

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

STRIKE HOLDINGS LLC	:	CIVIL ACTION
	:	
v.	:	NO. 05-CV-1023
	:	
UC STRIKES, LLC, <u>et al.</u>	:	

MEMORANDUM AND ORDER

Kauffman, J.

July 28, 2005

Plaintiff Strike Holdings LLC (“Plaintiff”) asserts claims against Defendants UC Strikes, LLC, Matt Canno, and Scott Caplan (collectively “Defendants”) alleging trademark infringement under the Lanham Act (Count One); false designation of origin under the Lanham Act (Count Two); common law trademark infringement (Count Four); common law unfair competition (Count Five); and Unfair and Deceptive Trade Practices, in violation of 73 P.S. § 201-1 et seq. (Count Seven).¹ Presently before the Court is Plaintiff’s Motion for Preliminary Injunction. For the reasons that follow, this Motion will be denied.

I. Background

Plaintiff is a Delaware corporation, with its principal place of business in New York, in the business of “developing, owning and operating high-end, upscale bowling and entertainment facilities and in rendering consulting and advisory services related to the same.” Complaint at 2. Through its wholly-owned subsidiaries, Plaintiff owns and operates several bowling facilities along the east coast, located in New York, New York (“Bowlmor Lanes”); New Hyde Park, New

¹ Counts Three and Six have been dismissed with prejudice pursuant to the stipulation of the parties.

York (“STRIKE LONG ISLAND”); Bethesda, Maryland (“STRIKE BETHESDA”); and Miami, Florida (“STRIKE MIAMI”). Complaint at 4. Although Plaintiff does not presently operate a facility in Philadelphia, it claims that it has been planning an expansion into the city’s market. See Declaration of Thomas F. Shannon (“Shannon”) at 4, attached as Exhibit A to Plaintiff’s Motion for Preliminary Injunctive Relief (“Motion”). As part of its operation, Plaintiff owns U.S. Trademark Registrations in STRIKE (registered on July 13, 2004); STRIKE BETHESDA (registered on July 13, 2004); STRIKE MIAMI (filed on December 21, 2004 – this application is still pending); and NIGHT STRIKE (registered on December 28, 2004). Complaint at 6-7; Plaintiff’s Exhibits 1-4. Plaintiff claims that its marks, which are used “consistently and ubiquitously” in its advertising, are well-known in the marketplace and “synonymous” with the high-end bowling and entertainment facilities that Plaintiff operates. Complaint at 6-7.

Defendants own and operate a bowling facility, restaurant, and bar under the name “Strikes Bowling Lounge” in Philadelphia, Pennsylvania. Complaint at 2. Defendants formed their company on April 23, 2004; on July 1, 2004, they signed a lease at 4040 Locust Street in Philadelphia, where the facility is located. See Declaration of Matthew Canno (“Canno”) at 3, attached as Exhibit 1(A) to Defendants’ Memorandum of Law in Opposition to Plaintiff’s Motion for Preliminary Injunctive Relief (“Defendants’ Opposition”). Defendant Matthew Canno claims that he first developed the name “Strikes Bowling Lounge” in early April 2004; the logo was adopted in or around October 2004. Canno at 3-4. It was first used in Pennsylvania on or about February 9, 2005, and a Pennsylvania trademark registration was filed on February 22, 2005. Id.; see also Application for Registration of Mark, attached as Exhibit 1(B) to Defendants’ Opposition.

The gravamen of Plaintiff's action is that the mark associated with Defendants' facility is confusingly similar to its own mark, because the mark "is identical in appearance, sound, pronunciation and commercial impression to Plaintiff's STRIKE mark." Complaint at 8. Plaintiff's owner and Chief Executive Officer, Thomas F. Shannon, claims that he first became aware of Defendants' alleged infringement in November 2004.² In January 2005, Plaintiff sent a "cease and desist" letter to Defendants. Complaint at 9. Plaintiff then filed its Complaint on March 3, 2005, and thereafter moved for a preliminary injunction on April 7, 2005. Additional facts will be set forth below, as relevant to the issues before this Court.

II. Legal Standard for Issuance of Preliminary Injunction

In considering the issuance of a preliminary injunction under Federal Rule of Civil Procedure 65, a court must balance: (1) the likelihood that the moving party will prevail on the merits at a final hearing; (2) the extent to which the moving party will suffer irreparable injury in the absence of relief; (3) the extent to which the nonmoving party will suffer irreparable injury if the preliminary injunction is issued; and (4) the public interest. See Council of Alternative Political Parties v. Hooks, 121 F.3d 876, 879 (3d Cir. 1997). If a likelihood of success on the merits can be demonstrated, the Court must then balance the hardships associated with granting or denying the injunction and the public interest. See ECRI v. McGraw-Hill, Inc., 809 F.2d 223, 226 (3d Cir. 1987). While all four of the enumerated factors affect the appropriateness of

² Defendants argue, based on vague phrasing in Shannon's Declaration, that Plaintiff first became aware of Defendants' alleged infringement in October 2003. However, in testimony before this Court, Shannon clarified that he gained knowledge of Defendants' facility through a November 14, 2004 newspaper article. Moreover, Defendant Canno states that he first conceived the name "Strikes Bowling Lounge" in April 2004 and that the composite logo was adopted in October 2004, see Canno at 2-3; Plaintiff could not possibly have been on notice of the alleged infringement prior to these dates.

issuance of a preliminary injunction, the first two factors – “a likelihood of success on the merits and the probability of irreparable harm if relief is not granted” – are “fundamental.” See McKeesport Hosp. v. Accreditation Council for Graduate Med. Educ., 24 F.3d 519, 523 (3d Cir. 1994) (citing Hoxworth v. Blinder Robinson & Co., 903 F.2d 186, 198 (3d Cir. 1990)). Thus, if either of these is not met, the Court should refuse to grant preliminary injunctive relief. Id. The party seeking an injunction bears the burden of demonstrating each of the factors. See Punnett v. Carter, 621 F.2d 578, 582 (3d Cir. 1980). Finally, under Rule 65(c), no preliminary injunction may issue without the posting of a bond.

III. Analysis

A. Likelihood of Success on the Merits

Plaintiff brings suit under §§ 32(A) and 43(a) of the Lanham Act, as well as under common law trademark infringement and Pennsylvania’s Unfair Trade Practices and Consumer Protection Law (“UTPCPL”), 73 P.S. § 201-1 et seq. Section 32(1) of the Lanham Act provides, in relevant part:

Any person who shall, without the consent of the registrant ... use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive ... shall be liable in a civil action by the registrant

15 U.S.C. § 1114(1).³ The Lanham Act was intended to expand the common law of trademarks, extending trademark protection nationwide for properly registered marks. See Natural Footwear,

³ Similarly, § 43(a) of the Act prohibits “any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which ... is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person.” 15 U.S.C. § 1125(a)(1)(A).

Ltd. v. Hart, Schaffner & Marx, 760 F.2d 1383, 1395 (3d Cir. 1985). To establish trademark infringement under the Act, Plaintiff must prove (1) a valid and legally protectable mark; (2) ownership of the mark; and (3) that defendant's use of the mark to identify its goods or services is likely to create confusion concerning the origin of those goods or services. See, e.g., Fisons Horticulture, Inc. v. Vigoro Indus., Inc. ("Fisons"), 30 F.3d 466, 472 (3d Cir. 1994); AT&T, Co. v. Winback & Conserve Program, Inc., 42 F.3d 1421, 1428 (3d Cir. 1994). To the extent that the marks at issue here are legally protected, there is no dispute that Plaintiff is the rightful owner. Accordingly, this Court will focus on the legal protectability of the marks and the question of likelihood of confusion.

1. Does Plaintiff Own Valid and Legally Protectable Marks?

Plaintiff's marks are federally registered (with one application still pending) but, as Plaintiff concedes, they have not yet become "incontestable" under the Lanham Act.⁴ Motion at 10. As a result, the marks will only be considered valid and legally protected if (1) the marks are inherently distinctive or (2) they have acquired "secondary meaning." See Commerce Nat'l Ins. Servs. v. Commerce Ins. Agency, Inc. ("Commerce"), 214 F.3d 432, 438 (3d Cir. 2000); Fisons, 30 F.3d at 472.

A mark is inherently distinctive if it can be fairly characterized as arbitrary, fanciful, or suggestive. See Commerce, 214 F.3d at 438 n.5. Federal law recognizes a scale of distinctiveness in marks: A mark is arbitrary – the most distinctive – if it bears no logical or

⁴ If a mark is federally registered and "incontestable" then validity, legal protectability, and ownership are automatically proved. Commerce Nat'l Ins. Servs. v. Commerce Ins. Agency, Inc. ("Commerce"), 214 F.3d 432, 438 (3d Cir. 2000). A mark achieves such "incontestable" status when it is registered and has been in continuous use for five consecutive years, with no pending proceedings. Id. at 438 n.4.

suggestive relation to the goods or services with which it is associated. See, e.g., A&H Sportswear, Inc. v. Victoria's Secret Stores, Inc., 237 F.3d 198, 221 (3d Cir. 2000) (listing “Kodak” as an example of such a mark); A.J. Canfield Co. v. Honickman, 808 F.2d 291, 296 (3d Cir. 1986). A mark is suggestive if it suggests, but does not necessarily describe, characteristics of the associated goods or services, such that it requires imagination, thought, or perception to determine the nature of the associated goods. See A.J. Canfield Co., 808 F.2d at 296. Marks can also be descriptive – meaning they “forthwith convey” an immediate idea of the ingredients, qualities, or characteristics of the goods – or merely generic, the least distinctive type. Id. If a mark is arbitrary or suggestive, it is automatically considered distinctive and will be protected. See id. at 297. If a mark is descriptive, it can get trademark protection, but only with proof that the mark has achieved some “secondary meaning.” Id.; Checkpoint Sys., Inc. v. Check Point Software Technologies, Inc., 269 F.3d 270, 282-83 (3d Cir. 2001). A mark has secondary meaning when it is interpreted by the consuming public to be not only an identification of certain products or services, but also a representation of the origin of those products or services. Commerce, 214 F.3d at 438 (quoting Scott Paper Co. v. Scott's Liquid Gold, Inc., 589 F.2d 1225, 1228 (3d Cir. 1978)).

This Court need not reach the question of secondary meaning, however, because Plaintiff's mark is suggestive. Although the mark is somewhat descriptive, this Court finds that the mark does not fully describe the goods or services represented thereby; instead, the consumer must employ his or her imagination or perception to determine that “strike,” in this instance, is associated with bowling, and not used in the myriad of other contexts in which the word might be found. Moreover, other than the word “strike,” there is nothing in the mark itself connected to

bowling. Consequently, the mark is inherently distinctive and therefore constitutes a valid and legally protectable mark.

2. Is Defendants' Mark Likely to Create Confusion?

Under federal law, a plaintiff need not prove actual confusion to show trademark infringement; instead, a plaintiff need only establish a likelihood of confusion. AT&T, Co., 42 F.3d at 1442; Fisons, 30 F.3d at 472. A likelihood of confusion exists “when the consumers viewing the defendant’s mark would probably assume that the product or service it represents is associated with the source of a different product or service identified by a similar mark.” Commerce, 214 F.3d at 438-39; see also A&H Sportswear, Inc., 237 F.3d at 211. The Third Circuit has established a ten-factor test – frequently referred to as the Lapp factors – to determine the likelihood of confusion in trademark cases. See Interpace Corp. v. Lapp, Inc. (“Lapp”), 721 F.2d 460, 463 (3d Cir. 1983). These factors include: (1) the degree of similarity between the owner’s mark and the alleged infringing mark; (2) the strength of the owner’s mark; (3) the price of the goods and other factors indicative of the care and attention expected of consumers when making a purchase; (4) the length of time the defendant has used the mark without evidence of actual confusion arising; (5) the intent of the defendant in adopting the mark; (6) evidence of actual confusion; (7) whether the goods, competing or not competing, are marketed through the same channels of trade and advertised through the same media; (8) the extent to which the targets of the parties’ sales efforts are the same; (9) the relationship of the goods in the minds of consumers, whether because of the near-identity of the products, the similarity of function, or other factors; and (10) other facts suggesting that the consuming public might expect the prior owner to manufacture both products, or expect the prior owner to manufacture a product in the

defendant's market, or expect that the prior owner is likely to expand into the defendant's market. Lapp, 721 F.2d at 463; KOS Pharm., Inc. v. Andrx Corp., 369 F.3d 700, 709 (3d Cir. 2004). The factors are to be considered separately, but they need not be given equal weight. KOS Pharm., Inc., 369 F.3d at 710-11.

Although these factors were initially considered only in the case of non-competing goods, the Third Circuit has clarified that they may also be weighed in gauging the likelihood of confusion when goods or services are in direct competition (though in such cases a court rarely need look beyond the marks themselves). See KOS Pharm., Inc., 369 F.3d at 709-10; A&H Sportswear, Inc., 237 F.3d at 212. Here, Plaintiff argues that the goods or services (bowling facilities) are in direct competition, while Defendants contend that they are not. See Motion at 19. While the two companies offer similar services and would compete if they were in the same markets, at this point, they operate in geographically distinct areas: Defendants operate exclusively in Philadelphia, while Plaintiff has not yet established a facility in this city. See Motion at 23 (noting Plaintiff's facilities are "within no more than two and half hours driving distance from Philadelphia"); Deposition of Thomas Shannon ("Shannon Dep.") at 156-57, attached as Exhibit C to Defendants' Memorandum of Law in Response to Plaintiff's Bench Memorandum ("Defendants' Response") (stating Plaintiff does not advertise in Pennsylvania because it has no facilities there); Shannon Dep. at 104 (acknowledging that a majority of Plaintiff's patrons are likely local). At the same time, however, the goods and services provided by the two companies are nearly identical and the purpose of the Lanham Act was to provide national protection for properly registered marks. See, e.g., Natural Footwear, Ltd., 760 F.2d at 1395. Although more evidence is necessary before this issue can be definitively determined, this

Court will consider the Lapp factors as if the parties were in direct competition, recognizing the overriding importance of the first factor.

(1) Degree of similarity between the marks

The degree of similarity between the marks is considered the most important of the ten Lapp factors, especially if goods or services are in direct competition. See, e.g., Checkpoint Sys., Inc., 269 F.3d at 281; A&H Sportswear, Inc., 237 F.3d at 216. Marks are similar if they create the same “overall impression” when viewed separately, and courts have emphasized that this is not a matter of dissecting a mark into its component parts. A&H Sportswear, Inc., 237 F.3d at 216-18; Fisons, 30 F.3d at 477. A court should not undertake a side-by-side comparison, but rather should assume the perspective of the ordinary consumer and accordingly examine the appearance, sound, and meaning of the marks. See Checkpoint Sys., Inc., 269 F.3d at 281; Ford Motor Co. v. Summit Motor Products, Inc., 930 F.2d 277, 293 (3d Cir. 1991).

In this Court’s view, the marks create distinct impressions in the mind of the consumer. Because both marks prominently feature the word “strike,” they create similar (though not identical) auditory impressions. However, it is important that the Court consider the entire mark, and not merely its component parts. See, e.g., A&H Sportswear, Inc., 237 F.3d at 216. The word “strike” is one part of each mark; Plaintiff has no trademark rights in the term “strike” itself, nor could it achieve such rights in the simple, generic term alone. See Plaintiff’s Exhibit 4 (trademark application describing mark as “[t]he letters S-T-R-I-K-E each within adjoining multi-colored boxes”); Exhibit C, attached to Defendants’ Opposition (recognizing inability to trademark the term “strike” standing alone). Consequently, the Court must look to the impressions created by the marks as a whole, and not simply focus its attention on the singular

component that overlaps.

In terms of appearance, Plaintiff's STRIKE marks feature white, all-capital block lettering against a background of blue, green, purple, and red colored squares. See Exhibit A, attached to Complaint. The name "STRIKE" is accented by stars on the bottom and upper-right corner, and three of the logos have geographic indicators. See id.; see also Plaintiff's Exhibits 1-4. Defendants' mark, by contrast, includes the text "Strikes Bowling Lounge," with the "Strikes" portion set forth in a stylized semi-script font. See Exhibit B, attached to Complaint. The top portion of the mark features "Strikes" in blue lettering against a yellow background; the bottom section features "Strikes Bowling Lounge" in yellow lettering against a black background. See id. In addition to the name of the establishment, Defendants' mark also has a bowling pin shape silhouetted against a black "X". See id. As a result, Defendants' logo immediately conveys that the establishment has something to do with bowling (as the "X" represents the symbol for a strike), whereas Plaintiff's mark is accompanied by no such symbol, rendering it more suggestive overall. As Plaintiff itself argues "[t]he services provided by Plaintiff ... are not immediately apparent when viewing Plaintiff's mark." Motion at 11 (further stating that the mark could be associated with goods or services related to "baseball, cricket, boxing, labor relations, matches, clocks, fishing, the military, metallurgy and modeling"). As a result of these differences, the Court concludes that the marks would create different impressions in the mind of the average consumer and that they are not particularly similar overall. Cf. A&H Sportswear, Inc., 237 F.3d at 216-18 (ruling that Miraclesuit and Miracle bra had sufficiently distinct marks to avoid a finding of likelihood of confusion).

(2) Strength of Plaintiff's mark

The strength of a trademark can range from weak to strong; the stronger the mark, the greater the trademark protection it is afforded. See A&H Sportswear, Inc., 237 F.3d at 222. The strength of a mark is measured by (1) the distinctiveness or conceptual strength of the mark and (2) its commercial strength or marketplace recognition. Checkpoint Sys., Inc., 269 F.3d at 282; A&H Sportswear, Inc., 237 F.3d at 221. The first prong of this test looks to the inherent features of the mark, while the second focuses on factual evidence of recognition in the marketplace. Id. A strong mark is one which carries immediate, widespread recognition of one producer as associated with that product. Checkpoint Sys., Inc., 269 F.3d at 282. Just as with the initial question of whether trademark protection inheres, the strength of a mark depends to some extent on whether it is arbitrary, suggestive, descriptive, or merely generic. See Checkpoint Sys., Inc., 269 F.3d at 282; A&H Sportswear, Inc., 237 F.3d at 222 (explaining that this scale's primary purpose is determining protectability, while a secondary purpose is determining strength). However, even suggestive marks can and will be considered weak if used in connection with a number of different products. See A&H Sportswear, Inc., 237 F.3d at 222-23; see also Citizens Fin. Group, Inc. v. Citizens Nat'l Bank of Evans City, 383 F.3d 110, 123 (3d Cir. 2004) (finding that widespread use of a distinctive mark can weaken that mark); First Sav. Bank, F.S.B. v. First Bank Sys., Inc., 101 F.3d 645, 653 (10th Cir. 1996) (ruling that a strong trademark is one rarely used by parties).

Plaintiff's mark is weak. The mark is not arbitrary; as stated above, it is at most suggestive. Moreover, the distinctiveness and strength of the mark are undermined by the widespread use of the term "strike" throughout the bowling industry. Defendants have presented

evidence that this term – the dominant feature of Plaintiff’s mark and the only aspect that overlaps with Defendants’ mark – is used throughout the bowling industry in association with bowling related services and products.⁵ See Exhibits 2(A) and 3, attached to Defendants’ Memorandum; Shannon Dep. at 164-65 (acknowledging existence of “Lucky Strikes” bowling facilities in and outside of Philadelphia and discussing confusion created by the similarity of the name). “The relevance of such other uses of similar marks is apparent; if a consumer is aware that a particular mark ... is often used to designate a variety of products made by a variety of manufacturers, that consumer will be less likely to assume that in a particular case, two individual products, both with the mark ... come from the same source.” A&H Sportswear, Inc., 237 F.3d at 223; see also Fisons, 30 F.3d at 478 (noting relevant question is whether word is unique enough in a particular context to warrant strong trademark protection); Commerce, 214 F.3d at 439. As a result, although the mark may be considered suggestive, it is not conceptually strong.

Moreover, Plaintiff has put forth only limited evidence of commercial recognition within the relevant market. Cf. Checkpoint Sys., Inc., 269 F.3d at 283-84. Evidence on this prong can include money expended on advertising, trends in purchases, and other indicators of recognition

⁵ Plaintiff argues that this evidence of other trademark registrations is not probative because registrations alone have, in some instances, been deemed insufficient to prove that the actual marks are used in commerce. See Chips ‘N Twigs, Inc. v. Chip-Chip, Ltd., 414 F. Supp. 1003, 1117 (E.D. Pa. 1976). However, Defendants have gone beyond registrations, offering evidence in the form of promotional materials and sworn statements as to the existence of businesses associated with bowling across the country, which currently employ the term “strike” in their name. See Revised Declaration of Christopher Miller, attached as Exhibit A to Defendants’ Response; Declaration of Garnell Belt, attached as Exhibit B to Defendants’ Response. As a result, this evidence is both relevant and probative in determining the strength of Plaintiff’s mark.

by consumers. A&H Sportswear, Inc., 237 F.3d at 224; Commerce, 214 F.3d at 440. Plaintiff does not advertise in Philadelphia and has no discernable presence in the city, Defendants' only apparent market. However, Plaintiff has provided evidence of advertising expenditures and recognition in certain national and local publications. See Shannon at 3 (noting \$850,000 spent on marketing for STRIKE BETHESDA, \$750,000 spent on marketing STRIKE LONG ISLAND, and \$235,000 spent on marketing for STRIKE MIAMI); see also Articles, attached as Exhibit A to Motion. While this does bolster Plaintiff's claim, it is not sufficient to establish that Plaintiff's mark has strong overall marketplace recognition.⁶ Consequently, the Court finds that the first two factors weigh against finding a likelihood of confusion.

(3) Price and other factors indicative of the care expected of consumers

Under the third factor, courts will consider the price of the goods and the sophistication of the buyer; if goods are expensive, or there is evidence that the average buyer exercises a certain level of care in making the purchase, or is a professional or commercial consumer, confusion is deemed less likely. See Checkpoint Sys., Inc., 269 F.3d at 284-85. Interestingly, Plaintiff argues that it caters to a sophisticated, well-informed, discriminating buyer, stating: "Plaintiff's targeted customers are young, hip and upscale, and such customers are likely well-traveled and well-read on what is trendy and 'hot' now." Motion at 21. To the extent this is true, one might expect the customer to exercise reasonable care in selecting a product, despite the relatively low price of that product. Generally, however, there is no evidence that the product is particularly expensive or that customers take above-average care in deciding which bowling facilities to

⁶ In addition, to the extent Plaintiff's evidence on this front concerns its flagship facility, Bowlmor Lanes in New York, it is not relevant to the present suit, as that facility does not operate under the STRIKE mark.

patronize. Consequently, this weighs in favor of finding a likelihood of confusion.

(4) Length of time without actual confusion

The longer the period without actual confusion, the less likely it is that confusion will ever result. This factor is not helpful in this case, however, as Defendants adopted their logo in October 2004 and the facility first advertised in February 2005 (this suit commenced in March 2005). See Canno at 3-4.

(5) Intent of Defendants in adopting their mark

Evidence of willful or admitted adoption or copying of a mark by a defendant weighs heavily in favor of finding a likelihood of confusion. KOS Pharm., Inc., 369 F.3d at 721. While Plaintiff presented circumstantial evidence of Defendants' alleged knowledge of Plaintiff's mark prior to the development of their own, Defendant Canno avers and testifies that he had no knowledge of the STRIKE mark when he conceived of Defendants' mark. See Canno at 2; Testimony of Matthew Canno at Hearing on July 21, 2005 (stating he had not heard of any of Plaintiff's locations when he conceived the name); see also Deposition of Scott Caplan at 53, attached as Exhibit C to Defendants' Second Proposed Findings of Fact and Conclusions of Law (stating he was not aware of Plaintiff's facilities until the start of this suit). As a result, this Court finds that there is no convincing evidence that Defendants had knowledge of or sought to copy Plaintiff's mark.

(6) Evidence of actual confusion

Plaintiff has not presented any evidence of customer confusion in purchasing. Instead, Plaintiff has offered evidence that it received two inquiries from individuals in the Philadelphia area (an advertising sales representative and a recruiter) who wrongfully assumed that

Defendants' business was in some way associated with Plaintiff. See Plaintiff's Exhibit 41 and Exhibit 42. These isolated incidents of non-customer confusion are not sufficient proof to establish that there has been actual confusion between Plaintiff's and Defendants' products, especially considering the large number of customers who patronize Plaintiff's facilities in a given year. See Testimony of Thomas F. Shannon at Hearing held on July 21, 2005 (stating STRIKE Miami has approximately 250,000 customers each year, while the Long Island and Bethesda facilities have about 150,000 customers a year each); cf. Checkpoint Sys., Inc., 269 F.3d at 297-98 (noting significance of lack of specific proof as to confusion in the minds of consumers); Scott Paper Co. v. Scott's Liquid Gold, Inc., 589 F.2d 1225, 1231 (3d Cir. 1978) (ruling evidence of a few misdirected phone calls insufficient evidence of confusion); A&H Sportswear, Inc., 237 F.3d 198, 226-27 (cautioning against relying on isolated instances of confusion to support an infringement claim).

(7) Whether the goods are marketed through the same channels

The seventh factor for this Court to consider is whether the goods, competing or not competing, are marketed through the same channels of trade and advertised through the same media. The greater the similarity between the advertising or marketing campaigns, the greater the likelihood of confusion. KOS Pharm., Inc., 369 F.3d at 722. The parties here operate in geographically distinct markets, but through similar media. Cf. Checkpoint Sys., Inc., 269 F.3d at 289. Plaintiff has presented evidence that it advertises in magazines, other forms of print media, on the radio, and on television. See Shannon at 3-4; Articles. Similarly, Defendants advertise in various forms of print media and on the radio. See Canno at 4-5; Advertisements, attached as Exhibit 1(C) to Defendants' Opposition. Although the two companies advertise in

different specific magazines and publications, the basic channels of advertising appear similar.

(8) Extent that targets of sales efforts are the same

Superficial and geographic distinctions aside, the advertising evidence presented and briefs indicate that both parties cater to young professionals or students interested in an “upscale” bowling experience, and appear generally aimed at attracting the same type of consumer. See Motion at 21 (“Plaintiff’s targeted customers are young, hip and upscale”); Defendants’ Opposition at 4 (“Defendants’ modern logo is reflective of its modern-era clientele.”); Defendants’ Opposition at 24 (recognizing most likely customer is the “youthful and trendy bowler”); Canno at 3 (stating that the core focus of Defendants’ marketing efforts is the University of Pennsylvania campus and its vicinity, further noting that 80% of the business’s prime time hourly rates are student discount rates). While Plaintiff may have a greater focus on attracting corporate customers, the consumer targets of the two companies clearly overlap.

(9) Relationship of the goods in the minds of consumers

Goods or services need not be identical to find a risk of confusion under this prong and the closer the relationship between the goods, the more heavily this prong favors a plaintiff. KOS Pharm., Inc., 369 F.3d at 722-23. Again, although there are superficial differences between the “products” in this case, both essentially aim to offer an “upscale” bowling experience, providing similar facilities, accouterments, and services. As a result, the bowling facilities would seem to have a strong connection in the mind of the average consumer.

(10) Other facts

The final factor focuses this Court’s attention on other facts suggesting that the consuming public might expect that the plaintiff manufactures both products, or expect the

plaintiff to manufacture a product in the defendant's market, or expect that the plaintiff is likely to expand into the defendant's market. This factor is highly context-dependant and most significant in cases where a court determines that two products are not in direct competition. See Scott Paper Co., 589 F.2d at 1230. Due to the similarity of the products, as discussed above, this factor weighs in favor of Plaintiff.

3. Weighing the Factors to Determine Likelihood of Confusion

Considering each of the factors set forth in Lapp, the Court finds that Plaintiff has not sufficiently demonstrated a likelihood of success on its trademark infringement claim because Plaintiff cannot make the requisite showing on the most important prongs for determining likelihood of confusion. First, and most significantly, the marks themselves are simply not that similar. Both marks employ the word "strikes" but their complete names, design, and coloring are distinct. Furthermore, Plaintiff's mark is weak. To the extent infringement involves use of the word "strike," Defendants have presented evidence that this word is widely used in the industry throughout the country by many different bowling alley companies, and Plaintiff has not adequately proven a strong marketplace presence. Cf. Spraying Sys. Co. v. Delavan, Inc., 975 F.2d 387, 383-84 (7th Cir. 1992) (noting significance that many cleaning products use "jet" in their name); Beech-Nut, Inc. v. Warner-Lambert Co., 480 F.2d 801, 804 (2d Cir. 1973) (ruling "BREATH SAVERS" and "BREATH PLEASERS" sufficiently distinct). Finally, there is no credible evidence of actual confusion or of a malicious or unlawful intent on the part of Defendants in adopting their mark. Because the most important of the Lapp factors militate against Plaintiff, this Court concludes that confusion between the two marks is not likely.

4. Plaintiff's Remaining Claims

Because this Court has determined that there is no likelihood of confusion, Plaintiff is unlikely to succeed under its Lanham Act or common law trademark infringement claims. Similarly, unfair competition under Pennsylvania law requires likelihood of confusion or other false representations. See 73 P.S. § 201-2(4). Moreover, aside from empowering the state attorney general to take certain actions, the UTPCPL creates a private right of action for “[a]ny person who purchases or leases goods or services primarily for personal, family or household purposes and thereby suffers any ascertainable loss of money or property” as a result of the seller’s deceptive or unlawful actions. 73 P.S. § 201-9.2(a). Neither party has briefed this issue, but it is not clear that Plaintiff would have standing to sue under the statute. See, e.g., Katz v. Aetna Cas. & Sur. Co., 972 F.2d 53, 55 (3d Cir. 1992) (describing limited nature of private right of action under UTPCPL). As a result, this Court concludes that Plaintiff has not demonstrated a likelihood of success on any of its claims.

B. Irreparable Injury to the Moving Party

Plaintiff argues that it is suffering a loss of control over its marks and loss of reputation and goodwill because Defendants operate a similarly-named bowling alley “in proximity” to two of Plaintiff’s existing locations (Defendants’ business is located in Philadelphia; Plaintiff has locations in Bethesda, Maryland and Long Island, New York). Furthermore, Plaintiff claims it has a business plan for expansion into the Philadelphia area, which is being impeded and “burdened” by Defendants’ infringement. It is true that damage to reputation, loss of goodwill, and loss of control over one’s mark can constitute irreparable harm if there is a particularly strong demonstration of a likelihood of success on the merits. See KOS Pharma, Inc., 369 F.3d

at 726; Opticians Ass'n of Am. v. Indep. Opticians of Am., 920 F.2d 187, 195-96 (3d Cir. 1990). However, for the reasons set forth above, Plaintiff does not present a particularly strong case for trademark infringement and, therefore, the requisite injury is not present here. See Pharmacia Corp. v. Alcon Laboratories., Inc., 201 F. Supp. 2d 335, 382 (D. N.J. 2002); see also ECRI, 809 F.2d at 226 (stating that injunction should issue only with a “clear showing of immediate irreparable injury” and that serious or substantial injury will not be enough).

C. Irreparable Injury to the Non-Moving Party and the Public Interest

Courts have long recognized that there is a public interest in protecting trademarks and that the public has a general right not to be confused or deceived as to the origin of goods or services. See Opticians Ass'n of Am., 920 F.2d at 197. However, the public interest does not weigh in favor of an injunction in this case, because Plaintiff has not demonstrated that confusion is likely. Moreover, this Court need not analyze these factors at this stage, as the Third Circuit has declared the questions of likelihood of success on the merits and irreparable injury “fundamental,” and cautioned that a court should refuse to grant injunctive relief if a plaintiff’s burden on these factors is not met. See McKeesport Hosp., 24 F.3d at 523.

IV. Conclusion

Based on the above analysis, this Court will deny Plaintiff’s Motion for Preliminary Injunction. An appropriate Order follows.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

STRIKE HOLDINGS LLC	:	CIVIL ACTION
	:	
v.	:	NO. 05-CV-1023
	:	
UC STRIKES, LLC, <u>et al.</u>	:	

ORDER

AND NOW, this 28th day of July, 2005, upon consideration of Plaintiff's Motion for Preliminary Injunction (docket no. 8), Defendants' response thereto, and following a hearing held on June 20, 2005 and continued on July 21, 2005, it is **ORDERED** that the Motion is **DENIED**.

BY THE COURT:

S/Bruce W. Kauffman
BRUCE W. KAUFFMAN, J.