D. Ariz. January 6, 2011) (granting preliminary injunction against the former owners of a
20 Circle K franchised location). Even more importantly in this case, an injunction would serve the
21 health and safety of the public by eliminating any chance of a perception by students or others in
22 the community that the State’s largest university somehow supports, endorses or is affiliated with
23 COVID parties and the related messaging promoted by the “asu_covid.parties” Instagram account.

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