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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

TOUGHLOVE AMERICA, LLC,)
)
Plaintiff,)
)
v.)
)
MTV NETWORKS COMPANY, et al.)
)
Defendants.)
_____)

NO. CV 09-01521 SJO (Ex)
**ORDER DENYING PLAINTIFF'S MOTION
FOR PRELIMINARY INJUNCTION**

This matter is before the Court on Plaintiff Toughlove America, LLC's ("Plaintiff") Motion for Preliminary Injunction, filed March 16, 2008. Defendants MTV Networks Company ("MTV"), Flower Films, Inc. ("Flower Films"), High Noon Productions, LLC ("High Noon") (collectively, "Defendants") filed an Opposition, to which Plaintiff replied. The Court found this matter suitable for disposition without oral argument and vacated the hearing set for April 13, 2009. See Fed. R. Civ. P. 78(b). For the following reasons, Plaintiff's Motion for Preliminary Injunction is DENIED.

I. BACKGROUND

A. Defendants' Television Series

In the summer of 2007, Defendant High Noon began developing a reality television program, which would focus on the male perspective on dating. (See Decl. Mioshi Jade Hill Supp. Defs.' Opp'n Pl.'s Mot. Prelim. Inj. ("Hill Decl.") ¶ 4.) After conducting a search of matchmaking services throughout the country, High Noon selected Steven Ward and JoAnn Ward (collectively,

1 the "Wards"), who own a professional matchmaking company as subjects for the show. (See Hill
2 Decl. ¶¶ 3–5.) Based on Steven Ward's "brutally honest," "tough" approach to helping women who
3 are seeking "love," High Noon began to refer to the Wards' matchmaking style as "tough love,"
4 which became the working title for the show.¹ (See Hill Decl. ¶¶ 6–7.) From September 4, 2007
5 through September 5, 2007, High Noon filmed a short video for use in "pitching" the television
6 program to potential buyers, the final version of which featured the title "Tough Love." (See Hill
7 Decl. ¶ 8, Ex. 1.)

8 After completing the short film, High Noon partnered with Flower Films and then "pitched"
9 the show to a number of television and cable television channels. (Hill Decl. ¶¶ 9, 11; see Pollack
10 Decl. ¶ 5; Decl. Nyle Washington Supp. Defs.' Opp'n Pl.'s Mot. Prelim. Inj. ("Washington Decl.")
11 ¶ 2.) Specifically, High Noon and Flower Films orally "pitched" the show to VH1 on
12 February 15, 2008 and sent VH1 written material, entitled "Tough Love," a few days later. (See
13 Hill Decl. ¶ 11, Ex. 2; Pollack Decl. ¶ 5.) After VH1 offered to produce the show to which
14 High Noon and Flower Films agreed, casting began on April 21, 2008; an outline of a pilot, again
15 entitled "Tough Love," was created on May 29, 2008; and the pilot was videotaped in the summer
16 of 2008. (See Hill Decl. ¶¶ 12–14, Exs. 3–4; Pollack Decl. ¶ 5, Ex. 2.)

17 On December 2, 2008, VH1 issued a press release publicly announcing its commitment to
18 distribute the television program, "Tough Love" (the "Program"), a reality television series, which
19 features a select group of single women who receive dating advice from the Wards. (Hill Decl. ¶¶
20 3, 15; Washington Decl. ¶ 7, Ex. 1.) The same day, *Variety*, an online entertainment news
21 magazine, published an article entitled "VH1 commits to 'Tough Love,'" which explained that VH1
22 made an eight-episode commitment to the Program. (See Hill Decl. ¶ 15; Pollack Decl. ¶ 5, Ex.
23 4; Washington Decl. ¶ 8, Ex. 2.) On December 3, 2008, the following day, the print version of
24 *Variety* also published a similar article on the Program. (See Hill Decl. ¶ 15; Pollack Decl. ¶ 5, Ex.
25 5; Washington Decl. ¶ 9, Ex. 3.)

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27 ¹ VH1 kept this working title as the official title of the television series for similar reasons.
28 (See Decl. Noah Pollack Supp. Defs.' Opp'n Pl.'s Mot. Prelim. Inj. ("Pollack Decl.") ¶¶ 6–7.)

1 The Program was filmed from January 12, 2009 through February 8, 2009. (Hill Decl. ¶¶
2 16–17; see Pollack Decl. ¶ 5.) On February 24, 2009, VH1 issued another press release
3 promoting the Program, which was sent to several "trade" publications in the entertainment
4 industry, national television critics, and television bookers. (See Washington Decl. ¶ 10, Ex. 4.)
5 Beginning in early February 2009 through the present, the Program's advertising campaign has
6 featured frequent television commercials on major channels, radio advertisements on popular
7 radio shows, print advertisements in widely circulated magazines, and other advertisements such
8 as billboards and posters in women's restrooms, women's locker rooms, supermarkets, and nail
9 salons. (See Decl. Tony Maxwell Supp. Defs.' Opp'n Pl.'s Mot. Prelim. Inj. ("Maxwell Decl.") ¶¶
10 6–7, 9; Decl. Faye Stein Supp. Defs.' Opp'n Pl.'s Mot. Prelim. Inj. ("Stein Decl.") ¶¶ 6–9;
11 Washington Decl. ¶¶ 11–13.) Throughout March 2009, articles about the Program have appeared
12 in nationally circulated magazines and newspapers and Steven Ward has made appearances on
13 a number of well-known television programs. (See Washington Decl. ¶¶ 11–12.)

14 The Program premiered on Sunday, March 15, 2009 and new episodes have aired weekly
15 on Sunday nights. (Hill Decl. ¶¶ 2, 16.) The final episode of the eight-episode first series is
16 scheduled to air on Sunday, May 3, 2009. (Hill Decl. ¶ 2.)

17 B. Plaintiff's "TOUGHLOVE" Program, Efforts to Develop a Television Series, and the
18 Present Suit

19 In 1979, family therapists Phyllis York and David York (the "Yorks") founded
20 Toughlove International, "a non[-]profit self-help program" and began using the "TOUGHLOVE"
21 mark. (Decl. Phyllis York Supp. Pl. Toughlove America, LLC's Mot. Prelim. Inj. ("York Decl.") ¶
22 3.) Over the past thirty years, the "TOUGHLOVE" mark has been used in connection with this
23 program, which has published successful educational materials and three books, including one
24 entitled "TOUGHLOVE," which sold over one million copies and is still in print. (See Decl. Igal
25 Jonathan Feibush Supp. Pl. Toughlove America, LLC's Mot. Prelim. Inj. ("Feibush Decl.") ¶ 2; York
26 Decl. ¶ 3.) Phyllis York, along with her now-deceased husband David York, federally registered
27 the "TOUGHLOVE" mark for an "educational self-help manual for parents troubled by teenage
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1 behavior" and "educational services—namely, conducting seminars in the field of parent-child
2 relationships" on March 5, 1985, Federal Registration Number 1,323,169. (See York Decl. ¶ 2,
3 Ex. 1.) In addition, David York federally registered the "TOUGHLOVE" mark for "clinical treatment
4 centers providing psychiatric and/or psychological consultation, evaluation and testing, psychiatric
5 and/or psychological counseling and treatment, rehabilitation services for substance-abuse
6 patients, rehabilitation services for mental health patients, rehabilitation facilities for treatment of
7 these patients," on August 17, 2004, Federal Registration Number 2,873,723. (See York Decl.
8 ¶ 2, Ex. 1.) Upon the death of her husband, David York, "Phyllis York succeeded to all [his] rights,
9 titles, and interests," including those in the "TOUGHLOVE" mark. (See Decl. Igal Feibush Supp.
10 Pl.'s Reply Defs.' Opp'n Pl.'s Mot. Prelim. Inj. ("Feibush Supp. Decl."), Ex. 1 Am.) Pursuant to a
11 license agreement executed between Phyllis York and Plaintiff in March 2008, Plaintiff is the
12 exclusive licensee of Phyllis York's rights in the "TOUGHLOVE" mark. (Feibush Supp. Decl., Ex.
13 1 ¶ 5.A; York Decl. ¶ 3.)

14 In 2005, Plaintiff began taking steps to develop a television series directed toward exploring
15 techniques for self-improvement through the "TOUGHLOVE" program's approach. (See Feibush
16 Decl. ¶ 5; Feibush Supp. Decl. ¶ 3; Decl. Matthew Lifschultz Supp. Pl.'s Reply Defs.' Opp'n Pl.'s
17 Mot. Prelim. Inj. ("Lifschultz Decl.") ¶ 2.) After meetings and email discussions between Plaintiff's
18 executives and representatives from Stick Figure Productions ("Stick Figure"), Plaintiff and
19 Stick Figure agreed, on April 25, 2006, to "mutually develop" and "create pitch materials" for a
20 television program, the format of which they would "mutually determine" from "any number of
21 formats (e.g., reality, talk, magazine, serial, fiction, etc.)" (See Feibush Decl. ¶ 5; Feibush
22 Supp. Decl. ¶¶ 5–8, Ex 2; Lifschultz Decl. ¶¶ 3–5.)

23 In 2007, Plaintiff's executives worked with a television producer to "develop concepts" for
24 a "talk/reality television show." (Feibush Supp. Decl. ¶ 9; Lifschultz Decl. ¶ 7.) On
25 March 21, 2007, Plaintiff filed its television show concept with the Writers Guild in Los Angeles,
26 California. (Feibush Decl. ¶ 5; Feibush Supp. Decl. ¶ 9; Lifschultz Decl. ¶ 7.) The concept,
27 entitled "ToughLove®," explained that the proposed "daily hour-long talk show" would "explore
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1 techniques for self-improvement" and provide "solutions to challenges people face in parenting,
2 the workplace, romantic relationships etc. . . ." (Feibush Decl., Ex. 7.) Plaintiff then "pitched" the
3 show to the President of Paramount Network Television Entertainment Group and in mid-
4 April 2007, "pitched" the show, through emails, telephone calls, and meetings, to
5 Creative Artists Agency ("CAA"), who eventually informed Plaintiff that it would not pursue the
6 show. (See Feibush Supp. Decl. ¶¶ 10–12; Lifschultz Decl. ¶¶ 8–11.) On November 17, 2008,
7 Plaintiff "posted a casting call on Breakdown Express (a standard casting company in the
8 television industry) . . . to find a host for its television program."² (Feibush Supp. Decl. ¶ 14; see
9 Feibush Decl. ¶ 5.)

10 On December 2, 2008, Plaintiff's Chief Executive Officer saw the article announcing VH1's
11 commitment to the Program in the online version of *Variety*. (See Feibush Decl. ¶ 8.) Thereafter,
12 on December 5, 2008, Phyllis York filed an intent-to-use federal trademark application for the
13 "TOUGHLOVE" mark in connection with, *inter alia*, "education, training and counseling services
14 provided . . . through television programs broadcast through television, cable and satellite, in the
15 fields of parenting, motivation, prevention and treatment of substance abuse and other addictive
16 and destructive behaviors, family relationships, counseling, marital issues, and self esteem," Serial
17 Number 77627661, which remains pending before the U.S. Patent and Trademark Office ("PTO").
18 (See Feibush Decl., Ex. 12; Decl. David E. Fink Supp. Defs.' Opp'n Pl.'s Mot. Prelim. Inj. ("Fink
19 Decl."), Ex. 8.) On December 10, 2008, Plaintiff's counsel sent a "cease and desist" letter to MTV,
20 which informed MTV of Plaintiff's trademark rights in the "TOUGHLOVE" mark, informed MTV that
21 it was in the process of developing a daily television show using the "TOUGHLOVE" mark, and
22 demanded that MTV immediately cease all use of "Tough Love" as a mark. (See Feibush Decl.
23 ¶ 13, Ex. 12.) On December 23, 2008, MTV responded that it was investigating the matter and
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25 ² Plaintiff has since extended an offer to a "celebrity persona;" the terms of an agreement
26 with this individual, along with another psychologist who would be featured on the show, are being
27 finalized. (See Feibush Supp. Decl. ¶¶ 15, 17.) In January 2009, Plaintiff negotiated an
28 agreement with "a film and television production and talent management company," "pertain[ing]
to developing and packaging a 'Toughlove' television show." (Feibush Supp. Decl. ¶ 17.)

1 would respond shortly. (See Feibush Decl. ¶ 13, Ex. 12.) Because MTV did not send any further
2 communications to Plaintiff, Plaintiff sent MTV a follow-up letter, which requested the results of
3 MTV's investigation, on February 17, 2009. (See Feibush Decl. ¶ 13, Ex. 12.) On February 25,
4 2009, MTV responded with a letter, which detailed MTV's contention that there was no likelihood
5 of confusion based on the dissimilarity of Plaintiff's products and the Program, noted that MTV
6 publicly advertised the Program prior to Plaintiff's filing of the intent-to-use trademark application,
7 and stated that MTV intended to move forward with the Program under the title "Tough Love."
8 (See Feibush Decl. ¶ 13, Ex. 12.)

9 On March 4, 2009, Plaintiff filed this suit against MTV, Flower Films, and High Noon,
10 alleging causes of action for: (1) federal trademark infringement, (2) false designation of origin,
11 (3) federal trademark dilution, (4) trademark dilution under California state law, (5) unfair
12 competition in violation of California Business & Professions Code § 17200, *et seq*, and (6)
13 common law trademark infringement. (See *generally* Compl.) On March 16, 2009, Plaintiff filed
14 the present Motion for Preliminary Injunction, which seeks a preliminary injunction preventing
15 Defendants from using the "Tough Love" mark "in connection with a reality television show and
16 any advertisement or promotional materials or activities relating thereto," based on the argument
17 that Plaintiff is likely to succeed on its trademark infringement claim and that failure to grant the
18 injunction would cause Plaintiff irreparable harm. (See Pl. Toughlove America, LLC's Not. Mot.
19 & Mot. Prelim. Inj. ("Pl.'s Notice") 1; Mem. P. & A. Supp. Pl.'s Mot. Prelim. Inj. ("Pl.'s Mot.") 6–18.)

20 II. DISCUSSION

21 A. Standard for a Preliminary Injunction

22 "A preliminary injunction is an extraordinary and drastic remedy, one that should not be
23 granted unless the [plaintiff], by a clear showing, carries the burden of persuasion." *Mazurek v.*
24 *Armstrong, et al.*, 520 U.S. 968, 972 (1997) (internal citation omitted). "A plaintiff is entitled to a
25 preliminary injunction in a trademark case [if] it demonstrates either[:] (1) a combination of
26 probable success on the merits and the possibility of irreparable injury or (2) the existence of
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1 serious questions going to the merits and that the balance of hardships tips sharply in [its] favor."³
2 *GoTo.com, Inc. v. The Walt Disney Co., et al.*, 202 F.3d 1199, 1204–05 (9th Cir. 2000) (internal
3 quotations omitted) (quoting *Sardi's Rest. Corp. v. Sardi*, 755 F.2d 719, 723 (9th Cir. 1985)).
4 These two formulations represent "two points on a sliding scale in which the required degree of
5 irreparable harm increases as the probability of success decreases." *Perfect 10, Inc. v.*
6 *Amazon.com, Inc.*, 508 F.3d 1146, 1158 (9th Cir. 2007).

7 The Ninth Circuit has explained that the "the relative hardship to the parties" is the "critical
8 element" in "deciding at which point along the continuum [an injunction] is justified." *Lopez, et al.*
9 *v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983) (internal citation omitted); see *Alaska*, 856 F.2d
10 at 1389 (internal citations omitted). "If the balance of harm tips decidedly toward the plaintiff, then
11 the plaintiff need not show as robust a likelihood of success on the merits as when the balance
12 tips less decidedly." *Alaska*, 856 F.2d at 1389 (internal citations omitted).

13 B. Plaintiff Has Not Demonstrated that the Balance of Hardships Tips in Its Favor

14 "The balanc[e] of the hardships analysis ensures [that] the issuance of an injunction will not
15 harm the defendants more than a denial will harm the plaintiffs." *Falcon Stainless, Inc. v. Rino*
16 *Cos., Inc.*, No. SA CV 08-926 AHS (MLGx), 2008 WL 5179037, at *9 (C.D. Cal. Dec. 9, 2008)
17 (internal citation omitted). Here, Plaintiff has not shown that the balance of hardships tips in its
18 favor. Plaintiff argues that if the Court does not grant its request for a preliminary injunction, the
19 well-respected reputation of the "TOUGHLOVE" mark for professional counseling and educational
20 services, which has developed over thirty years of use, will continue to be damaged by
21 Defendants' "over-the-top" and "flashy" reality television series in which Defendants use harsh
22 techniques on the female participants. (See Feibush Decl. ¶¶ 17–18; Pl.'s Mot. 18–19.) Although
23 the Court understands Plaintiff's concerns regarding the potential degradation of a mark that it and
24 its affiliates have used for many years, by the time Plaintiff's Motion for Preliminary Injunction was

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26 ³ In the trademark infringement context, if the plaintiff shows a likelihood of success on the
27 merits, then the court will presume "irreparable injury." *GoTo.com, Inc.*, 202 F.3d at 1205 n.4.
28 "This presumption effectively conflates the dual inquiries of th[e first] prong into the single question
of whether the plaintiff has shown a likelihood of success on the merits. *Id.*

1 scheduled for hearing before this Court based on when Plaintiff filed the Motion and the notice
2 requirements under the Local Rules of this district, the Program was already in the middle of its
3 first series. (See Hill Decl. ¶¶ 2, 16; Pollack Decl. ¶ 5.) As such, Plaintiff asks this Court to
4 prevent Defendants from using the title of its reality television show mid-series. This fact is
5 significant because it not only increases the harm that Defendants will suffer if the preliminary
6 injunction is granted but it also decreases the harm Plaintiff will suffer if the preliminary injunction
7 is denied. Given that more than half of the episodes in the eight-episode first series of the
8 Program have already aired, the Court finds that any reputational harm to Plaintiff's mark caused
9 by the Program and its marketing would not substantially increase by allowing Defendants to
10 continue to use the "Tough Love" mark. In contrast, however, if the Court grants the preliminary
11 injunction, thereby preventing Defendants from using the "Tough Love" mark in the middle of the
12 Program's first series, Defendants will suffer severe harm.

13 Defendants represented that if the requested preliminary injunctive relief is granted,
14 preventing them from using the "Tough Love" mark in association with the Program, they will not
15 be able to air the final episodes of the Program's first series because it would be impossible to
16 omit the term in such a limited amount of time, especially because production of the Program has
17 already been completed. (See Pollack Decl. ¶¶ 12–13.) This mid-series termination of the
18 Program would have serious consequences for Defendants. As each episode of the Program cost
19 several hundred thousand dollars to produce, Defendants have spent a total of \$4.7 million
20 producing the Program. (See Pollack Decl. ¶ 9.) Moreover, Defendants have spent nearly a half
21 million dollars promoting the Program under the title "Tough Love," including frequent television
22 commercials on major channels, radio advertisements on popular radio shows, print
23 advertisements in widely circulated magazines, and other advertisements such as billboards and
24 posters in women's restrooms, women's locker rooms, supermarkets, and nail salons, in addition
25 to costs associated with Steven Ward's promotional tour. (See Maxwell Decl. ¶¶ 6–7, 9; Stein
26 Decl. ¶¶ 6–9; Washington Decl. ¶¶ 11–13.) Although Defendants may have already reaped some
27 of the benefits of these expenditures, they would certainly lose a portion of these financial
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1 investments if the Program were halted as a result of a preliminary injunction. Furthermore,
2 Defendants would likely lose advertising revenue from companies that have already paid to
3 advertise on the final episodes of the Program's first series. (See Pollack Decl. ¶ 14.) In addition
4 to the substantial tangible financial losses to be incurred, Defendants would likely damage their
5 reputation with the millions of viewers who have watched the Program and with the advertisers
6 to whom they may be unable to fulfill their commitments. (See Hill Decl. ¶ 21; Pollack Decl. ¶¶ 11,
7 13–14; Stein Decl. ¶ 10.) Given that the evidence before the Court shows that if an injunction
8 were to issue, Defendants would lose a "significant financial investment" in the Program and
9 advertising revenue, *see Playmakers LLC*, 376 F.3d at 898, as well as suffer reputational damage
10 with viewers and advertisers, the Court finds that the likely harm to Defendants if the preliminary
11 injunction is granted exceeds the potential harm to Plaintiff if the preliminary injunction is denied.⁴

12 Accordingly, Plaintiff has not shown that the balance of hardships weighs in its favor. As
13 such, in order to be entitled to preliminary injunctive relief under Ninth Circuit standards, Plaintiff
14 must show a "combination of probable success on the merits and the possibility of irreparable
15 injury." *See GoTo.com, Inc.*, 202 F.3d at 1204–05 (internal citations and quotations omitted).

16 C. Plaintiff Has Failed to Show a Likelihood of Success as to Trademark Infringement

17 To prevail on a claim of trademark infringement, a plaintiff must prove: "(1) that it has a
18 protectable ownership interest in the mark; and (2) that the defendant's use of the mark is likely
19 to cause consumer confusion" *Dep't of Parks & Recreation*, 448 F.3d at 1124.

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23 ⁴ In balancing the hardships, a court "must consider the public interest as a factor . . . when
24 the public interest may be affected." *Dep't of Parks & Recreation v. Bazaar del Mundo Inc.*, 448
25 F.3d 1118, 1124 (9th Cir. 2006) (internal citation omitted). Although the public has "an interest in
26 preventing consumer confusion" and being free from misleading advertising, "there is also a broad
27 societal interest in preserving common, useful words for the public domain." *Entrepreneur Media,
28 Inc.*, 279 F.3d at 1148 (internal citation omitted); *see Falcon Stainless, Inc.*, 2008 WL 5179037,
at *9. Thus, despite any public interest in preventing consumer confusion, given that "tough love"
is a common phrase the public also has an interest in allowing its fair usage. As such, to the
extent the public interest is implicated, it is a neutral factor.

1 1. Ownership Interest in the "TOUGHLOVE" Mark

2 As to the first element of a claim for trademark infringement, "federal registration of the
3 mark is prima facie evidence that the registrant is the owner of the mark," *Sengoku Works Ltd. v.*
4 *RMC Int'l, Ltd.*, 96 F.3d 1217, 1219 (9th Cir. 1996) (internal citations omitted); see *Dep't of Parks*
5 *& Recreation*, 448 F.3d at 1124 (internal citations omitted), that the mark is valid, and that the
6 registrant has the exclusive right to use the mark on the goods and services specified in the
7 registration," *Brookfield Commc'ns, Inc. v. West Coast Entm't Corp.*, 174 F.3d 1036, 1046–47 (9th
8 Cir. 1999) (internal citations omitted). As such, if a mark is federally registered, the registrant is
9 presumed to be the owner of the mark and "the challenger must overcome this presumption by
10 a preponderance of the evidence." *Sengoku Works Ltd.*, 96 F.3d at 1219 (internal citations
11 omitted). "A 'pending' trademark application" for a mark, however, does not entitle the applicant
12 "to any statutory presumption of ownership, validity, or exclusive right to use the mark in
13 commerce." *Pollution Denim & Co. v. Pollution Clothing Co.*, 547 F. Supp. 2d 1132, 1139 (C.D.
14 Cal. 2007) (internal citations omitted).

15 If a plaintiff has only a pending trademark application, not a registered trademark, for the
16 mark it is seeking to enforce, the plaintiff must establish its ownership of the mark by proving
17 "priority of use," *id.* (internal citation omitted), which is "the standard test of [trademark]
18 ownership," *Sengoku Works Ltd.*, 96 F.3d at 1219. "To demonstrate priority of use," the plaintiff
19 must prove: (1) "both adoption of the mark[] and use in a way sufficiently public to identify or
20 distinguish the marked goods in an appropriate segment of the public mind as those of the adopter
21 of the mark" and (2) "that its use of the mark[] was continuous and not interrupted." *Dep't of Parks*
22 *& Recreation*, 448 F.3d at 1125–26 (internal citations and quotations omitted); see *Pollution Denim*
23 *& Co.*, 547 F. Supp. 2d at 1141 (internal citation omitted). As such, to establish trademark
24 ownership through priority of use, "it is not enough to have invented the mark first or even to have
25 registered it first; the party claiming ownership must have been the first to actually use the mark
26 in the sale of goods or services." *Dep't of Parks & Recreation*, 448 F.3d at 1125 (internal citations
27 omitted); *Sengoku Works Ltd.*, 96 F.3d at 1219 (internal citation omitted).

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1 "The use necessary to acquire protectable [trademark] rights is more than token or *de*
2 *minim[i]s* use." *Matrix Motor Co., Inc. v. Toyota Jidosha Kabushiki Kaisha*, 290 F. Supp. 2d 1083,
3 1088 (C.D. Cal. June 30, 2003) (internal citation omitted). "[T]he use must be bona fide[,]
4 commercial in character," and "continuous," i.e., "accompanied or followed by activities which
5 would tend to indicate a continuing effort or intent to continue such use and place the product on
6 the market on a commercial scale within a time demonstrated to be reasonable in the particular
7 trade." *Dep't of Parks & Recreation*, 448 F.3d at 1126 (internal citation omitted); *Pollution Denim*
8 *& Co.*, 547 F. Supp. 2d at 1141 (internal citations omitted); see *Chance v. Pac-Tel Teletrac Inc.*,
9 242 F.3d 1151, 1157 (9th Cir. 2001) (internal citations omitted). To be "continuous," "the use must
10 be maintained without interruption," not "sporadic, casual, and nominal." *Garden of Life, Inc. v.*
11 *Letzer*, 318 F. Supp. 2d 946, 957 (C.D. Cal. May 10, 2004) (internal citation omitted).

12 a. Intent-to-Use Trademark Application for Use of the "TOUGHLOVE"
13 Mark in Connection with a Television Program

14 On December 5, 2008, Phyllis York, who has granted Plaintiff an exclusive license to her
15 trademark rights in the "TOUGHLOVE" mark, filed an intent-to-use federal trademark application
16 for the "TOUGHLOVE" mark in connection with, *inter alia*, "education, training and counseling
17 services provided . . . through television programs broadcast through television, cable and
18 satellite, in the fields of parenting, motivation, prevention and treatment of substance abuse and
19 other addictive and destructive behaviors, family relationships, counseling, marital issues, and self
20 esteem," Serial Number 77627661, which is pending before the PTO. (See Feibush Decl., Ex. 12;
21 Feibush Supp. Decl., Ex. 1; Fink Decl., Ex. 8; York Decl. ¶ 3.) Given that a pending trademark
22 application does not entitle the applicant "to any statutory presumption of ownership, validity, or
23 exclusive right to use the mark in commerce," Plaintiff must prove "priority of use" in order to
24 establish an ownership interest in the mark. See *Pollution Denim & Co.*, 547 F. Supp. 2d at 1139
25 (internal citation omitted). Plaintiff, however, has not shown a likelihood of success in satisfying
26 Ninth Circuit standards for "priority of use" of the "TOUGHLOVE" mark with respect to a television
27 program.

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1 Despite Plaintiff's alleged adoption of the "TOUGHLOVE" mark in relation to its plans to
2 develop a television series, "mere adoption of a mark without bona fide use . . . does not create
3 trademark rights" See *Chance*, 242 F.3d at 1157 (internal citations omitted). Plaintiff has
4 not submitted evidence to suggest that it has ever used the "TOUGHLOVE" mark "in a way
5 sufficiently public to identify" the proposed television program with the mark "in an appropriate
6 segment of the public mind." See *Dep't of Parks & Recreation*, 448 F.3d at 1125–26; *Pollution*
7 *Denim & Co.*, 547 F. Supp. 2d at 1141 (internal citation omitted). Plaintiff has detailed its efforts
8 toward producing a television series under the "TOUGHLOVE" mark, including (1) meetings and
9 emails with Stick Figure culminating in the April 25, 2006 agreement to "mutually develop" and
10 "create pitch materials" for a television program, see Feibush Decl. ¶ 5; Feibush Supp. Decl. ¶¶
11 5–8, Ex 2; Lifschultz Decl. ¶¶ 3–5; (2) the work of Plaintiff's executives with a television producer
12 to "develop concepts" for a "talk/realty television show" in 2007, see Feibush Supp. Decl. ¶ 9,
13 Lifschultz Decl. ¶ 7; (3) the filing of its television show concept, entitled "ToughLove®," with the
14 Writer's Guild in Los Angeles, California on March 21, 2007, see Feibush Decl. ¶ 5; Feibush Supp.
15 Decl. ¶ 9; Lifschultz Decl. ¶ 7; (4) Plaintiff's "pitch" of its idea for a television program to Paramount
16 Network Television Entertainment Group and CAA, see Feibush Supp. Decl. ¶¶ 10–12; Lifschultz
17 Decl. ¶¶ 8–11; (5) its November 17, 2008 "casting call on Breakdown Express (a standard casting
18 company in the television industry)" for a host of the proposed television program, see Feibush
19 Decl. ¶ 5; Feibush Supp. Decl. ¶ 14; (6) its January 2009 agreement with "a film and television
20 production and talent management company," "pertain[ing] to developing and packaging" a
21 television show, see Feibush Supp. Decl. ¶ 17; and (7) its yet-to-be-finalized agreements with a
22 "celebrity persona" and a psychologist for commitments to appear on the proposed television
23 program, see Feibush Supp. Decl. ¶¶ 15–17. None of these purported uses, however, is even
24 close to being "sufficiently public" that any "segment of the public mind" would identify Plaintiff with
25 a television program under the "TOUGHLOVE" mark. See *Dep't of Parks & Recreation*, 448 F.3d
26 at 1125–26; *Pollution Denim & Co.*, 547 F. Supp. 2d at 1141 (internal citation omitted). It is
27 without question that Plaintiff's private meetings, emails, telephone conversations, and
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1 agreements with various businesses in the television industry and potential hosts of the proposed
2 program are not "sufficiently public" to allow the public to identify Plaintiff with a television series
3 under the "TOUGHLOVE" mark, as the public is unaware of any of these developments. With
4 regard to Plaintiff's March 21, 2007 filing of its "ToughLove®" television show concept with the
5 Writer's Guild in Los Angeles, California, Plaintiff does not indicate how much, if any, public
6 exposure such a filing received and it would seem that such a filing would only be viewable by
7 members of the Writer's Guild, see Feibush Decl. ¶ 5; Feibush Supp. Decl. ¶ 9; Lifschultz Decl.
8 ¶ 7. Moreover, as to the November 17, 2008 casting call for a host of the proposed television
9 show, Plaintiff does not suggest that this was a public event, such as by explaining how it was
10 advertised, where it was held, how many people attended, and the like. See *Garden of Life, Inc.*,
11 318 F. Supp. 2d at 958; Feibush Decl. ¶ 5; Feibush Supp. Decl. ¶ 14. As such, there is no
12 evidence before the Court to suggest that any portion of the public would identify Plaintiff with a
13 television series under the "TOUGHLOVE" mark.⁵

14 Although Plaintiff may intend to create a television series with the "TOUGHLOVE" mark,
15 its "future goals and dreams" of creating such a show do not "constitute . . . evidence of actual use
16 of the ["TOUGHLOVE"] mark . . . in connection with" a television program. See *Matrix Motor Co.*,

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20 ⁵ Additionally, the Court has concerns that Plaintiff's use of the "TOUGHLOVE" mark in
21 relation to a television program may not have been "continuous" as required to obtain trademark
22 rights, as it seems that Plaintiff's conduct may not have indicated a "continuing effort" to develop
23 and produce the proposed television series "within a time demonstrated to be reasonable in the
24 particular trade." See *Dep't of Parks & Recreation*, 448 F.3d at 1126 (internal citation omitted);
25 *Pollution Denim & Co.*, 547 F. Supp. 2d at 1141 (internal citations omitted). To the Court,
26 Plaintiff's use of the "TOUGHLOVE" mark in connection with a television program, spanning from
27 2005 to the present, appears to be somewhat sporadic. Given that the Court is unfamiliar with the
28 process of developing a television program, which neither party has addressed in order to allow
the Court to determine whether the use was within a "reasonable" time frame in the television
industry, and that the Court's finding that Plaintiff has not shown a likelihood of success in
establishing use "sufficiently public" to obtain trademark rights suffices to prevent Plaintiff from
showing a likelihood of success in establishing trademark rights in connection with a television
program, the Court declines to make a determination of whether Plaintiff's use of the
"TOUGHLOVE" mark was or was not "continuous" under trademark law.

1 *Inc.*, 290 F. Supp. 2d at 1089. "Trademark rights are not established by goals and dreams. They
2 are established only through prior use of the mark in the marketplace." *Id.*

3 In contrast, since early December 2008, when Defendants issued a press release
4 announcing its commitment to an eight-episode television series entitled, "Tough Love,"
5 Defendants have embarked on an aggressive nation-wide advertising campaign, which has
6 included television commercials and appearances, as well as radio and magazine advertisements.
7 (See Hill Decl. ¶ 15; Maxwell Decl. ¶¶ 6–9; Pollack Decl. ¶ 5; Stein Decl. ¶¶ 6–9; Washington Decl.
8 ¶¶ 8–13.) More importantly, the Program has already aired with the mark "Tough Love." (See Hill
9 Decl. ¶ 2.) As such, Defendants have demonstrated use in a way "sufficiently public" to identify
10 Defendants with the "Tough Love" television series "in an appropriate segment of the public mind."
11 See *Dep't of Parks & Recreation*, 448 F.3d at 1125–26; *Pollution Denim & Co.*, 547 F. Supp. 2d
12 at 1141. Moreover, Defendants have detailed "continuous" use of the "Tough Love" mark, which
13 has appeared on all Defendants' "pitch" and promotional materials since its adoption in late 2007,
14 throughout its intensive development, production, and advertising of the Program. (See Hill Decl.
15 ¶¶ 6–8, 11–14, Exs. 1–4; Pollack Decl. ¶ 5.)

16 Because Plaintiff has failed to demonstrate a likelihood of success on a "priority of use" of
17 the "TOUGHLOVE" mark in connection with a television program and, thus, that it has a
18 protectable ownership interest in the mark in relation to this type of goods, Plaintiff has not met
19 its burden for preliminary injunctive relief on the threshold prong of the trademark infringement
20 analysis. See *Pollution Denim & Co.*, 547 F. Supp. 2d at 1139; *Matrix Motor Co., Inc.*, 290 F.
21 Supp. 2d at 1088. Accordingly, in order to succeed on its Motion for Preliminary Injunction,
22 Plaintiff must demonstrate a likelihood of success on the merits with respect to its trademark rights
23 other than those relating to its pending intent-to-use application for a television program.

24 b. Federal Registration of the "TOUGHLOVE" Mark

25 In contrast to the recently filed trademark application for the "TOUGHLOVE" mark in
26 relation to a television program, which is currently pending before the PTO, the PTO has already
27 issued federal registrations for the "TOUGHLOVE" mark for an "educational self-help manual for
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1 parents troubled by teenage behavior" and "educational services—namely, conducting seminars
2 in the field of parent-child relationships," Federal Registration Number 1,323,169, and for "clinical
3 treatment centers providing psychiatric and/or psychological consultation, evaluation and testing,
4 psychiatric and/or psychological counseling and treatment, rehabilitation services for substance-
5 abuse patients, rehabilitation services for mental health patients, rehabilitation facilities for
6 treatment of these patients," Federal Registration Number 2,873,723, of which Plaintiff is the
7 exclusive licensee. (See Feibush Supp. Decl., Ex. 1; York Decl. ¶¶ 2–3, Ex. 1.) Because the
8 "TOUGHLOVE" mark is federally registered with respect to these goods and services and
9 Defendants have not come forward with any evidence to rebut the statutory presumption of an
10 ownership interest in the mark and the exclusive right to use the mark in relation to the specified
11 goods and services, the Court presumes that Plaintiff has an ownership interest in the
12 "TOUGHLOVE" mark in relation to these goods and services. See *Brookfield Commc'ns, Inc.*, 174
13 F.3d at 1046–47; *Sengoku Works Ltd.*, 96 F.3d at 1219 (internal citations omitted); *Dep't of Parks
14 & Recreation*, 448 F.3d at 1124 (internal citations omitted); *Pollution Denim & Co.*, 547 F. Supp.
15 2d at 1139–40 (internal citations omitted). Thus, the issue becomes whether there is a likelihood
16 of confusion between Defendants' use of "Tough Love" mark for the Program and Plaintiff's use
17 of the "TOUGHLOVE" mark for these goods and services.

18 2. Likelihood of Confusion

19 The second prong of the trademark infringement analysis requires the plaintiff to prove that
20 "the defendant's use of the mark is likely to cause consumer confusion" *Dep't of Parks &
21 Recreation*, 448 F.3d at 1124 (internal citation omitted). "The test for likelihood of confusion is
22 whether a 'reasonably prudent consumer' in the marketplace is likely to be confused as to the
23 origin of the good or service bearing one of the marks." *Entrepreneur Media, Inc. v. Smith*, 279
24 F.3d 1135, 1140 (9th Cir. 2002) (internal citation omitted). "Actionable confusion for purposes of
25 a trademark infringement analysis must be 'probable,' not simply a possibility." *Matrix Motor Co.,
26 Inc.*, 290 F. Supp. 2d at 1090 (internal citation omitted). The Ninth Circuit has identified eight
27 relevant factors that are "intended to guide the court in" the "likelihood of confusion" determination,
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1 *Entrepreneur Media, Inc.*, 279 F.3d at 1140 (internal citation omitted), including: "(1) strength of
2 the mark; (2) proximity of the goods; (3) similarity of the marks; (4) evidence of actual confusion;
3 (5) marketing channels used; (6) type of goods and the degree of care likely to be exercised by
4 the purchaser; (7) defendant's intent in selecting the mark; and (8) the likelihood of expansion of
5 the product lines." *AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348–49 (9th Cir.1979) (internal
6 citation omitted).

7 a. Strength of the Mark

8 "The scope of trademark protection" accorded to a mark "depends upon the strength of the
9 mark with stronger marks receiving greater protection than weak ones." *Entrepreneur Media, Inc.*,
10 279 F.3d at 1141 (internal citation omitted). Under trademark law, there are five categories of
11 marks: (1) generic; (2) descriptive; (3) suggestive; (4) arbitrary; and (5) fanciful. *Yellow Cab Co.*
12 *of Sacramento v. Yellow Cab of Elk Grove, Inc.*, 419 F.3d 925, 927 (9th Cir. 2005) (internal citation
13 omitted). Under this "continuum" of marks, "generic" marks are given "no protection," "descriptive"
14 and "suggestive" marks are given "moderate protection," and "arbitrary" and "fanciful" marks are
15 given "maximum protection." *Nutri/Sys., Inc. v. Con-Stan Indus., Inc.*, 809 F.2d 601, 605 (9th Cir.
16 1987) (internal citation omitted). "Arbitrary or fanciful marks" are "strong" marks, whereas
17 "descriptive or suggestive marks" are "weak" marks. *Id.* (internal citation omitted). Although both
18 "descriptive" and "suggestive" marks are "weak" marks, "courts bestow less protection on a
19 descriptive mark than a suggestive one" and the holder of a descriptive mark must demonstrate
20 "secondary meaning," i.e., "show that an association between the mark and the product has been
21 established in . . . consumers' minds," to obtain trademark protection. *Id.* (internal citation
22 omitted).

23 "Arbitrary" or "fanciful" marks are the "strongest marks," receiving "the maximum trademark
24 protection." *Entrepreneur Media, Inc.*, 279 F.3d at 1141 (internal citation omitted). "A fanciful
25 mark is 'a coined word or phrase, . . . invented solely to function as a trademark.'" *Id.* at 1141 n.2
26 (internal citation omitted). "An arbitrary mark is a common word that is 'non-descriptive of any
27 quality of the goods or services.'" *Id.* (internal citation omitted). At the other extreme, the
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1 "weakest marks" are "generic marks," which "give the general name of the product," i.e., "they
2 embrace an entire class of products." *Id.* at 1141 & n.2 (internal citation omitted).

3 In between these extremes lies "suggestive" and "descriptive" marks, both of which are
4 "weak" marks. *Id.* at 1141 (internal citation omitted). "A descriptive mark tells something about
5 the product," *Sleekcraft Boats*, 599 F.2d at 349; it defines "qualities or characteristics of a product
6 in a straightforward way that requires no exercise of the imagination to be understood,"
7 *Entrepreneur Media, Inc.*, 279 F.3d at 1141–42 (internal citations omitted). In contrast, a
8 suggestive mark "subtly connote[s] something about the product[]." *Sleekcraft Boats*, 599 F.2d
9 at 349. In other words, a suggestive mark "does not *describe* the product's features," it "*suggests*
10 them." *Entrepreneur Media, Inc.*, 279 F.3d at 1142 (internal citation omitted). A suggestive mark
11 requires "a consumer [to] use imagination or any type of multistage reasoning to understand the
12 mark's significance." *Id.* (internal citation omitted).

13 "Although the distinction between descriptive and suggestive marks may be inarticulable,
14 several criteria offer guidance." *Sleekcraft Boats*, 599 F.2d at 349 (internal citation omitted). "The
15 primary criterion is 'the imaginativeness involved in the suggestion,' that is, how immediate and
16 direct is the thought process from the mark to the particular product." *Id.* (internal citation omitted).
17 "If the mental leap between the word and the product's attribute is not almost instantaneous, this
18 strongly indicates suggestiveness, not . . . descriptiveness." *Fin. Express LLC v. Nowcom Corp.,*
19 *et al.*, 564 F. Supp. 2d 1160, 1169 (C.D. Cal. June 18, 2008) (quoting *Self-Realization Fellowship*
20 *Church v. Ananda Church of Self-Realization*, 59 F.3d 902, 911 (9th Cir. 1995)). "A second
21 criterion is whether granting the trademark owner a limited monopoly will in fact inhibit legitimate
22 use of the mark by other sellers." *Sleekcraft Boats*, 599 F.2d at 349. "Widespread use of a word
23 by others may serve as confirmation of the *need* to use that word." *Entrepreneur Media, Inc.*, 279
24 F.3d at 1143 (internal citations omitted). Extensive third-party use of a mark such that "the
25 marketplace is replete with products using a particular trademarked word indicates not only the
26 difficulty in avoiding its use but also, and directly, the likelihood that consumers will *not* be
27 confused by its use," as consumers may have learned to carefully distinguish similar marks. *Id.*

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1 at 1144; see *Matrix Motor Co., Inc.*, 290 F. Supp. 2d at 1091 (internal citations omitted). "The fact
2 that the term resides in the public domain lessens the possibility that a purchaser would be
3 confused and think the mark came from a particular single source." *Entrepreneur Media, Inc.*, 279
4 F.3d at 1144 (internal citations omitted); see *Matrix Motor Co., Inc.*, 290 F. Supp. 2d at 1091
5 (internal citations omitted). The Ninth Circuit has held that a mark is weak if it is "a meaningful
6 word in common usage" and "has meaning in the English language." See *Alpha Indus., Inc. v.*
7 *Alpha Steel Tube & Shapes, Inc.*, 616 F.2d 440, 445 (9th Cir. 1980); see also *Playmakers LLC v.*
8 *ESPN, Inc.*, 376 F.3d 894, 897 & n.2 (9th Cir. 2004).

9 Here, Plaintiff asserts that "TOUGHLOVE" is a "coined, fanciful mark," which is therefore
10 entitled to wide protection. See *Sleekcraft Boats*, 599 F.2d at 349; Pl.'s Mot. 8. This assertion,
11 however, is incorrect. See *Sleekcraft Boats*, 599 F.2d at 349. "Tough love" is a commonly used
12 phrase whose use dates back to well before the Yorks began using the mark in 1979. See York
13 Decl. ¶ 3; Merriam-Webster Dictionary, www.merriam-webster.com (providing 1968 as date for
14 definition of "tough love"); Oxford English Dictionary, www.oed.com (providing various uses of
15 phrase "tough love" in books and articles from, *inter alia*, 1957, 1968, and 1976). Given that the
16 phrase was not "invented solely to function as a trademark," it is not a "fanciful" mark. See
17 *Entrepreneur Media, Inc.*, 279 F.3d at 1141 (internal citation omitted). Furthermore, Plaintiff's
18 "TOUGHLOVE" mark is also not an "arbitrary" mark, as the mark is at least related to the goods
19 and services that the Yorks and Plaintiff provide. See *id.* As such, [t]he issue, as [the Court]
20 view[s] it, is whether [the "TOUGHLOVE" mark] is descriptive or suggestive" of Plaintiff's products
21 and services. See *Sleekcraft Boats*, 599 F.2d at 349.

22 The Court is inclined to hold that the "TOUGHLOVE" mark is "descriptive," rather than
23 "suggestive" of Plaintiff's goods and services. From the evidence presently before the Court, it
24 appears as though the "TOUGHLOVE" mark "describes," rather than "suggests" or "subtly
25 connote[s]," characteristics of Plaintiff's products "in a straightforward way" such that consumers
26 exposed to the mark will not need to use their imagination or "any type of multistage reasoning"
27 to understand that the mark references that Plaintiff's program, educational services, and books
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1 use a seemingly strict approach to allow individuals, including troubled teens, substance abusers,
2 and persons with mental health issues, to improve their behavior. See *Entrepreneur Media, Inc.*,
3 279 F.3d at 1141–42 (internal citations omitted); *Sleekcraft Boats*, 599 F.2d at 349. Given that
4 this "thought process" or "mental leap" between the mark and the characteristics of Plaintiff's
5 goods and services seems to be "immediate and direct" and "almost instantaneous," it appears
6 to the Court that the "TOUGHLOVE" mark is a descriptive mark. See *Sleekcraft Boats*, 599 F.2d
7 at 349 (internal citation omitted); *Fin. Express LLC*, 564 F. Supp. 2d at 1169 (quoting *Self-*
8 *Realization Fellowship Church*, 59 F.3d at 911)). Further supporting the conclusion that the
9 "TOUGHLOVE" mark is descriptive rather than suggestive is that the phrase "tough love" "resides
10 in the public domain," having been in common usage for decades, and is featured in several
11 dictionaries. See *Alpha Indus., Inc.*, 616 F.2d at 445; see, e.g., Merriam-Webster Dictionary,
12 www.merriam-webster.com; Oxford English Dictionary, www.oed.com; see also *Playmakers LLC*,
13 376 F.3d at 897 & n.2. Moreover, the Court is not aware of and Plaintiff has not pointed to any
14 synonyms for the phrase "tough love," suggesting a need to use the phrase. See *Entrepreneur*
15 *Media, Inc.*, 279 F.3d at 1143. Such common usage implies that consumers would be less
16 inclined to associate marks similar to the phrase "tough love" with the source of a particular
17 product and may more carefully distinguish between products with such marks.

18 Given the "uncertain" line separating suggestive and descriptive marks, see *Sleekcraft*
19 *Boats*, 599 F.2d at 349 (internal citations omitted), and that Plaintiff has not provided a detailed
20 explanation of its products and services to enable the Court to determine the precise extent of the
21 mental leap or thought process between the "TOUGHLOVE" mark and Plaintiff's goods and
22 services, the Court finds it more prudent not to make a definitive holding on this point at this
23 juncture. The distinction between a "suggestive" and "distinctive" mark is of little importance at
24 this stage of the litigation, as Defendants have not provided any evidence to suggest that the
25 "TOUGHLOVE" mark lacks "secondary meaning" and thus, would not be entitled to trademark
26 protection if found to be a descriptive mark. See *Nutri/Sys., Inc.*, 809 F.2d at 605. Most
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1 importantly, regardless of whether the "TOUGHLOVE" mark is descriptive or suggestive, it is "a
2 weak mark entitled to a restricted range of protection." See *Sleekcraft Boats*, 599 F.2d at 350.

3 Because "[Plaintiff's] mark is weak, this factor does not weigh in favor of a likelihood of
4 consumer confusion." *Entrepreneur Media, Inc.*, 279 F.3d at 1141 (quoting *Sleekcraft*, 599 F.2d
5 at 350)). As such, Plaintiff must make a "stronger showing as to the other [likelihood-of-confusion]
6 factors." *Alpha Indus., Inc.*, 616 F.2d at 446 (internal citation omitted).

7 b. Proximity of the Goods

8 "The more closely related the goods . . . , the more likely consumers will be confused by
9 similar marks." *Entrepreneur Media, Inc.*, 279 F.3d at 1147. In determining the proximity of
10 goods, courts consider: (1) whether the goods are "complementary;" (2) whether "the products are
11 sold to the same class of purchasers;" and (3) whether "the goods are similar in use and function."
12 *Sleekcraft Boats*, 599 F.2d at 350 (internal citations omitted); see *Matrix Motor Co., Inc.*, 290 F.
13 Supp. 2d at 1092 (internal citation omitted); *Walter v. Mattel, Inc.*, 31 F. Supp. 2d 751, 759 (C.D.
14 Cal. Sept. 4, 1998) (internal citation omitted).

15 The Court finds that Defendant's reality television program, which seeks to entertain
16 viewers while providing dating advice for women participants, is distinct from Plaintiff's goods and
17 services, namely educational services, psychological counseling, and manuals and books for
18 troubled teenagers, as well as substance abuse and mental health patients, or their loved ones.
19 (See Feibush Decl. ¶ 2; Hill Decl. ¶ 3; York Decl. ¶¶ 2–3, Ex. 1.) Defendants' entertainment
20 television show is not complementary with the serious educational and counseling services and
21 goods that Plaintiff provides. As to whether "the products are sold to the same class of
22 purchasers," the Program is broadcast on national television such that anyone who has the VH1
23 channel can watch the Program, but Defendants have targeted their advertising to solicit young
24 women. (See Stein Decl. ¶¶ 5–6.) In contrast, Plaintiff's goods and services are utilized by the
25 loved ones of individuals facing serious psychological or behavioral issues. Given the breadth of
26 Defendants' advertising and the ease with which viewers may find the Program, there may be
27 some overlap between the classes of people who are exposed to the Program and Plaintiff's
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1 goods and services. (See generally Maxwell Decl.; Stein Decl.) Finally, the Program, which is
2 intended to entertain viewers while providing women participants with light-hearted dating advice
3 from matchmakers, has a different "use and function" from Plaintiff's educational services,
4 psychological counseling, and manuals and books for troubled teenagers, as well as substance
5 abuse and mental health patients, which seek to help individuals overcome severe hardships.
6 (See Feibush Decl. ¶ 2; Hill Decl. ¶ 3; York Decl. ¶¶ 2–3, Ex. 1.) The fact that both products could
7 "broadly" be described as relating to troubled relationships, as Plaintiff argues, is not sufficient to
8 find that the products are similar in use or function, given the great disparity in focus and tone
9 between the Program and Plaintiff's goods and services. See *Matrix Motor Co., Inc.*, 290 F. Supp.
10 2d at 1091 (internal citation omitted); Pl.'s Mot. 10.

11 Because the Program and Plaintiff's goods and services are remote from one another, the
12 "proximity of goods" factor weighs against a finding of likelihood of confusion.

13 c. Similarity of the Marks

14 "Obviously, the greater the similarity between the two marks at issue, the greater the
15 likelihood of confusion." *Entrepreneur Media, Inc.*, 279 F.3d at 1144 (internal citation omitted).
16 "Similarity of the marks is tested on three levels: sight, sound, and meaning." *Sleekcraft Boats*,
17 599 F.2d at 351 (internal citation omitted); see *GoTo.com, Inc.*, 202 F.3d at 1206 (internal citations
18 omitted). In considering the similarity of the marks, a court must consider the marks "as they are
19 encountered in the marketplace." *Sleekcraft Boats*, 599 F.2d at 351; see *GoTo.com, Inc.*, 202
20 F.3d at 1206 (internal citation omitted). For example, use of a "distinctive logo" and a "housemark
21 can reduce the likelihood of confusion." See *Sleekcraft Boats*, 599 F.2d at 351 (internal citation
22 omitted); *Charles Schwab & Co., Inc. v. The Hibernia Bank*, 665 F. Supp. 800, 808 n.9 (N.D. Cal.
23 Mar. 3, 1987) (internal citation omitted); see also *Matrix Motor Co., Inc.*, 290 F. Supp. 2d at 1093
24 (internal citations omitted). However, "the presence of a housemark in conjunction with the
25 trademark alone will not negate the likelihood of confusion." *Charles Schwab & Co., Inc.*, 665 F.
26 Supp. at 808 (internal citation omitted).

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1 In this case, the similarity of the "TOUGHLOVE" and "Tough Love" marks weighs heavily
2 in favor of a finding of likelihood of confusion. With regard to sound, the two marks are identical.
3 Additionally, the marks have a similar meaning, both referring to a stern or "tough" approach to
4 helping individuals improve their behavior, though the behavior at issue between the Program and
5 Plaintiff's goods and services is distinct. (See Hill Decl. ¶¶ 6–7; Pollack Decl. ¶¶ 6–7.)

6 With respect to sight, an analysis of the similarity of the marks is necessarily incomplete
7 because Plaintiff has not proffered any pictures of its mark on products or advertisements and,
8 thus, the Court cannot determine how Plaintiff's mark appears in the marketplace. See *Garden*
9 *of Life, Inc.*, 318 F. Supp. 2d at 964. Nevertheless, it is clear that the fact that Plaintiff's
10 "TOUGHLOVE" mark consists of one word while Defendants' "Tough Love" mark is two words is
11 insufficient to distinguish the marks. See *In re Woodbridge Labs, Inc.*, No. 76636010, 2006 TTAB
12 LEXIS 402, at *5–*6 (T.T.A.B. Aug. 28, 2006) ("The marks are not distinguished by the mere fact
13 that the registered mark consists of two words and the applicant's mark is a single word."); see
14 also *In re Magnetic Ticket & Label Corp.*, No. 76389761, 2005 TTAB LEXIS 421, at *9 (T.T.A.B.
15 Sept. 29, 2005). In terms of a comparison of the precise appearance of the marks in the
16 marketplace, the only images related to Plaintiff's "TOUGHLOVE" mark that are presently before
17 the Court are images of the website of a group related to Plaintiff, the Fort Worth, Texas
18 "TOUGHLOVE®" support group, which features the "TOUGHLOVE" mark in capital letters in
19 either all black, white, or red font with "TOUGH" occasionally italicized, see Feibush Decl., Ex. 9,
20 and the intent-to-use application, which specifies that the mark "consists of standard characters,
21 without claim to any particular font, style, size, or color" and features an image of the
22 "TOUGHLOVE" mark in all capital letters in plain black font, see Feibush Decl., Ex. 12, Fink Decl.,
23 Ex. 8. In contrast, the official logo of Defendants' Program features the housemark "VH1" along
24 with the word "TOUGH" in blue capital letters, distinguished from the word "Love" in a golden-
25 colored script with the "L," the only capital letter in "Love," threaded through the "O" of "TOUGH."
26 (See Maxwell Decl. ¶ 8, Ex. 1; Pollack Decl., Ex. 6.) The terms "VH1," "TOUGH," and "Love" all
27 appear on different lines of the logo. (See Maxwell Decl. ¶ 8, Ex. 1; Pollack Decl., Ex. 6.) Thus,
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1 this "distinctive logo" as well as the presence of the "VH1" "housemark," may help reduce the
2 likelihood of confusion, as Defendants argue. See *Sleekcraft Boats*, 599 F.2d at 351 (internal
3 citation omitted); *Charles Schwab & Co., Inc.*, 665 F. Supp. at 808 n.9 (internal citation omitted);
4 Mem. Defs.' MTV Networks, Flower Films, Inc. & High Noon Productions, LLC Opp'n Pl.'s Mot.
5 Prelim. Inj. ("Defs.' Opp'n") 14; see also *Matrix Motor Co., Inc.*, 290 F. Supp. 2d at 1093 (internal
6 citations omitted). Nevertheless, the effect of the logo and the housemark appears to be
7 somewhat limited in this case. From the evidence presented, it seems that the logo is often
8 absent in advertisements and articles about the Program, as the words "Tough Love" in plain font,
9 rather than the official logo, are frequently used in articles, television listings, and on the screen
10 of the Program itself. See Decl. Victor de Gyarfaz Supp. Pl.'s Reply Defs.' Opp'n Pl.'s Mot. Prelim.
11 Inj. ("Gyarfaz Decl.") ¶¶ 3–4, Exs. A–B; Decl. Michael J. Song Supp. Pl.'s Reply Defs.' Opp'n Pl.'s
12 Mot. Prelim. Inj. ¶¶ 3–4, Exs. 1–2; see also *Sleekcraft Boats*, 599 F.2d at 350. Additionally, the
13 effect of the "VH1" housemark appears to be "negligible," see *Sleekcraft Boats*, 599 F.2d at 351,
14 because even in the formal logo, the VH1 mark is "down-played," in small font, and "the emphasis
15 is on [the 'Tough Love' mark]." See *Sleekcraft Boats*, 599 F.2d at 351; Maxwell Decl. ¶ 8, Ex. 1;
16 Pollack Decl., Ex. 6. Moreover, the "VH1" housemark has not been consistently used in all press
17 releases, articles relating to the Program, and television listings of the Program. See, e.g.,
18 Gyarfaz Decl. ¶¶ 3–4, Exs. A–B; Washington Decl., Exs. 1–4.

19 Given that the two marks sound identical and their meaning is similar, as well as that factors
20 that could serve to distinguish the appearance of the marks, such as the distinctive logo and "VH1"
21 housemark for Defendants' "Tough Love" mark, do not appear to have been consistently
22 employed, the "the similarity of the marks" factor weighs heavily in favor of a finding of likelihood
23 of confusion.

24 d. Evidence of Actual Confusion

25 "Evidence that use of the two marks has already led to confusion is persuasive proof that
26 future confusion is likely." *Sleekcraft Boats*, 599 F.2d at 352 (internal citation omitted); see
27 *GoTo.com, Inc.*, 202 F.3d at 1208 (internal citation omitted). Nevertheless, "[t]o constitute
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1 trademark infringement, use of a mark must be likely to confuse an *appreciable* number of people
2 as to the source of the product." *Entrepreneur Media, Inc.*, 279 F.3d at 1141 (internal citation
3 omitted). "That there are a few consumers who do not pay attention to obvious differences[] and
4 assume common sources where most other people would not, may not demonstrate the requisite
5 likelihood of confusion." *Id.* at 1151. As such, particularly where the defendant advertises
6 extensively, courts often consider a few instances of actual confusion, e.g., the misdirection of
7 several letters, to be "negligible," "insignificant," "de minimis," or "minimal." *See Alpha Indus., Inc.*,
8 616 F.2d at 445 n.2; *Sleekcraft Boats*, 599 F.2d at 352; *Nutri/Sys., Inc.*, 809 F.2d at 606–07. In
9 addition, the Ninth Circuit, in reviewing a district court's decision discounting the plaintiff's evidence
10 of actual confusion, has noted that "selection of a mark with a common word . . . naturally entails
11 a risk of some uncertainty and the law will not assure absolute protection." *Alpha Indus., Inc.*, 616
12 F.2d at 445 (internal citation and quotations omitted).

13 Here, Plaintiff has submitted a total of seventeen misdirected emails inquiring about the
14 Program, as well as declarations from four individuals who were "already personally familiar" with
15 Plaintiff's "TOUGHLOVE" program and who attest to believing that the Program was "sponsored
16 by or affiliated with" Plaintiff after viewing a television commercial for the Program. (See Feibush
17 Decl. ¶¶ 14–16, Exs. 13–14; Decl. Sharon Bell Supp. Pl. Toughlove America, LLC's Mot. Prelim.
18 Inj.; Decl. Steven Berman Supp. Pl. Toughlove America, LLC's Mot. Prelim. Inj.; Decl. Penny
19 Davidi Supp. Pl. Toughlove America, LLC's Mot. Prelim. Inj.; Decl. Paul Vicino Supp. Pl.
20 Toughlove America, LLC's Mot. Prelim. Inj.) In light of Defendants' extensive advertising
21 campaign, which has included frequent television commercials on major channels and
22 Steven Ward's appearances on a number of television shows, radio advertisements on popular
23 radio shows, and print advertisements and articles about the Program in widely circulated
24 magazines, the Court finds the number of misdirected emails and phone inquiries to be minimal.
25 *See Alpha Indus., Inc.*, 616 F.2d at 445 n.2; *Sleekcraft Boats*, 599 F.2d at 352; *Nutri/Sys., Inc.*,
26 809 F.2d at 606–07; Stein Decl. ¶¶ 6–7; Washington Decl. ¶¶ 11–13. Particularly where Plaintiff
27 is using a variant of a common phrase as its mark, some uncertainty is to be expected. *See Alpha*

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1 *Indus., Inc.*, 616 F.2d at 445 (internal citation and quotations omitted). The Court also notes that
2 Plaintiff's evidence of actual confusion is less convincing given that it has not identified where the
3 email addresses to which the misdirected emails were sent are publicly available. Nevertheless,
4 the Court, cognizant that garnering evidence of actual confusion is difficult, see *Sleekcraft Boats*,
5 599 F.2d at 353 (internal citation omitted), finds that this factor weighs slightly in favor of a finding
6 of likelihood of confusion.

7 Accordingly, given that Plaintiff has come forward with some evidence of consumer
8 confusion, the Court finds that the "evidence of actual confusion" factor weighs slightly in favor of
9 a finding of likelihood of confusion.

10 e. Marketing Channels Used

11 "Convergent marketing channels increase the likelihood of confusion." *Nutri/Sys., Inc.*, 809
12 F.2d at 606; *Sleekcraft Boats*, 599 F.2d at 353 (internal citation omitted). In addressing this factor,
13 courts consider the proximity of the parties' "retail distribution" and "advertising." *Walter*, 31 F.
14 Supp. 2d at 760 (internal citation omitted); see *Nutri/Sys., Inc.*, 809 F.2d at 606 (internal citation
15 omitted).

16 With regard to internet-based advertising and marketing, "[s]ome use of the Internet for
17 marketing, . . . does not alone . . . constitute overlapping marketing channels." *Entrepreneur*
18 *Media, Inc.*, 279 F.3d at 1151. Rather, the Ninth Circuit has held that the "proper inquiries" to be
19 considered are whether: (1) "both parties use the [Internet] as a *substantial* marketing and
20 advertising channel," (2) "the parties' marks are utilized in conjunction with [Internet]-based
21 products," and (3) "the parties' marketing channels overlap in any other way." *Id.* at 1151 (internal
22 citations and quotations omitted); *Herbalife Int'l, Inc. v. Lumene N. Am. LLC, et al.*, No. CV 07-
23 5040 AHM (RCx), 2007 WL 4225776, at *9 (C.D. Cal. Oct. 15, 2007) (internal citations omitted).
24 Under this standard, "[a]bsent other convergent marketing channels," the advertisement or sale
25 of the products on the Internet, is not "sufficient overlap" to find that the "marketing channels"
26 factor weighs in favor of finding a likelihood of confusion. See *Herbalife Int'l, Inc.*, 2007 WL
27 4225776, at *9.

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1 In this case, the marketing channels used by Plaintiff and Defendants are dissimilar.
2 Plaintiff's sole argument that the marketing channels converge is that both Plaintiff and Defendants
3 market their products and services on "television and the Internet." (See Pl.'s Mot. 13–14.)
4 Plaintiff, however, submits absolutely no evidence of any television advertisements, vaguely
5 referencing that Plaintiff's program has received "positive media attention" on "various television
6 segments," such as "Oprah Winfrey" and "Larry King," without suggesting when these instances
7 occurred. (See Feibush Decl. ¶ 2; Pl.'s Mot. 13.) Moreover, the only evidence of Plaintiff's use
8 of the Internet to advertise its product that is presently before the Court is the website of a group
9 related to Plaintiff, the Fort Worth, Texas "TOUGHLOVE®" support group. See Feibush Decl. ¶
10 10, Ex. 9. Plaintiff would have this Court find that the marketing channels converge because
11 Plaintiff's products have been mentioned on television shows and groups affiliated with the Plaintiff
12 operate websites. Based on the evidence before the Court, however, the Court cannot find that
13 Plaintiff has used the Internet as a "*substantial* marketing and advertising channel," as Plaintiff's
14 Internet usage does not appear to be significant. See *Entrepreneur Media, Inc.*, 279 F.3d at 1151.
15 Additionally, neither of the parties' goods are "[Internet]-based products." See *id.* More
16 importantly, the parties' marketing channels do not otherwise overlap. See *id.* While Plaintiff has
17 not submitted any evidence of advertising beyond the website of the Texas group affiliated with
18 Plaintiff, Defendants have detailed an extensive advertising campaign, which has included
19 frequent television commercials on major channels and Steven Ward's appearances on a number
20 of specific television shows, radio advertisements on popular radio shows, print advertisements
21 and articles about the Program in nationally circulated magazines, and other advertisements such
22 as billboards and posters in women's restrooms, women's locker rooms, supermarkets, and nail
23 salons. (See Stein Decl. ¶¶ 6–7; Washington Decl. ¶¶ 11–13.) As such, Defendants advertise
24 heavily on television and radio, as well as in magazines and other mediums, particularly targeting
25 young females. See *Walter*, 31 F. Supp. 2d at 761; Stein Decl. ¶¶ 5–7. Given that "[s]ome use
26 of the Internet for marketing, . . . does not alone . . . constitute overlapping marketing channels,"
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1 Defendants' and Plaintiff's marketing channels do not appear to overlap to any significant degree.
2 See *Entrepreneur Media, Inc.*, 279 F.3d at 1151.

3 Therefore, the Court finds that the "marketing channels used" factor weighs against a
4 finding of likelihood of confusion.

5 f. Type of Goods and the Degree of Care Likely to be Exercised by the
6 Purchaser

7 In assessing the "degree of care likely to be exercised by the purchaser," the standard "is
8 the typical buyer exercising ordinary caution." See *Sleekcraft Boats*, 599 F.2d at 353 (internal
9 citation omitted). If "the goods are expensive, the buyer can be expected to exercise greater care
10 in his [or her] purchases." See *id.* (internal citation omitted). "Of course, price alone is not
11 determinative of the care a consumer will take in making purchases . . ." See *Herbalife Int'l, Inc.*,
12 2007 WL 4225776, at *9 (internal citation omitted). As such, the court "must look at the specific
13 products in question rather than just the price." See *id.* at *10.

14 Here, the typical viewer of the Program may not exercise much caution before watching an
15 episode of this entertainment-focused reality television series, particularly because the Program
16 is shown without any fees beyond those paid for cable services. Nevertheless, the Court finds that
17 a "typical buyer" is likely to exercise a high degree of care in purchasing Plaintiff's goods or in
18 using services associated with Plaintiff's program. Plaintiff's educational and counseling services,
19 as well as its books, are directed towards parents troubled by teenage behavior and individuals
20 suffering from substance abuse and mental health issues. (See York Decl. ¶¶ 2–3, Ex. 1.)
21 Although such goods and services may be offered for little or no cost, see Pl.'s Mot. 15,
22 consumers of such products are likely to be extremely cautious in their purchasing decisions given
23 the seriousness of the issues to be addressed.

24 Accordingly, the "type of goods and the degree of care likely to be exercised by the
25 purchaser" factor weighs against a finding of likelihood of confusion.

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1 g. Defendant's Intent in Selecting the Mark

2 Although "an intent to confuse consumers is not required for a finding of trademark
3 infringement, intent to deceive is strong evidence of a likelihood of confusion" *Entrepreneur*
4 *Media, Inc.*, 279 F.3d at 1148 (internal citations and quotations omitted). If an "alleged infringer
5 knowingly adopts a mark similar to another's [mark]," then the court may presume that "the public
6 will be deceived." *Id.* (quoting *Sleekcraft*, 599 F.2d at 354). "[I]nfringement is not willful," however,
7 "if the defendant might have reasonably thought that its proposed usage was not barred" under
8 the Lanham Act. *Matrix Motor Co., Inc.*, 290 F. Supp. 2d at 1095–96 (internal citations omitted).
9 As such, "the failure to stop using a mark after receiving a cease and desist letter does not
10 [necessarily] show willful infringement" and "bad faith," "particularly where the [defendant] has a
11 reasonable basis to believe that it has a legal right to use the mark at issue." *Id.* at 1096 (internal
12 citation omitted).

13 The Court is satisfied that Defendants adopted the "Tough Love" mark in good faith without
14 any intention to trade upon Plaintiff's good will and reputation. Various declarations submitted by
15 Defendants detail their reasons for adopting "Tough Love" as the title of their reality television
16 series. Specifically, a High Noon executive explained that the company's executives began to
17 refer to the Wards' matchmaking style as "tough love" and, thus, "Tough Love" became the
18 working title for the show based on their observation of Steven Ward's "brutally honest," "tough"
19 approach to helping women who are seeking "love." (See Hill Decl. ¶¶ 6–7.) A VH1 executive
20 explains that after VH1 agreed to produce the Program, it decided to keep this working title as the
21 official title of the Program for the same reasons, specifically that "tough love" is a common term,
22 which precisely described the Program whose "central plot . . . is . . . to have the host . . . take a
23 'tough' approach to helping the participants solve their 'love' problems." (See Pollack Decl. ¶¶
24 6–7.) Based on the common understanding of the phrase "tough love" as a means to promote
25 self-improvement through a stern or unaffectionate manner, as well as the premise of the
26 Program, the Court finds Defendants' explanation for their selection of the "Tough Love" mark to
27 be logical and believable. Further supporting their good faith adoption of the mark, High Noon,
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1 which originally selected the working title, has attested to its unawareness of Plaintiff's programs
2 and goods prior to the initiation of this dispute. (See Hill Decl. ¶ 18.)

3 Additionally, despite Plaintiff's arguments to the contrary, see Pl.'s Mot. 16, Defendants'
4 failure to stop using the "Tough Love" mark after receiving Plaintiff's "cease and desist" letter does
5 not necessarily show bad faith. See *Matrix Motor Co., Inc.*, 290 F. Supp. 2d at 1095–96 (internal
6 citations omitted). In MTV's response to Plaintiff's "cease and desist" letter, MTV detailed its
7 contention that there was no likelihood of confusion based on the dissimilarity of Plaintiff's
8 products and the Program and noted that MTV publicly advertised the Program prior to Plaintiff's
9 filing of the intent-to-use trademark application for use of the "TOUGHLOVE" mark in a television
10 program. (See Feibush Decl. ¶ 13, Ex. 12.) Not only does MTV's response show a thorough
11 investigation of the matter but also given that Plaintiff's intent-to-use application was filed after
12 Defendants publicly announced the Program under the "Tough Love" mark and that the Program
13 is not similar to the goods and services for which Plaintiff has publicly used its mark, Defendants
14 had at least a "reasonable basis" to believe that they had a legal right to use the "Tough Love"
15 mark. See *Matrix Motor Co., Inc.*, 290 F. Supp. 2d at 1096.

16 Therefore, the "defendant's intent in selecting the mark" factor does not favor a finding of
17 likelihood of confusion.

18 h. Likelihood of Expansion of the Product Lines

19 "A 'strong possibility' that either party may expand [its] business to compete with the other
20 will weigh in favor of finding that the present use is infringing." *Sleekcraft Boats*, 599 F.2d at 354
21 (internal citation omitted); *Garden of Life, Inc.*, 318 F. Supp. 2d at 966 (quoting *Sleekcraft Boats*,
22 599 F.2d at 354). "Speculative or unrealistic plans cannot be considered." *Matrix Motor Co., Inc.*,
23 290 F. Supp. 2d at 1096 (internal citation omitted).

24 Here, Plaintiff has extensively detailed its efforts to create a television program under the
25 "TOUGHLOVE" mark. (See Feibush Decl. ¶ 5; Feibush Supp. Decl. ¶¶ 3–17; Lifschultz Decl. ¶¶
26 2–11.) Since 2005, Plaintiff has "pitched" the show to a number of television production
27 companies, filed its concept for a television show with the Writer's Guild in Los Angeles, California,
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1 held a casting call for a host of the proposed television series, and is now working on finalizing
2 agreements with a "celebrity persona" and a psychologist for commitments to appear on the
3 proposed television show. (See Feibush Decl. ¶ 5; Feibush Supp. Decl. ¶¶ 3–17; Lifschultz Decl.
4 ¶¶ 2–11.) Although the Court is not willing to say that Plaintiff's plans are "unrealistic," the plans
5 for a television show still appear "speculative." See *Matrix Motor Co., Inc.*, 290 F. Supp. 2d at
6 1096 (internal citation omitted). Despite having "pitched" the concept for a television show to
7 several television companies, Plaintiff has yet to find a network willing to make Plaintiff's plans a
8 reality. Although Plaintiff may desire to produce a television series, this does not mean that there
9 is a "strong possibility" that Plaintiff will expand its business to include a television program that
10 would compete with Defendants' reality television program, which is currently airing its first series.
11 See *Sleekcraft Boats*, 599 F.2d at 354 (internal citation omitted); *Garden of Life, Inc.*, 318 F. Supp.
12 2d at 966 (quoting *Sleekcraft Boats*, 599 F.2d at 354). Nevertheless, because Plaintiff has made
13 efforts in this direction, the Court finds that "likelihood of expansion of the product lines" factor
14 weighs slightly in favor of finding a likelihood of confusion.

15 Although Plaintiff's "TOUGHLOVE" mark and Defendants' "Tough Love" mark are very
16 similar and Plaintiff has proffered some evidence of actual consumer confusion and its desire to
17 pursue a television program, given that Plaintiff's "TOUGHLOVE" mark is a weak mark entitled to
18 a limited scope of protection, that Plaintiff's goods and services are distinct from the Program, that
19 Plaintiff and Defendants use dissimilar marketing channels, that consumers of Plaintiff's goods and
20 services are likely to exercise of high degree of care, and that Defendant acted in good faith in
21 selecting the "Tough Love" mark, the Court finds that Plaintiff has not shown a likelihood of
22 success in establishing a likelihood of confusion. As Plaintiff has not demonstrated a likelihood
23 of success in proving the second prong of the trademark infringement analysis with respect to the
24 goods and services for which it has publicly used the "TOUGHLOVE" mark, it is not entitled to a
25 preliminary injunction.

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1 D. Conclusion

2 Accordingly, because Plaintiff has not shown a likelihood of success in proving its "priority
3 of use" of the "TOUGHLOVE" mark in connection with a television series, thereby failing the first
4 prong of the trademark infringement analysis with respect to a television program, and has not
5 shown a likelihood of success in proving a likelihood of confusion between the Program and the
6 goods and services for which Plaintiff has publicly used the "TOUGHLOVE" mark, thereby failing
7 the second prong of the trademark infringement analysis with respect to these goods and services,
8 the Court concludes that Plaintiff has failed to show a likelihood of success on the merits sufficient
9 to warrant a preliminary injunction.⁶

10 III. RULING

11 For the foregoing reasons, Plaintiff's Motion for Preliminary Injunction is DENIED.
12 IT IS SO ORDERED.

13
14 April 21, 2009



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17 S. JAMES OTERO
UNITED STATES DISTRICT JUDGE

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27 ⁶ Because the Court has found that Plaintiff failed to demonstrate that it is likely to prevail
28 on its trademark infringement claim, the Court "need not address its showing of irreparable harm."
Pollution Denim & Co., 547 F. Supp. 2d at 1143 (internal citations omitted).