

1 Andrea M. Kimball, State Bar No. 196485  
Ben West, State Bar No. 251018  
2 LUCE, FORWARD, HAMILTON & SCRIPPS LLP  
600 West Broadway, Suite 2600  
3 San Diego, CA 92101-3372  
Tele.: 619.236.1414  
4 Fax: 619.232.8311  
E-Mail: akimball@luce.com  
5 bwest@luce.com

6 Attorneys for Defendants  
Flynt Media Corporation, Jimmy Flynt, II; Dustin Flynt  
7

8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA

10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

LARRY C. FLYNT,  
Plaintiff,  
v.  
FLYNT MEDIA CORPORATION, a  
Delaware Corporation; JIMMY  
FLYNT, II; DUSTIN FLYNT; and  
DOES 1 through 10, inclusive,  
Defendants.

Case No. CV 09-00048 AHM (RZx)

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
DEFENDANTS' OPPOSITION TO  
PLAINTIFF'S *EX PARTE*  
APPLICATION FOR  
TEMPORARY RESTRAINING  
ORDER AND OSC RE:  
PRELIMINARY INJUNCTION**

Complaint Filed: January 5, 2009

1	I.	INTRODUCTION AND FACTUAL BACKGROUND .....	i
2	II.	PLAINTIFF IS NOT ENTITLED TO A TEMPORARY	
3		RESTRAINING ORDER OR PRELIMINARY INJUNCTION.....	2
4	III.	PLAINTIFF’S EX PARTE APPLICATION SUFFERS FROM	
5		NUMEROUS PROCEDURAL DEFECTS.....	3
6	A.	Plaintiff’s Ex Parte Application Ignores the Local Rules .....	3
7	B.	Plaintiff Lacks Standing to Bring Federal Trademark Claims.....	4
8	IV.	PLAINTIFF HAS FAILED TO ESTABLISH A LIKELIHOOD OF	
9		SUCCESS ON THE MERITS OF HIS THREE LANHAM ACT	
10		CLAIMS .....	7
11	A.	Plaintiff Has No Evidence to Support His Claim for Federal	
12		Infringement of an Unregistered Trademark in His Name.....	7
13	B.	Plaintiff Has Not Demonstrated a Likelihood of Success on	
14		Dilution Because Plaintiff Does Not Use Flynt as a Trademark.....	12
15	V.	PLAINTIFF HAS NOT ESTABLISHED IMMINENT	
16		IRREPARABLE HARM ON HIS TRADEMARK CLAIMS .....	14
17	VI.	THE BALANCE OF HARSHIPS STRONGLY FAVORS	
18		DEFENDANTS .....	16
19	VII.	A SIZABLE BOND SHOULD BE REQUIRED.....	17
20	VIII.	CONCLUSION.....	18

21  
22  
23  
24  
25  
26  
27  
28

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>CASES</b>	
<i>A &amp; M Records, Inc. v. Napster, Inc.</i> , 239 F.3d 1004 (9th Cir. 2001).....	7
<i>AMF Inc. v. Sleekcraft Boats</i> , 599 F.2d 341 (9th Cir. 1979).....	8
<i>Ashcroft v. American Civil Liberties Union</i> , 542 U.S. 656 (2004) .....	7
<i>Belgard v. Hawaii</i> , 883 F.Supp. 510 (D. Haw. 1995).....	2
<i>Cagan v. Mutual Benefit Life Ins. Co.</i> , 28 F.3d 654 (7th Cir. 1994) .....	17
<i>Comedy III Productions, Inc. v. New Line Cinema</i> , 200 F.3d 593 (9th Cir. 2000).....	6
<i>Department of Parks and Recreation v. Bazaar Del Mundo Inc.</i> , 448 F.3d 1118 (9th Cir. 2006).....	6, 7
<i>Grupo Gigante SA De CV v. Dallo &amp; Co., Inc.</i> , 391 F.3d 1088 (9th Cir. 2004).....	8
<i>Hoechst Diafoil Co. v. Nan Ya Plastics Corp.</i> , 174 F.3d 411 (9th Cir. 1999).....	17
<i>K-2 Ski Co. v. Head Ski Co.</i> , 467 F.2d 1087 (9th Cir. 1972).....	14
<i>Love v. The Mail on Sunday</i> , 2006 U.S. Dist. LEXIS 95456 (C.D. Cal. Aug. 16, 2006).....	6
<i>Mayo v. U.S. Gov't Printing Office</i> , 839 F.Supp. 697 (N.D. Cal. 1992).....	2
<i>Miss World (U.K.), Ltd. v. Mrs. America Pageants</i> , 856 F.2d 145 (9th Cir. 1988).....	3
<i>Nintendo of America, Inc. v. Lewis Galoob Toys, Inc.</i> , 16 F.3d 1032 (9th Cir. 1994).....	17
<i>Nissan Motor Co. v. Nissan Computer Corp.</i> , 378 F.3d 1002 (9th Cir. 2004).....	14
<i>Nutri/System, Inc. v. Con-Stan Indus., Inc.</i> , 809 F.2d 601 (9th Cir. 1987).....	8

1	<i>Perfumebay.com, Inc. v. eBay, Inc.</i> ,	12
	506 F.3d 1165 (9th Cir. 2007).....	
2		
3	<i>Rodde v. Bonta</i> ,	2
	357 F.3d 988 (9th Cir. 2004).....	
4	<i>Sardi’s Restaurant Corp. v. Sardie</i> ,	3, 10, 14, 15
	755 F.2d 719 (9th Cir. 1985).....	
5		
6	<i>Self-Realization Fellowship Church v. Ananda Church of Self-Realization</i> ,	9
	59 F.3d 902 (9th Cir. 1995) .....	
7	<i>Sierra Club v. Hickel</i> ,	2
	433 F.2d 24 (9th Cir. 1970) .....	
8		
9	<i>State of Alaska ex rel. Yukon Flats School Dist. v. Native Village of Venetie</i> ,	3, 15
	856 F.2d 1384 (9th Cir. 1988).....	
10	<i>Thane Int’l Inc. v. Trek Bicycle Corp.</i> ,	12
	305 F.3d 894 (9th Cir. 2002).....	
11		
12	<i>The Lands Council v. Martin</i> ,	2
	479 F.3d 636 (9th Cir. 2007).....	
13	<i>United States v. Nutri-Cology, Inc.</i> ,	2
	982 F.2d 394 (9th Cir. 1992).....	
14		
15	<i>Vallavista Corp. v. Amazon.com, Inc.</i> ,	13
	2008 U.S. Dist. LEXIS 100058 (N.D. Cal. Dec. 11, 2008) .....	
16		
17	<b>STATUTES</b>	
18	15 U.S.C. § 1125(c)(2)(A) (2009).....	13
19	15 U.S.C. § 1127 (2009).....	5
20	§ 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).....	6, 7
21	§ 43(c), 15 U.S.C. § 1125(c).....	6, 12
22		
23	<b>OTHER AUTHORITIES</b>	
24	2 J. McCarthy, <i>Trademarks and Unfair Competition</i> , § 16:1 (4th ed. 2008).....	4
25	2 McCarthy on <i>Trademarks and Unfair Competition</i> § 13:2 (4th ed. 2008).....	8
26	13. <i>Moore’s Federal Practice and Procedure</i> , § 65.36 .....	2
27	Fed. R. Civ. P. 65(b).....	2
28	Fed. R. Civ. Pro. 65(c).....	17

1	Local Rule 7-6 .....	3
2	Local Rule 7-19.1 .....	3, 4
3	Local Rule 7-19 .....	3
4		
5		
6		
7		
8		
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

1 **I. INTRODUCTION AND FACTUAL BACKGROUND**

2 This case is about the limits of fame. In an attempt to stifle competition and free  
3 speech, Plaintiff Larry Flynt is exploiting his fame/infamy to support a fabricated  
4 statutory trademark claim so he can preclude Defendants Jimmy and Dustin Flynt from  
5 using their own surname in their startup business. By declaring himself  
6 “internationally famous” he confuses the issues and blurs the line between the fame of  
7 his name and his purported rights in the FLYNT mark. Curiously, despite registering  
8 countless marks related to his HUSTLER empire, Plaintiff has never applied for  
9 trademark protection, marketed, or sold anything in commerce under the stand alone  
10 terms “Flynt” or “Larry Flynt”. Accordingly, Plaintiff does not own any rights in the  
11 FLYNT mark. Larry Flynt has always used his name as a name.

12 Plaintiff relies exclusively on his Lanham Act claims to support this *Ex Parte*  
13 Application. However, Plaintiff has not shown a likelihood of success on any of the  
14 three trademark claims.

15 Plaintiff’s request is also riddled with procedural deficiencies that flout this  
16 Court’s local rules and compel denial of the Application altogether.

17 This case must be seen for what it is—Plaintiff’s vicious reprisal against his  
18 nephews. It is an obvious attempt to keep them out of the only industry in which they  
19 have ever worked. Plaintiff may think his “fame” entitles him to claim ownership of  
20 the entire industry, but it does not. Larry Flynt cannot ask this Court to declare his  
21 name a trademark to keep his nephews from using their last name as part of their  
22 business, Flynt Media Corporation (“FMC”). Plaintiff boldly asks for a drastic  
23 “nuclear weapon” type remedy without any showing whatsoever that Larry Flynt has  
24 protectable rights in the FLYNT mark. Defendants and their fledgling business would  
25 suffer a disastrous hardship if enjoined. As such, Defendants respectfully request that  
26 Plaintiff’s *Ex Parte* Application be denied.

27 ///

28 ///

1 **II. PLAINTIFF IS NOT ENTITLED TO A TEMPORARY RESTRAINING**  
2 **ORDER OR PRELIMINARY INJUNCTION**

3 Temporary restraining orders and preliminary injunctions are extraordinary  
4 remedies to be granted only in exceptional cases. *Sierra Club v. Hickel*, 433 F.2d 24,  
5 33 (9th Cir. 1970). The Ninth Circuit employs two similar tests to evaluate whether to  
6 grant preliminary injunctive relief. *The Lands Council v. Martin*, 479 F.3d 636, 639  
7 (9th Cir. 2007); *accord*, *Rodde v. Bonta*, 357 F.3d 988, 994 (9th Cir. 2004). Under the  
8 traditional test, the Court may grant preliminary injunctive relief only if the plaintiff  
9 demonstrates either “a likelihood of success on the merits and the possibility of  
10 irreparable injury ... or that serious questions going to the merits were raised and the  
11 balance of the hardships tips sharply in plaintiff’s favor.” *Id.* This is the traditional  
12 “sliding scale” analysis. *See United States v. Nutri-Cology, Inc.*, 982 F.2d 394, 397  
13 (9th Cir. 1992). Thus, only upon a greater showing of irreparable hardship to the  
14 moving party, will a lesser probability of success suffice. *Rodde*, 357 F.3d at 994.<sup>1</sup>

15 Moreover, if the preliminary injunctive relief sought is a temporary restraining  
16 order (“TRO”), the plaintiff must also prove “that immediate and irreparable injury,  
17 loss, or damage will result to the applicant” if the requested relief is denied. Fed. R.  
18 Civ. P. 65(b); *Belgard v. Hawaii*, 883 F.Supp. 510, 517 (D. Haw. 1995) (“[A] TRO  
19 may not be granted absent specific facts showing that an ‘immediate and irreparable  
20 injury’ will otherwise result.”)<sup>2</sup> Under this standard, Plaintiff bears a heavy burden in  
21 showing that the relative hardship tips decidedly in his favor, rather than the

22 <sup>1</sup> Under the alternative test, the Court may only grant preliminary injunctive relief if the  
23 plaintiff establishes: ““(1) a strong likelihood of success on the merits, (2) the  
24 possibility of irreparable injury to plaintiff if preliminary relief is not granted, (3) a  
balance of hardships favoring the plaintiff, and (4) advancement of the public interest  
(in certain cases).” *Rodde*, 357 F.3d at 994.

25 <sup>2</sup> “The factors considered by the Court in assessing whether to grant a TRO are similar  
26 to the factors to determine the merits of a motion for a preliminary injunction.” Vol 13.  
27 *Moore’s Federal Practice and Procedure*, § 65.36 (M. Bender 3d ed.); *see also*, *Mayo*  
28 *v. U.S. Gov’t Printing Office*, 839 F.Supp. 697, 699 (N.D. Cal. 1992) (applying the  
Ninth Circuit’s preliminary injunction standard to determine whether to grant a  
temporary restraining order).

1 Defendants'. *See State of Alaska ex rel. Yukon Flats School Dist. v. Native Village of*  
2 *Venetie*, 856 F.2d 1384, 1389 (9th Cir. 1988).

3       Importantly, some Courts in trademark cases have found the failure to establish  
4 independent and realistic irreparable harm sufficient grounds by itself to deny  
5 injunctive relief. *Sardi's Restaurant Corp. v. Sardie*, 755 F.2d 719, 724-25 (9th Cir.  
6 1985) (refusing to issue preliminary injunction; plaintiff failed to carry its burden of  
7 showing irreparable harm); *see also, Miss World (U.K.), Ltd. v. Mrs. America*  
8 *Pageants*, 856 F.2d 145, 1452 (9th Cir. 1988) (refusing injunction because "enjoin[ing]  
9 the defendants would inflict more harm" than any harm spared plaintiffs).

10       Plaintiff falls woefully short of meeting the standards for either a TRO or a  
11 preliminary injunction.

12 **III. PLAINTIFF'S EX PARTE APPLICATION SUFFERS FROM**  
13 **NUMEROUS PROCEDURAL DEFECTS**

14       In addition to failing to meet the standard for an ex parte restraining order and/or  
15 a preliminary injunctive, Plaintiff's numerous procedural defects require denial of this  
16 Application. Plaintiff ignores multiple local rules and brings three federal trademark  
17 claims without standing.

18 **A. Plaintiff's Ex Parte Application Ignores the Local Rules**

19       Plaintiff has violated three Local Rules: namely, Rules 7-6, 7-19, 7-19.1. First,  
20 Rule 7-19 requires the applicant to lodge the proposed ex parte order along with the ex  
21 parte application. The relief requested in Plaintiff's proposed ex parte order must  
22 match the relief requested in the application. Plaintiff's proposed ex parte order differs  
23 from his application in several respects, including the proposed order's request to  
24 enjoin Defendants from "promoting such goods and services on their Internet websites  
25 [www.flyntdistribution.com](http://www.flyntdistribution.com) and [www.flyntcorp.com](http://www.flyntcorp.com)," whereas the *Ex Parte*  
26 Application makes no such request. (*Compare* Application and Order).

27       Second, Local Rule 7-6 mandates that any motion be presented, heard, and  
28 determined upon supporting "declarations and other written evidence." L.R. 7-6.



1 Plaintiff makes several arguments without any supporting reference to a declaration or  
2 other writing. For example, Plaintiff states that Defendants’ use of the FLYNT mark  
3 will “result in a loss of good will” without any citation to evidence whatsoever.  
4 (Memo. of P’s & A’s, p. 17.)

5 Third, Local Rule 7-19.1 imposes a duty on the attorney applying ex parte to  
6 advise the Court, in writing, of efforts to contact other counsel, and whether counsel  
7 opposes the application. When Plaintiff’s counsel called Defendants’ Nevada  
8 counsel, Bryce Earl, Mr. Earl expressly stated the Defendants would oppose this  
9 Application. That fact was not disclosed to the Court in the Application, requiring  
10 Defendants to file a hurried “Notice of Intent to Oppose.” Plaintiff has failed to  
11 comply with the simple requirements of this rule and others, resulting in prejudice to  
12 Defendants. Thus, this Application should be denied in its entirety.

13 **B. Plaintiff Lacks Standing to Bring Federal Trademark Claims**

14 Plaintiff Larry Flynt lacks standing to bring Lanham Act claims based on the  
15 FLYNT mark because he does not own any rights to the mark. Under U.S. law,  
16 trademark rights flow from use of the mark in interstate commerce. 2 J. McCarthy,  
17 *Trademarks and Unfair Competition* § 16:1 (4th ed. 2008) (stating “the way to obtain  
18 rights in a business symbol is to actually *use* it in a mark”).

19 Plaintiff has failed to plead use of the stand-alone FLYNT mark in commerce  
20 and has failed to provide any evidence of such use. The Lanham Act defines use of a  
21 mark in commerce in Section 1127:

22 a mark shall be deemed to be in use in commerce—

23 (1) on goods when—

24 (A) it is placed in any manner on the goods or their containers or the  
25 displays associated therewith or on the tags or labels affixed thereto, or if  
26 the nature of the goods makes such placement impracticable, then on  
27 documents associated with the goods or their sale, and

28 (B) the goods are sold or transported in commerce, and

1 (2) on services when it is used or displayed in the sale or advertising of  
2 services and the services are rendered in commerce, or the services are  
3 rendered in more than one State or in the United States and a foreign  
4 country and the person rendering the services is engaged in commerce in  
5 connection with the services.

6 15 U.S.C. §1127 (2009). Plaintiff has not offered any evidence establishing the  
7 placement of the stand-alone FLYNT mark on tags, labels or other documents  
8 associated with the sale of any goods. Nor has Plaintiff provided evidence that the  
9 stand-alone FLYNT mark was used or displayed in the sale or advertising of any  
10 services.<sup>3</sup> In fact, the evidence of record shows that Plaintiff has never used the stand-  
11 alone FLYNT mark in connection with the marketing or sale of any goods or services.  
12 (Jimmy Flynt, II Decl. ¶¶ 17, 19; Dustin Flynt Decl. ¶¶ 10-11; *see also* Decl. of Eric  
13 Lane.)

14 Instead, Plaintiff makes self-serving and conclusory statements about his  
15 “international notoriety” while discussing the importance of a completely different  
16 famous mark that he uses for adult entertainment goods and services. (*See, e.g.*, Pl’s  
17 Memo of P & As, p. 1-2: “Plaintiff Larry C. Flynt is best known for his sexually  
18 explicit publication *Hustler* Magazine, which he founded in 1972” and Plaintiff’s  
19 companies “own and operate ‘Hustler Hollywood’ adult merchandise stores and related  
20 adult enterprises”; “[Larry Flynt’s] *Hustler* magazine is known throughout the United  
21 States as a champion of free expression . . .”). Therefore, Plaintiff has not met the most  
22 basic threshold burden of any trademark case: he has not demonstrated ownership of

23  
24 <sup>3</sup> To the extent Plaintiff has pled or provided evidence of use of the term “Flynt” in  
25 connection with the sale of goods or services, Flynt is not used as a stand-alone mark.  
26 *See, e.g.*, Compl. ¶ 5 (“Plaintiff Larry C. Flynt has used the FLYNT name and common  
27 law mark *in connection with* his registered trademark HUSTLER for sexually explicit  
28 adult magazines and other similar publications . . .”) (emphasis added) Decl. of Larry  
C. Flynt in Supp. of Pl’s Ex Parte Appl. at ¶ 6 (“In addition, I license my name, Larry  
Flynt, to adult clubs named ‘Larry Flynt’s Hustler Clubs’”); *Id.* ¶ 12 (listing “Larry  
Flynt’s Poker Challenge Cup” for poker tournaments, “Larry Flynt’s Grand Slam of  
Poker” for poker tournaments, and “Larry Flynt’s Bar & Grill” for restaurant services).

1 the mark at issue.<sup>4</sup>

2 Plaintiff's *Ex Parte* Application is based on infringement of an unregistered mark  
3 and unfair competition under Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a),  
4 and dilution under Section 43(c), 15 U.S.C. § 1125(c). Plaintiff lacks standing under  
5 either section because each requires a protectable ownership interest in the subject  
6 mark. With respect to Section 43(a), Plaintiff must prove the existence of a trademark.  
7 *See Comedy III Productions, Inc. v. New Line Cinema*, 200 F.3d 593, 594 (9th Cir.  
8 2000) ("to prevail on a Lanham Act claim, a plaintiff must prove the existence of a  
9 trademark . . ."). As discussed *infra*, Plaintiff has not, and cannot, do so.

10 In *Department of Parks and Recreation v. Bazaar Del Mundo Inc.*, 448 F.3d  
11 1118, 1121 (9th Cir. 2006), the Ninth Circuit affirmed a district court's denial of  
12 injunctive relief because the plaintiff failed to introduce sufficient evidence of  
13 ownership of the marks at issue. The court stated that plaintiff had to prove a  
14 protectable ownership interest in the mark to prevail on its claim of trademark  
15 infringement. Because plaintiff did not do so, it "failed to establish the requisite degree  
16 of likelihood of success on the merits" and was not entitled to an injunction. *Id.*<sup>5</sup>

17 Plaintiff also lacks standing to bring the dilution claim. Section 43(c)—the  
18 dilution provision of the Lanham Act—clearly grants standing to sue only to owners of  
19 famous marks. *See* 15 U.S.C. §1125(c) (2009) ("[t]he owner of a famous mark shall be  
20 entitled ... to an injunction against another person's commercial use in commerce of a  
21 mark or trade name, if such use begins after the mark has become famous and causes  
22 dilution of the distinctive quality of the mark ..."); *see also, Love v. The Mail on*  
23 *Sunday*, 2006 U.S. Dist. LEXIS 95456, \*38 (C.D. Cal. Aug. 16, 2006) (stating that  
24 Section 43(c) of the Lanham Act "grants standing to sue only to the 'owner of the

25 <sup>4</sup> The HUSTLER mark is irrelevant to this Application as that is not the mark Plaintiff  
26 alleges is infringed. Plaintiff simply cannot piggyback off the strength of the  
27 HUSTLER mark; Flynt's name is not a part of the registered HUSTLER mark. (*See*  
28 Complaint, alleging infringement of "Larry Flynt" or "Larry C. Flynt", not HUSTLER.)

<sup>5</sup> Remarkably, Plaintiff cites *Bazaar Del Mundo* in his own application.

1 famous mark”’). In *Love*, this Court dismissed a claim for trademark dilution under the  
2 Lanham Act because the plaintiff did not own the mark at issue. *See Love* at \*38  
3 (holding that plaintiff lacked standing to bring a federal dilution claim because he was  
4 the exclusive licensee, and not the owner of the subject mark).

5 Accordingly, Plaintiff, an individual who has never used his name as a  
6 trademark, has no ownership rights in the FLYNT mark and thus lacks standing to  
7 bring any federal trademark claims under the Lanham Act.

8 **IV. PLAINTIFF HAS FAILED TO ESTABLISH A LIKELIHOOD OF**  
9 **SUCCESS ON THE MERITS OF HIS THREE LANHAM ACT CLAIMS**

10 Plaintiff moves for a TRO and/or OSC regarding Preliminary Injunction based  
11 solely on his Lanham Act Claims.<sup>6</sup> Plaintiff has failed to meet the heavy burden of  
12 showing likelihood of success on any of those three claims. In order to obtain an  
13 injunction in this Circuit, Plaintiff must show that he is likely to prevail on the merits.  
14 *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 665 (2004); *A & M Records,*  
15 *Inc. v. Napster, Inc.*, 239 F.3d 1004, 1015, n.3 (9th Cir. 2001).

16 **A. Plaintiff Has No Evidence to Support His Claim for Federal**  
17 **Infringement of an Unregistered Trademark in His Name**

18 To prevail on his claim of trademark infringement, Plaintiff must prove (1) that  
19 he has a protectable ownership interest in the mark; and (2) that the Defendants’ use of  
20 the mark is likely to cause consumer confusion, thereby infringing upon Plaintiff’s  
21 rights to the mark. *Bazaar Del Mundo Inc.*, 448 F.3d at 1124.<sup>7</sup>

22 \_\_\_\_\_  
23 <sup>6</sup> Again, despite pleading three California statutory and common law claims in his  
24 Complaint, Plaintiff only argues the federal trademark claims (Claims 1-3) in this  
25 Application.

26 <sup>7</sup> Plaintiff’s First and Third Claims, entitled “Federal Infringement of Unregistered  
27 Trademark and Federal Statutory Unfair Competition,” respectively, both allege  
28 violations of 15 U.S.C. § 1125(a). Plaintiff states that claims “for trademark  
infringement and unfair competition” are subject to the “same analysis” in  
determining the likelihood of success and Plaintiff does not provide any independent  
argument why he is likely to succeed on the merits of his unfair competition claim.  
(Memo. of P’s & A’s at 14:24 – 15:7.) Defendant’s Opposition will likewise treat  
the analysis the same.

1 Defendants have demonstrated in Section III.B., *supra*, that Plaintiff has not  
2 provided any evidence that he has a protectable ownership interest in the FLYNT mark.  
3 On this basis alone, Plaintiff fails to demonstrate a likelihood of success on the merits  
4 of both his federal trademark infringement claim and his federal statutory unfair  
5 competition claim.

6 Even if the Court finds that Plaintiff has demonstrated a protectable ownership  
7 interest in the FLYNT mark, Plaintiff has failed to provide the Court with sufficient  
8 evidence demonstrating likelihood of confusion.

9 In the Ninth Circuit, likelihood of confusion is determined by considering eight  
10 factors: (1) the strength or weakness of Plaintiff’s alleged mark; (2) Defendants’ use of  
11 the mark; (3) the similarity of Plaintiff’s and Defendants’ marks; (4) actual confusion;  
12 (5) Defendants’ intent; (6) marketing channels used; (7) purchaser’s degree of care; and  
13 (8) Defendants’ plans for product line expansion. *AMF Inc. v. Sleekcraft Boats*, 599  
14 F.2d 341, 348-49 (9th Cir. 1979).

15 The first factor, the strength of the FLYNT mark, favors Defendants because  
16 Plaintiff has not demonstrated that FLYNT has developed secondary meaning.

17 The strength of a mark is determined by its placement on a “continuum of marks  
18 from ‘generic,’ afforded no protection; through ‘descriptive’ or ‘suggestive,’ given  
19 moderate protection; to ‘arbitrary’ or ‘fanciful’, awarded maximum protection.”  
20 *Nutri/System, Inc. v. Con-Stan Indus., Inc.*, 809 F.2d 601, 605 (9th Cir. 1987).

21 As a matter of law, a surname is not inherently distinctive and not entitled to  
22 trademark protection unless it has developed secondary meaning. 2 *McCarthy on*  
23 *Trademarks and Unfair Competition* § 13:2 (4th ed. 2008). “Secondary meaning refers  
24 to a mark’s actual ability to trigger in consumers’ minds a link between a product or  
25 service and the source of that product or service.” *Grupo Gigante SA De CV v. Dallo &*  
26 *Co., Inc.*, 391 F.3d 1088, 1095-96 (9th Cir. 2004).

27 Plaintiff has the burden of showing that his unregistered mark has acquired  
28 secondary meaning. In order to satisfy his burden, Plaintiff must present reliable

1 evidence demonstrating that his surname has attained secondary meaning. His woeful  
2 failure to do so is fatal to the Application.

3       In *Self-Realization Fellowship Church v. Ananda Church of Self-Realization*, 59  
4 F.3d 902, 910-12 (9th Cir. 1995), plaintiff alleged that its SELF-REALIZATION mark  
5 had acquired secondary meaning. To satisfy its burden of proof, plaintiff submitted  
6 self-serving declarations from its employees and wholesalers, opining that the mark  
7 was famous. *Id.* The district court held that plaintiff had not established secondary  
8 meaning and granted summary judgment to defendants. *Id.* Affirming, the Ninth  
9 Circuit held that “[a]ttestations from person[s] in close association and intimate contact  
10 with (the trademark claimant’s) business do not reflect the views of the purchasing  
11 public.” *Id.* at 910 (quoting *Norm Thompson Outfitters, Inc. v. General Motors Corp.*,  
12 448 F.2d 1293, 1297 (9th Cir. 1971)).

13       Plaintiff has not offered the Court any evidence demonstrating that his name has  
14 attained secondary meaning. In fact, Plaintiff’s declaration does not even mention the  
15 phrase “secondary meaning.” Plaintiff offers mere attorney arguments that Plaintiff’s  
16 personal fame means that his name has attained secondary meaning. (Memo. of P’s &  
17 A’s at 9.) But that is not good enough. Like the plaintiff in *Self-Realization Church*,  
18 Plaintiff’s own declaration is nothing more than a biased, predictable, and self-serving  
19 statement. The absence of any proof of secondary meaning means that Plaintiff has not  
20 demonstrated that his surname “mark” is entitled to any trademark protection.

21       The second factor, Defendant’s use of the mark, determines whether Plaintiff and  
22 Defendants use their trademarks on the same, related, or complimentary kinds of goods.  
23 As stated in Section III.B., *supra*, Plaintiff has not demonstrated that he personally uses  
24 the FLYNT mark as a source identifier. Plaintiff has not provided the Court with  
25 evidence of a single instance where he affixed the FLYNT mark to any good or service  
26 he placed in commerce. Therefore, there can be no comparison between Defendants’  
27 goods and Plaintiff’s goods.

28 ///

1           The third factor, the similarity of Plaintiff’s and Defendants’ marks, compares  
2 the appearance of the marks. Defendants are unaware of any instances where Plaintiff,  
3 or any company Plaintiff owns, has used the FLYNT mark as a stand-alone mark to  
4 promote any goods or services. (Jimmy Flynt, II Decl. ¶¶ 12, 17-19; Dustin Flynt Decl.  
5 ¶¶ 10-12). The Declaration of Eric L. Lane establishes that there are three instances  
6 where parties other than Plaintiff registered marks incorporating Plaintiff’s full name:  
7 LARRY FLYNT’S BAR & GRILL, LARRY FLYNT’S GRAND SLAM OF POKER,  
8 and LARRY FLYNT’S POKER CHALLENGE CUP. (Lane Decl. ¶ 4.) On each  
9 registration certificate for these marks the registrants included a statement that they  
10 have obtained the consent of Larry Flynt to use his name in the registration. (Lane  
11 Decl. ¶ 5.) This demonstrates that Larry Flynt does not use his name as a mark but only  
12 uses his name as a name.

13           Plaintiff has also not submitted any evidence of the fourth factor, evidence of  
14 actual confusion. On the other hand, Jimmy Flynt, II states that he is not aware of any  
15 instances of actual confusion. (Jimmy Flynt, II Decl. ¶ 15.) Given the manner in which  
16 Plaintiff describes his overarching fame, one would expect that the instances of actual  
17 confusion would be numerous. The fact that Plaintiff has not introduced any evidence  
18 of actual confusion suggests that consumers do not view the Flynt name as a source  
19 identifier for Plaintiff.

20           Regarding the fifth factor, Defendants’ intent to knowingly use the FLYNT  
21 mark, Plaintiff urges the Court to believe that Defendants’ use of the FLYNT mark  
22 means they are intentionally “seeking to trade off on [sic] my own internationally  
23 famous name.” (Larry Flynt Decl. ¶ 19.) The Court should consider, however, that  
24 FLYNT is also Jimmy Flynt’s and Dustin Flynt’s surname, and that they have  
25 developed a degree of name recognition in the adult entertainment industry that they are  
26 entitled to use for the promotion of their own business. (Jimmy Flynt, II Decl. ¶ 11;  
27 Dustin Flynt Decl. ¶ 9.) “[C]ourts are naturally reluctant wholly to forbid a man to do  
28 business in his own name and have generally refused to do so.” *Sardi’s Restaurant*

1 *Corp.*, 755 F.2d at 725 (quoting 2 *McCarthy on Trademarks and Unfair Competition*  
2 § 13:3(d) (1984)). Jimmy and Dustin Flynt have both stated that an order preventing  
3 them from using the FLYNT mark will likely put FMC out of business, thus preventing  
4 them from doing business in their own name. (Jimmy Flynt, II Decl. ¶ 6-8; Dustin  
5 Flynt Decl. ¶ 6-7).

6 The sixth factor, the similarity of marketing channels, also favors Defendants.  
7 Plaintiff has not provided the Court with any evidence indicating any marketing  
8 channels through which he *personally* provides goods and services under the FLYNT  
9 mark. Jimmy Flynt, II states that LFP, Inc. markets its HUSTLER brand DVDs  
10 through HUSTLER-branded retail stores and HUSTLER-branded websites. Jimmy  
11 Flynt, II states that FMC markets its DVDs through its own website and that it is  
12 unlikely FMC's products will ever appear in a HUSTLER-branded store or on a  
13 HUSTLER-branded website. (Jimmy Flynt, II Decl. ¶ 14.)

14 The seventh factor is admittedly more complex. Other than his own self-serving  
15 statement, Plaintiff does not offer any reliable evidence indicating the degree of care  
16 with which consumers of adult-oriented entertainment exercise when making  
17 purchases. (Larry Flynt Decl. ¶ 22.) Jimmy Flynt, II, however, has repeatedly stated  
18 that FMC's products are aimed at a specific and different type of consumer. (Jimmy  
19 Flynt, II Decl. ¶ 14.) Defendants, thus, are the only parties to provide any evidence on  
20 this factor.

21 Finally, the eighth factor, the likelihood that Defendants will expand into  
22 Plaintiff's product line, favors Defendants because Plaintiff has not presented any  
23 evidence indicating that he actually markets *any* goods or services under the FLYNT  
24 mark. It follows that: if Plaintiff has no products, then Defendants cannot expand into  
25 Plaintiff's product line.

26 This analysis establishes that Plaintiff has completely missed the point. Rather  
27 than providing the Court with evidence of his own personal use of the FLYNT mark  
28 and facts supporting the *Sleekcraft* factors, Plaintiff simply expects the Court to treat



1 his self-serving declaration as sufficient evidence. (Larry Flynt Decl. ¶ 13.) If that  
2 were the case, then every plaintiff claiming mark infringement would be entitled to  
3 injunctive relief. The law, however, requires reliable evidence of which Plaintiff has  
4 provided none. The Court should deny Plaintiff’s Application.

5 **B. Plaintiff Has Not Demonstrated a Likelihood of Success on Dilution**  
6 **Because Plaintiff Does Not Use Flynt as a Trademark**

7 The dilution provision of the Lanham Act provides the owner of a famous mark  
8 with protection from dilution by blurring or tarnishing of that mark. *See* 15 U.S.C.  
9 §1125(c) (2009). A party alleging dilution must prove that “(1) its mark is famous;  
10 (2) the defendant is making commercial use of the mark in commerce;<sup>8</sup> (3) the  
11 defendant’s use began after the plaintiff’s mark became famous; and (4) the defendant’s  
12 use presents a likelihood of dilution of the distinctive value of the mark.”  
13 *Perfumebay.com, Inc. v. eBay, Inc.*, 506 F.3d 1165, 1180 (9th Cir. 2007). The dilution  
14 provision is clear that it only protects *owners* of famous marks. *See* 15 U.S.C.  
15 §1125(c) (2009) (“[t]he owner of a famous mark shall be entitled ... to an injunction  
16 against another person’s commercial use in commerce of a mark or trade name, if such  
17 use begins after the mark has become famous and causes dilution of the distinctive  
18 quality of the mark ...”).

19 As discussed above, Plaintiff fails to meet the threshold requirement of  
20 ownership of the mark at issue and therefore lacks standing to bring a federal dilution  
21 claim under the Lanham Act. This is because Plaintiff has not used the stand-alone  
22 FLYNT mark in commerce, as defined by the Lanham Act. (Jimmy Flynt, II Decl.  
23 ¶¶ 17, 19; Dustin Flynt Decl. ¶¶ 10-11.)

24 However, even if the Court were to find that Plaintiff has ownership rights in the  
25 stand-alone FLYNT mark, Plaintiff has not demonstrated that the mark is famous and

26 \_\_\_\_\_  
27 <sup>8</sup> Although Plaintiff’s brief recites the second factor as “Defendant is or is threatening  
28 to make commercial use of the mark in commerce,” the *Perfumebay.com* decision  
articulates this factor as presented above.

1 cannot meet this first prong of the dilution test. Fame for purposes of dilution is a  
2 narrow concept. *See Thane Int'l Inc. v. Trek Bicycle Corp.*, 305 F.3d 894, 907 (9th Cir.  
3 2002). Such limitations on dilution protection are important because “[a]bsent strict  
4 policing of the famousness requirement, neither participants in the commercial  
5 marketplace nor courts are likely to apply dilution statutes in a predictable fashion.”  
6 *Thane* at 908.

7 The statute codifies this narrow definition by requiring that the mark be “widely  
8 recognized by the general consuming public of the United States as a designation of the  
9 source of the goods or services of the mark’s owner.” *See* 15 U.S.C.  
10 §1125(c)(2)(A) (2009). The statute provides four factors that the courts may consider in  
11 determining whether a mark qualifies as famous:

12 (1) The duration, extent, and geographic reach of advertising and  
13 publicity of the mark, whether advertised or publicized by the owner or  
14 third parties.

15 (2) The amount, volume, and geographic extent of sales of goods or  
16 services offered under the mark.

17 (3) The extent of actual recognition of the mark.

18 (4) Whether the mark was registered under the Act of March 3, 1881, or  
19 the Act of February 20, 1905, or on the principal register.

20 15 U.S.C. § 1125(c)(2)(A) (2009).

21 Plaintiff has provided no evidence that the stand-alone mark FLYNT has been  
22 advertised or publicized by anyone, has been used on goods or services generating any  
23 sales, or has any recognition as a stand-alone mark. As indicated above, the evidence of  
24 record demonstrates the opposite, that Plaintiff has not advertised the stand-alone  
25 FLYNT mark or used it in connection with any goods or services. (Jimmy Flynt, II  
26 Decl. ¶¶ 17, 19; Dustin Flynt Decl. ¶¶ 10-11.) In addition, Plaintiff does not have a  
27 U.S. trademark registration or a currently pending trademark application in the U.S.  
28 Patent & Trademark Office for the stand-alone mark FLYNT. (Lane Decl. ¶¶ 3-4.)

1           Instead, Plaintiff makes the conclusory and unsupported assertion that he “has  
2 made the FLYNT mark famous through decades of well-publicized use and  
3 exploitation.” (See Memo. of P’s & A’s, p. 15.) Plaintiff relies solely on his personal  
4 notoriety and recognition of his name. However, the proper analysis for fame is the  
5 prominence and renown not of a person’s *name*, but of the mark itself. See *Vallavista*  
6 *Corp. v. Amazon.com, Inc.*, 2008 U.S. Dist. LEXIS 100058 at \*12 (N.D. Cal. Dec. 11,  
7 2008) (“[t]he mark at issue must be so prominent and renowned as to be a household  
8 name”) (emphasis added). Accordingly, Plaintiff has fallen far short of demonstrating  
9 that the FLYNT mark is famous under the dilution provision of the Lanham Act.<sup>9</sup>

10           For at least the reasons stated above, Plaintiff has not demonstrated that he is  
11 likely to succeed on the dilution claim.

12 **V. PLAINTIFF HAS NOT ESTABLISHED IMMINENT IRREPARABLE**  
13 **HARM ON HIS TRADEMARK CLAIMS**

14           Plaintiff offers no specific evidence or facts showing how he will be irreparably  
15 harmed by Defendants’ use of their own surname as part of their company name, FMC.  
16 Larry Flynt merely makes the bald and conclusory assertion that he “will suffer  
17 irreparable harm to [his] name, reputation and goodwill.”<sup>10</sup> (Larry Flynt Decl. ¶ 21.)  
18 Therefore, Defendants can only assume Plaintiff is arguing that likelihood of confusion  
19 is so clear here that irreparable harm can be presumed. Not so on both accounts.

20           While it is generally true that irreparable harm will be found when there is a

21 <sup>9</sup> Plaintiff cites *Nissan Motor Co. v. Nissan Computer Corp.*, 378 F.3d 1002, 1011 (9th  
22 Cir. 2004), for the proposition that the protected mark and the alleged diluter’s mark  
23 must be identical for a dilution claim to succeed. It should be noted that any dilution  
24 claim brought by Plaintiff based on a mark Plaintiff actually uses in commerce (and has  
trademark rights in), such as LARRY FLYNT’S POKER CHALLENGE CUP or  
LARRY FLYNT’S BAR & GRILL, would fail due to this identity requirement.

25 <sup>10</sup> While Plaintiff’s memorandum does list concerns about the inferior quality of FMC’s  
26 products and a loss of goodwill and control, this is merely unsupported argument by  
27 Plaintiff’s counsel and should not be considered by the Court. Injunctions require facts  
28 and proof, not one self-serving declaration “consist[ing] largely of general assertions  
which are substantially controverted by counter-affidavits.” *K-2 Ski Co. v. Head Ski*  
*Co.*, 467 F.2d 1087, 1088-1089 (9th Cir. 1972) (reversing grant of preliminary  
injunction based on inadequate evidence).

1 “high probability of confusion,” that is not always the case. *See Sardi’s Restaurant v.*  
2 *Sardie*, 755 F.2d 719, 724 (9th Cir. 1985) (Affirming the trial court’s denial of  
3 preliminary injunction.) “[C]ommon sense and various authorities suggest that any  
4 infringement or confusion must pose a threat to the business, profits or reputation of the  
5 plaintiff in order to create a possibility of irreparable harm.” *Id.*

6 Larry Flynt must show that Defendants’ use of their own surname will pose a  
7 threat to his business, profits or reputation. Failure to prove **independent and realistic**  
8 **irreparable harm** in a trademark case alone is enough to deny injunctive relief.  
9 *Sardi’s*, 755 F.2d at 724-25 (refusing to issue preliminary injunction; plaintiff failed to  
10 carry its burden of showing irreparable harm); *see also, Miss World* , 856 F.2d at 1452  
11 (refusing injunction because “enjoin[ing] the defendants would inflict more harm” than  
12 any harm spared plaintiffs).

13 By offering not one shred of evidence of any way he will be irreparably harmed  
14 by Defendants’ conduct, Plaintiff has fallen woefully short of meeting his burden.<sup>11</sup>  
15 Tellingly, even Larry Flynt doubts he will suffer any irreparable harm. In fact, he  
16 predicts FMC and his nephews will fail, after which time he will have to bail them out:

17 Larry Flynt said he fired his nephews for being unproductive and gave  
18 them a severance package of \$100,000 . . . He said he is unimpressed  
19 with that company’s products and expects he will have to help out his  
20 nephews when it fails.

21 (*See* Ex. A to Declaration of Jimmy Flynt, II, submitted herewith).

22 If the FMC product is truly “substandard” material as Larry Flynt claims, then  
23 how will he be damaged? Nobody will buy the FMC products. And, given that Larry  
24 Flynt expects to have to rescue his nephews after FMC “flops,” then even he  
25 acknowledges there is no realistic irreparable harm. (*Id.*)

26 <sup>11</sup> It is also hard to imagine that Larry Flynt’s companies that sell thousands of adult  
27 DVD titles will realistically suffer “irreparable harm” from Defendants’ sales of only  
28 seven DVD titles. Moreover, Plaintiff makes absolutely no showing that sales of  
Defendants’ DVDs is not a claim compensable by money damages.

1 If Defendants do sell some of their seven titles, then money damages will  
2 adequately compensate Larry Flynt if he ultimately prevails on one of his novel  
3 trademark claims. There is absolutely no evidentiary support for his claim that money  
4 damages will not adequately compensate him. And, once again, Plaintiff has not shown  
5 that he sells DVDs. Thus, Plaintiff has not shown he will suffer any damages  
6 whatsoever.

7 **VI. THE BALANCE OF HARDSHIPS STRONGLY FAVORS DEFENDANTS**

8 Larry Flynt merely concludes his “name” and “reputation” will be sullied by  
9 Jimmy and Dustin using their surname in conjunction with their business. (Larry Flynt  
10 Decl. ¶ 21). This is not a realistic, imminent harm. Instead, Jimmy and Dustin Flynt  
11 provide factual support for their position that they FMC will be severely damaged if the  
12 Court enjoins Defendants. An injunction could essentially destroy the company.

13 Jimmy Flynt, II attests that an injunction would likely mean he could lose  
14 approximately \$150,000 in his personal funds invested in FMC, as well as the year he  
15 spent developing the business. (Jimmy Flynt, II Decl. ¶¶ 5-6.) Other investors would  
16 also see their investment and in-kind contributions lost, and FMC would have difficulty  
17 attracting any type of ongoing funding with an injunction hanging over the new  
18 company. (*Id.* ¶ 6.) Enjoining the release of FMC’s titles would cause severe harm and  
19 necessitate remanufacturing the videos, plus all the DVDs and packaging  
20 (approximately 30,000 boxes and sleeves have already been printed). (*Id.* at ¶ 7; Dustin  
21 Flynt Decl. ¶¶ 4-7.) FMC would lose additional money already spent on the industry  
22 parties and promotions designed to coincide with the Las Vegas AVN Expo. Worse  
23 still would be the irreparable damage to Jimmy and Dustin Flynt’s reputation in the  
24 industry they have worked in their entire adult lives. (*Id.* ¶ 9; Dustin. Flynt Decl. ¶¶ 4-  
25 7).

26 The stigma of a new company being subject to an injunction before it even got  
27 started is a disaster scenario. Larry Flynt has already shown himself to be more than  
28 happy to run down Jimmy and Dustin Flynt in the media. An injunction would just fuel

1 his vitriol. (Jimmy Flynt, II Decl. at ¶8, Ex. A.) Issuance of either a TRO or a  
2 preliminary injunction is the equivalent of ordering Jimmy and Dustin Flynt to never  
3 work in the adult entertainment business again. The balance of hardships clearly favors  
4 denying Plaintiff’s requested extraordinary relief.

5 **VII. A SIZABLE BOND SHOULD BE REQUIRED**

6 The potential damage to Defendants is no less than the financial ruin of their  
7 business, their reputations and livelihood. Any type of injunctive relief, whether by  
8 TRO or preliminary injunction, requires the posting of an adequate bond. Fed. R. Civ.  
9 Pro. 65(c); *see also, Nintendo of America, Inc. v. Lewis Galoob Toys, Inc.*, 16 F.3d  
10 1032, 1037 (9th Cir. 1994); *see also, Hoechst Diafoil Co. v. Nan Ya Plastics Corp.*, 174  
11 F.3d 411, 421 (9th Cir. 1999) (failure to require bond upon issuance of injunctive relief  
12 is reversible error). Jimmy Flynt, II invested over a year of his life and at least  
13 \$150,000 of personal funds into FMC. (Jimmy Flynt, II Decl. ¶¶ 5-6). FMC has  
14 received nearly \$400,000 in investments and in-kind contributions. FMC has invested  
15 significant funds in producing, developing and promoting its products, an amount that  
16 will be wasted if this Court enjoins sales of any of FMC’s products, even for a short  
17 time. The requested injunction could put FMC out of business. (Jimmy Flynt, II Decl.  
18 ¶¶ 5-8.)

19 FMC’s promotions at the AVN Adult Entertainment Expo 2009 in Las Vegas  
20 this week are planned to coincide with the release of the first FMC video. All of that  
21 money will be wasted if people learn about the product but FMC is enjoined from  
22 selling anything. (Jimmy Flynt, II Decl. ¶ 9.) In these economic times, where lenders  
23 refuse to extend credit, any disruption to productivity could be ruinous to Defendants.

24 Absent the posting of at least the amount of money Defendants have already put  
25 into the business, plus the salary and profits they would make over the duration of the  
26 injunction, and attorneys fees and costs, Defendants will be deprived of an adequate  
27 recovery of damages when this case is seen for what it is—a vindictive attempt to  
28 destroy Jimmy and Dustin Flynt. *See Cagan v. Mutual Benefit Life Ins. Co.*, 28 F.3d

1 654, 656 (7th Cir. 1994) (recognizing that the absence of a bond strips enjoined party  
2 of available damages for wrongful injunction). Plaintiff is essentially asking this Court  
3 to shut down FMC. Should the Court consider granting Plaintiff this truly  
4 extraordinary relief, a bond of no less than \$1 million is necessary to protect  
5 Defendants.

6 **VIII. CONCLUSION**

7 This brief has demonstrated that Larry Flynt, although suing as Plaintiff, does  
8 not, in fact provide any goods or services in commerce using the FLYNT mark.  
9 Plaintiff does not use the FLYNT mark as a source identifier by any stretch of the  
10 imagination. This is entirely fatal to his Application and the Court should deny his  
11 requested relief. For all the reasons stated herein, Plaintiff's *Ex Parte* Application for a  
12 TRO and/or preliminary injunction, should be denied.

13 DATED: January 9, 2009

LUCE, FORWARD, HAMILTON & SCRIPPS LLP

14  
15  
16 By: /s/ \_\_\_\_\_

Andrea Kimball

Ben West

*Attorneys for Defendants*

FLYNT MEDIA CORPORATION, JIMMY  
17 FLYNT, II, AND DUSTIN FLYNT

18  
19 101140159.1

20

21

22

23

24

25

26

27

28