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7 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
8 IN AND FOR THE COUNTY OF MARICOPA

9 Citizens Clean Elections Commission,

10 Plaintiff,

11 v.

12 Melody Jennings and Doe Defendants 1-
10,

13 Defendants.

No. _____

**[Proposed] Temporary Restraining
Order (with notice)**

14
15 On application of Plaintiff, and under Arizona Rule of Civil Procedure 65, this
16 Court grants a temporary restraining order as follows.

17 Defendant Melody Jennings is the founder of an organization that calls itself
18 Clean Elections USA. Because Clean Elections USA appears to be an unincorporated
19 association that lacks a structure separate from Defendant, this Order refers to
20 Defendant and Clean Elections USA interchangeably. Clean Elections USA claims to
21 be an organization “committed to election integrity” with the “urgent mission” of
22 preventing ballot box stuffing in 2022. It has posted information on its website and
23 blog, including a post titled, “10+ Ways the Election was Rigged in Maricopa County.”
24 In October 2022, a group identified as members of Clean Elections USA monitored
25 people dropping off their ballots at drop boxes in Maricopa County. It began its
26 operations in 2022.

27 Plaintiff Citizens Clean Elections Commission is a state agency that, among
28 other things, engages in voter education. It publishes a voter guide, sponsors debates,

1 and includes voter information on its website and social media. It has been doing this
2 work consistently with the Clean Elections mark since its establishment in 1998.

3 To obtain temporary injunctive relief, the Court considers whether the Plaintiff
4 has established the following factors: (1) “a strong likelihood” of success on the merits;
5 (2) “the possibility of irreparable injury. . . if the requested relief is not granted;” (3) the
6 balance of hardships favors Plaintiff; and (4) “[p]ublic policy favors the injunction.”
7 *Shoen v. Shoen*, 167 Ariz. 58, 653 (App. 1990). Courts apply a sliding scale in assessing
8 these factors. *Smith v. Ariz. Citizens Clean Elections Comm’n*, 212 Ariz. 407, 410
9 (2006).

10 The Plaintiff may satisfy this burden by demonstrating “either 1) probable
11 success on the merits and the possibility of irreparable injury; or 2) the presence of
12 serious questions and [that] ‘the balance of hardships tip[s] sharply’ in favor of the
13 moving party.” *Id.* at 411, ¶ 10 (citation omitted and emphasis added). “The greater
14 and less reparable the harm, the less the showing of a strong likelihood of success on
15 the merits need be. Conversely, if the likelihood of success on the merits is weak, the
16 showing of irreparable harm must be stronger.” *Id.*

17 The evidence in this case satisfies the requirements for a preliminary injunction.

18 **Likelihood of success on the merits.**

19 Plaintiff is likely to succeed on the merits. First, it has established a protectible
20 interest in its mark. “To establish a protectible ownership interest in a common law
21 trademark, the owner must ‘establish not only that he or she used the mark before the
22 mark was registered, but also that such use has continued to the present.’” *Airs*
23 *Aromatics, LLC v. Victoria’s Secret Stores Brand Mgmt., Inc.*, 744 F.3d 595, 599 (9th
24 Cir. 2014) (quoting *Watec Co., Ltd. v. Liu*, 403 F.3d 645, 654 (9th Cir. 2005). Clean
25 Elections has used its mark for election-related education in Arizona for more than 20
26 years.

1 “[T]he standard test of ownership is priority of use.” *Sengoku Works v. RMC*
2 *Int’l*, 96 F.3d 1217, 1219 (9th Cir. 1996). Clean Elections began using the CLEAN
3 ELECTIONS mark in Arizona soon after it was established in 1998. Since then, it
4 continuously used its mark on its voter guides, debate sponsorship materials, and voter
5 education information on its social media pages and website. In contrast, Clean
6 Elections USA started using its mark on its election information in 2022. Accordingly,
7 Clean Elections is the senior user. Its use of the CLEAN ELECTIONS mark has priority
8 over that of Clean Elections USA.

9 Clean Elections USA’s use of the mark is infringement. Trademark
10 infringement occurs where a consumer of the goods or services is “likely to be confused
11 as to the origin of the good or service bearing one of the marks.” *Rearden LLC v.*
12 *Rearden Com., Inc.*, 683 F.3d 1190, 1214 (9th Cir. 2012). Courts use the eight-factor
13 *Sleekcraft* test to analyze the likelihood of confusion: (1) strength of the mark, (2)
14 proximity of the goods, (3) similarity of the marks, (4) evidence of actual confusion,
15 (5) marketing channels used, (6) types of goods and degree of care exercised by
16 consumers, (7) defendant’s intent in selecting the mark, and (8) likelihood of expansion
17 of the product lines. *AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348–49 (9th Cir.
18 1979). In applying this test, the relative importance of each factor is determined on a
19 case-by-case basis. *Brookfield Commc’ns, Inc. v. W. Coast Entm’t Corp.*, 174 F.3d
20 1036, 1054 (9th Cir. 1999).

21 1. **Strength of the mark.** The CLEAN ELECTIONS mark is strong here.
22 A mark’s conceptual strength falls on the spectrum between arbitrary and generic
23 depending on the “obviousness” of the connection between the mark and the good or
24 service. *Fortune Dynamic, Inc. v. Victoria’s Secret Stores Brand Mgmt., Inc.*, 618 F.3d
25 1025, 1032–33 (9th Cir. 2010). On the lower end of the spectrum, a descriptive mark
26 defines a characteristic of the product without requiring imagination, while a stronger
27
28

1 suggestive mark merely suggests the features of a product. *Survivor Media, Inc. v.*
2 *Survivor Prods.*, 406 F.3d 625, 632 (9th Cir. 2005).

3 The Court finds that Plaintiff showed that the CLEAN ELECTIONS mark is, at
4 a minimum, a strong suggestive mark. The CLEAN ELECTIONS mark does not
5 describe the services that Clean Elections provides. Clean Elections does not
6 administer elections; that is the role of another government entity. It therefore is not
7 merely descriptive and is at least suggestive. Plaintiff's status as a state agency also
8 supports the strength of its mark. The Court finds that this factor favors Plaintiff.

9 2. **Proximity of the goods.** Both Clean Elections and Clean Elections USA
10 offer information about elections and election-related activities. The Court finds that
11 this factor favors Plaintiff.

12 3. **Similarity of the marks.** The marks are similar. They are identical
13 except that Defendant's mark adds the geographic designator USA. Geographic
14 designations generally are not subject to trademark protection. *Van Camp Sea Food*
15 *Co. v. Cohn-Hopkins*, 56 F.2d 797, 798 (9th Cir. 1932). The Court finds that this factor
16 strongly favors Plaintiff.

17 4. **Evidence of actual confusion.** There is substantial evidence of actual
18 confusion. The evidence shows that many members of the public mistakenly believe
19 that the actions of Defendant using the CLEAN ELECTIONS USA mark are being
20 performed by Plaintiff. The Court finds that this factor strongly favors Plaintiff.

21 5. **Marketing channels.** Plaintiff and Defendant both convey messages
22 through social media and similar forms of traditional media. The Court finds that this
23 factor favors Plaintiff.

24 6. **Degree of care.** Members of the public are inundated with election-
25 related information each election cycle. Considering this deluge, consumers are less
26 likely to take great care to differentiate between subtle or minor differences in marks.
27 The Court finds that this factor favors Plaintiff.

1 The record shows that Clean Elections USA is infringing Clean Elections’ mark.
2 Accordingly, Plaintiff is highly likely to succeed on the merits.

3 **Irreparable injury.**

4 Plaintiff established a significant risk of irreparable harm. Injunctive relief is
5 proper where the threatened harm is not purely economic, and the scope of liability will
6 be difficult to ascertain. *The Power P.E.O., Inc. v. Emps. Ins. of Wausau*, 201 Ariz.
7 559, 562, ¶¶ 18, 20 (App. 2002). Intangible injuries, including harm to goodwill,
8 qualify as irreparable harm. *Rent-A-Ctr., Inc. v. Canyon Television & Appliance*
9 *Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991); *accord, e.g.*, 11A Charles Alan Wright
10 & Arthur R. Miller, *Federal Practice & Procedure: Civil* § 2948.1 (3d ed. Apr. 2022
11 update) (“Injury to reputation or goodwill is not easily measurable in monetary terms,
12 and so often is viewed as irreparable.”).

13 Clean Election USA’s infringing mark imperils Clean Elections’ voter education
14 role in Arizona and risks damaging its reputation earned over the past 20 years. In fact,
15 damage has already occurred. Clean Elections received numerous telephone calls,
16 emails, and posts on its social media pages wrongfully accusing it of supporting or
17 organizing the ballot box monitoring campaign. The comments directed at Clean
18 Elections often are hostile and derogatory; they accuse Clean Elections of engaging in
19 conduct antithetical to its purpose and educational efforts. That irreparable harm
20 justifies temporary injunctive relief. Absent injunctive relief, the harm will likely
21 continue.

22 **Balancing the hardships.**

23 The balance of hardships favors a party seeking a preliminary injunction if it
24 establishes probable success on the merits and the possibility of irreparable harm.
25 *Shoen*, 167 Ariz. at 63. The Court evaluates “the severity of the impact on defendant
26 should the temporary injunction be granted and the hardship that would occur to
27 plaintiff if the injunction should be denied.” 11A Charles Alan Wright & Arthur R.

1 Miller, Federal Practice & Procedure: Civil § 2948.2 (3d ed. Apr. 2022 update). The
2 balance of equities also favors Plaintiff. Clean Elections USA’s use of the mark is
3 harming Plaintiff—the many comments from the public show as much. In contrast, no
4 (or minimal) harm will occur to Clean Elections USA. An injunction will not preclude
5 Clean Elections USA from continuing its organization, website, and social media posts
6 under a different name. Moreover, because Clean Elections has both established
7 “probable success on the merits and the possibility of irreparable injury,” the balance
8 of the equities weighs in favor of granting injunctive relief. *See Power P.E.O.*, 201
9 Ariz. at 562, ¶ 16.

10 **Public policy.**

11 Finally, public policy favors the temporary injunction. Clean Elections is a state
12 agency that serves a public purpose. *See* A.R.S. §§ 16-940 to -961. Public policy favors
13 protecting Clean Elections from being harmed by an organization using its mark. Its
14 voter education work is undermined if other organizations engaging in election-related
15 activities in Arizona use its mark. Avoiding voter confusion—particularly confusion
16 about a governmental agency’s role and activities regarding elections—is a public
17 policy the Court should foster. *See, e.g., Barr v. Galvin*, 584 F. Supp. 2d 316, 321-22
18 (D. Mass. 2008) (entering injunction to ensure correct Libertarian candidates appeared
19 on ballot, which would “avoid voter confusion.”).

20 Therefore,

21 IT IS ORDERED granting plaintiff’s application for Temporary Restraining
22 Order;

23 IT IS FURTHER ORDERED that Melody Jennings and all other persons in
24 active concert or participation with her must immediately cease using the mark CLEAN
25 ELECTIONS USA or any other mark that incorporates the mark CLEAN ELECTIONS
26 or is a confusingly similar variation or colorable imitation of Plaintiff’s CLEAN
27 ELECTIONS mark, in connection with past, current, or future election activities in
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1 Arizona when such uses are likely to reach Arizona residents. This prohibition applies
2 to social media postings, websites, email, podcasts, and other media. This order does
3 not preclude Ms. Jennings from communicating about elections in Arizona so long as
4 her communication does use the mark CLEAN ELECTIONS USA;

5 IT IS FURTHER ORDERED that Ms. Jennings must remove from the
6 website www.cleanelectionsusa.org a blog post dated June 29, 2022, titled “10+ Ways
7 the Election was Rigged in Maricopa County.” Ms. Jennings may post that information
8 on another website or social media site that does not use the CLEAN ELECTIONS
9 mark or a confusingly similar variation or colorable imitation thereof;

10 IT IS FURTHER ORDERED that counsel for Clean Elections must serve this
11 order via email to Ms. Jennings within one business day of receiving it from the Court;

12 IT IS FURTHER ORDERED setting a preliminary injunction hearing via the
13 Court Connect platform at _____ a.m./p.m. on _____, 2022.
14 Parties must deliver exhibits to this division by _____, 2022, and must
15 disclose witnesses and exhibits to one another in writing (including email) by
16 _____, 2022. Participants in the hearing will participate via this division’s
17 Court Connect link:

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19 _____
20 Maricopa County Superior Court Judge
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