

HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MIRINA CORPORATION,

Plaintiff,

v.

MARINA BIOTECH,

Defendant.

CASE NO. C10-1322RAJ

ORDER

I. INTRODUCTION

This matter comes before the court on Plaintiff's motion for preliminary injunction (Dkt. # 33). The court has considered the parties' briefing and supporting evidence, and has heard from the parties at oral argument. For the reasons explained below, the court DENIES the motion (Dkt. # 33).

Because this order "grant[s] or den[ies] an interlocutory injunction," the court must make findings of fact and conclusions of law. Fed. R. Civ. P. 52(a)(2). The court includes its findings and conclusions in this order, which serves as a memorandum of the court's decision. Fed. R. Civ. P. 52(a)(1) (permitting findings and conclusions within "an opinion or a memorandum of decision"); *see also FTC v. H. N. Singer, Inc.*, 668 F.2d 1107, 1109 (9th Cir. 1982) (noting that explicit factual findings are unnecessary).

II. BACKGROUND

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2 In July 2010, Defendant Marina Biotech (“Marina”) changed its business name
3 from MDRNA, Inc. to Marina Biotech. Marina Biotech has offices in Seattle and
4 Boston, and provides services focused on the development and commercialization of
5 therapeutic products based on RNA interference. *See* French Decl. (Dkt. # 54) ¶ 3.
6 MDRNA, Inc. became a publicly traded company in June 2008, and trades on NASDAQ
7 under the “MRNA” ticker symbol. *See* French Decl. ¶ 4.

8 Plaintiff Mirina Corporation (“Mirina”) is a biotech company based in the greater
9 Seattle area that, since August 2008, has promoted microRNA-based therapeutic research
10 and drug development. *See* Hoekstra Decl. (Dkt. # 43) ¶ 3. Mirina has submitted
11 evidence that its name is pronounced like “marina” both inside and outside the company.
12 *See* 2d Atwood Decl. (Dkt. # 35) ¶ 4, Le Decl. (Dkt. # 46) ¶ 4, Gray Decl. (Dkt. # 39) ¶ 3,
13 Harris Decl. (Dkt. # 42) ¶ 3, Schubert Decl. (Dkt. # 51) ¶ 3, Hall Decl. (Dkt. # 41) ¶ 5,
14 Hubbert Decl. (Dkt. # 45) ¶ 5, Hoekstra Decl. (Dkt. # 43) ¶ 4, Frey Decl. (Dkt. # 38) ¶ 4,
15 Hooper Decl. (Dkt. # 44) ¶ 4, Dow Decl. (Dkt. # 36) ¶ 4, Fleming Decl. (Dkt. # 37) ¶ 4.

16 Five days after Defendant changed its name to Marina Biotech, Plaintiff filed a
17 trademark application for the “Mirina” mark. *See* Complaint, Ex. A. Plaintiff filed this
18 suit against Defendant, alleging that Defendant’s use of marks and trade name constitutes
19 trademark infringement, trade name infringement, false designation of origin and unfair
20 competition, and a violation of Washington’s Consumer Protection Act (“WCPA”).
21 Mirina moved for a preliminary injunction, asking the court to restrain Defendant from
22 all acts of infringement, including using the “Marina” or “Marina Biotech” marks.

III. ANALYSIS

A. Legal Standards.¹

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26 ¹ The court notes that the Plaintiff’s briefing was unhelpful regarding the appropriate
27 standards to be applied on a motion for injunctive relief. The Plaintiff did not cite *Winter* or
post-*Winter* authority until after the Defendant pointed out Plaintiff’s failure to do so in its

1 The Ninth Circuit has retooled its long-enduring standard for preliminary
2 injunctive relief in the wake of *Winter v. Natural Resources Defense Council, Inc.*, 129 S.
3 Ct. 365 (2008). The former Ninth Circuit standard included a sliding scale on which a
4 moving party could compensate for a lesser showing of harm by showing a
5 correspondingly greater chance of success on the merits, and vice versa:

6
7 Under the “traditional” criteria, a plaintiff must show (1) a strong likelihood
8 of success on the merits, (2) the possibility of irreparable injury to plaintiff
9 if preliminary relief is not granted, (3) a balance of hardships favoring the
10 plaintiff, and (4) advancement of the public interest (in certain cases).

11 Alternatively, a court may grant the injunction if the plaintiff demonstrates
12 either a combination of probable success on the merits and the possibility of
13 irreparable injury or that serious questions are raised and the balance of
14 hardships tips sharply in his favor.

15 *NRDC v. Winter*, 518 F.3d 658, 677 (9th Cir. 2008) (citation omitted). In *Winter*, the
16 Supreme Court rejected the Ninth Circuit standard to the extent that it made injunctive
17 relief available on a showing of a mere possibility of irreparable harm. 129 S. Ct. at 375.
18 Some subsequent Ninth Circuit panels used broad language about the effect of *Winter* on
19 the alternative standard for injunctive relief. *See, e.g., Stormans, Inc. v. Selecky*, 586 F.3d
20 1109, 1126-27 (9th Cir. 2009) (noting that “[t]o the extent that our cases have suggested a
21 lesser standard [than the one established in *Winter*], they are no longer controlling, or
22 even viable.”) (quoting *Am. Trucking Ass’ns, Inc. v. City of Los Angeles*, 559 F.3d 1046,
23 1052 (9th Cir. 2009)).

24 Opposition. *See* Def.’s Opp’n at 7. The Defendant had previously pointed out Plaintiff’s failure
25 to address current case authority (see Def.’s Opp’n (Dkt. # 12) at 6), and the court is mystified
26 why the Plaintiff did not address the recent changes to standards for injunctive relief in its
27 opening brief. Though the Plaintiff attempts to argue that *Winter* and its progeny do not apply in
trademark cases (see Pltf.’s Reply at 2), Plaintiff cited no authority for that proposition and other
district courts have applied *Winter* in trademark cases. *See, e.g., Internet Specialties West, Inc. v.*
Milon-DiGiorgio Enters., Inc., 559 F.3d 985, 993-94 (9th Cir. 2009).

1 The panel in *Alliance for the Wild Rockies* (“*Alliance*”) v. *Cottrell* took a narrow
2 view of *Winter*. 2011 WL 208360 (9th Cir. Jan. 25, 2011), *withdrawing op. at* 613 F.3d
3 960 (9th Cir. 2010) *and amended at* 622 F.3d 1045 (9th Cir. 2010). After reviewing the
4 post-*Winter* landscape in the Ninth Circuit and in other circuits with sliding-scale
5 injunction standards, *id.* at *3-7, the *Alliance* panel “conclude[d] that the ‘serious
6 questions’ version of the sliding scale test for preliminary injunctions remains viable after
7 the Supreme Court’s decision in *Winter*.” *Id.* at *7. The “serious questions version of the
8 sliding scale test” requires the movant to demonstrate that “serious questions going to the
9 merits were raised and the balance of hardships tips sharply in the plaintiff’s favor.” *Id.*
10 (quoting *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008) (en banc)). The
11 *Alliance* panel explained that the serious questions test survives, so long as the plaintiff
12 “make[s] a showing on all four prongs” of the *Winter* test. *Id.*

13 This court accordingly applies the following test for a preliminary injunction,
14 consistent with *Winter* and *Alliance*. The court may issue a preliminary injunction where
15 a party establishes (1) a likelihood of success on the merits, that (2) it is likely to suffer
16 irreparable harm in the absence of preliminary relief, that (3) the balance of hardships tips
17 in its favor, and (4) that the public interest favors an injunction. *Id.* at *10, *Winter*, 129 S.
18 Ct. at 374. A party can also satisfy the first and third elements of the test by raising
19 serious questions going to the merits of its case and a balance of hardships that tips
20 sharply in its favor. *Alliance*, 2011 WL 208360 at *20-21.

21 **B. The Merits of the Plaintiff’s Case.**

22 The court will turn to consider the first *Winter* prong: the likelihood that the
23 Plaintiff will succeed on the merits of its trademark infringement claim.² A plaintiff
24 alleging trademark infringement must show that the alleged infringer (1) used in

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27 ² Though the Plaintiff’s complaint lists several claims, the Plaintiff’s preliminary
injunction briefing focuses on the trademark infringement claim. *See* Pltf.’s Mot. at 11:26-27.

1 commerce “(2) a word, false designation of origin, false or misleading description, or
2 representation of fact,” that “(3) is likely to cause confusion or misrepresents the
3 characteristics of [its] or another [entity]’s goods or services.” *Freecycle Network, Inc. v.*
4 *Oey*, 505 F.3d 898, 902 (9th Cir. 2007).

5 To determine whether a likelihood of confusion exists for a reasonable consumer
6 in the marketplace, the Ninth Circuit suggests consideration of the following eight
7 factors: (1) strength of the mark, (2) proximity of the mark, (3) similarity of the mark, (4)
8 evidence of actual confusion, (5) marketing channels, (6) type of goods and degree of
9 care by purchaser, (7) the defendant’s intent, and (8) the likelihood of expansion of the
10 product line. *See AMF, Inc. v. Sleekcraft Boats*, 599 F.2d 341 (9th Cir. 1979). The
11 *Sleekcraft* list of factors is neither exhaustive nor exclusive. *See E. & J. Gallo Winery v.*
12 *Gallo Cattle Co.*, 967 F.2d 1280, 1290 (9th Cir. 1992). A claimant can establish a
13 likelihood of confusion without satisfying all of the *Sleekcraft* factors. *See Dreamwerks*
14 *Prod. Group, Inc. v. SKG Studio*, 142 F.3d 1127, 1129 (9th Cir. 1998).

15 The Plaintiff contends that the proximity, similarity, and marketing channels
16 factors weigh heavily in Plaintiff’s favor, and that the remaining *Sleekcraft* factors also
17 support the existence of a likelihood of confusion. Thus, the court will consider all the
18 *Sleekcraft* factors in numerical order to evaluate whether Plaintiff has shown that
19 confusion is likely.

20 **1. The Strength of Plaintiff’s Mark.**

21 Plaintiff contends its mark is strong because “Mirina” is a coined and/or arbitrary
22 term (i.e., it is not a word found in a dictionary); Defendant argues that “Mirina” is a
23 suggestive (and therefore weak) mark because it is a play on “miRNA,” which is a
24 commonly used abbreviation for micro-RNA.

25 Plaintiff’s arbitrariness argument is undercut by its own briefing: Plaintiff admits
26 that Mirina’s spelling “suggests an association with mirco-RNA (sic).” Pltf.’s Reply
27 (Dkt. # 55) at 1. *See also* Scott Decl. (Dkt. # 53), Ex. C at 21:7-18. A suggestive mark

1 is stronger than a generic mark, but not as strong as an arbitrary mark. *See, e.g., E. & J.*
2 *Gallo*, 967 F.2d at 1291. That other businesses (such as Mirna Therapeutics and Miragen
3 Therapeutics) in the micro-RNA industry use an “mir” prefix further belies the
4 arbitrariness of Plaintiff’s mark. *See Nutri/System, Inc. v. Con-Stan Indus., Inc.*, 809 F.2d
5 601, 605 (9th Cir. 1987) (holding that because “nutri-” was a common prefix in the food
6 and health products community, the district court did not err in finding “Nutri/System” to
7 be a weak mark). Thus, Plaintiff’s mark is moderately weak and this factor does not
8 favor Plaintiff.

9 **2. Proximity of the Marks.**

10 Plaintiff contends that this factor weighs heavily in Plaintiff’s favor because
11 Plaintiff and Defendant provide “competing, similar, and complementary services (RNA
12 based drug development)[.]” Pltf.’s Mot. at 13. Defendant argues that that assertion is
13 not supported by evidence. *See* Def.’s Opp’n at 22. To whatever degree a Mirina board
14 member opined that Plaintiff and Defendant offer similar and competitive services,
15 Defendant argues that the value of that opinion is severely undercut by that board
16 member’s deposition testimony, wherein he admits that Plaintiff’s “services” are still in
17 the development stage and that his understanding of Defendant’s plans to directly
18 compete with Plaintiff is based on an unidentified press release. *See* Scott Decl., Ex. C at
19 52-53, 71; *see also* Durrance Decl. (Dkt. # 56), Ex. C at 68:22-69:24 (Mirina board
20 member explains that though his declaration states that Defendant offers its services to
21 the same investors and customers as Plaintiff, that statement is based on an assumption
22 and not on personal knowledge).

23 The court agrees with Defendant that the record does not establish a close
24 proximity of the marks. While it is undisputed that both Plaintiff and Defendant are
25 interested in developing products related to RNA, Defendant’s work to date has focused
26 on products based on RNA interference, while Plaintiff intends to develop miRNA drugs.
27 Particularly where Plaintiff has not presented evidence that it has actually developed any

1 product or provided any service, it is difficult to determine exactly how closely related
2 Plaintiff's services would be to Defendant's services. Thus, this factor does not favor
3 Plaintiff.

4 **3. Similarity of the Marks.**

5 Though Defendant points to some evidence of differences in pronunciation and the
6 distinctions between the logos of each business (see Def.'s Opp'n at 11), Plaintiff's
7 briefing focuses on the fact that "Mirina" and "Marina" "differ by one letter, and that one
8 letter difference does not change their pronunciation[.]" Pltf.'s Reply at 4. Thus,
9 Plaintiff's infringement argument is based on the similarity of sound and spelling
10 between "Mirina" and "Marina," but not on the appearance of logos or meanings of the
11 marks.

12 While there is some evidence of potential variation in pronunciation of "Mirina"
13 (as either "marina" or "meerina") (see Scott Decl., Ex. C at 19-20), the Plaintiff has
14 submitted statements from multiple declarants who state that "Mirina" and "Marina" are
15 phonetically indistinct. *See* Atwood Decl. (Dkt. # 34) ¶ 2, Gray Decl. (Dkt. # 39) ¶ 3,
16 Hall Decl (Dkt. # 41) ¶ 5; Harris Decl. (Dkt. # 42) ¶ 3; Hoekstra Decl. (Dkt. # 43) ¶ 4;
17 Hooper Decl. (Dkt. # 44) ¶4; Hubbert Decl. (Dkt. # 45) ¶ 5; Le Decl. (Dkt. # 46) ¶ 4.
18 Thus, to the extent that Plaintiff argues that the "sound" of Plaintiff's and Defendant's
19 marks and their spellings are similar, the court agrees.

20 With regard to visual similarity of Plaintiff's and Defendant's marks in the form of
21 logos: the Plaintiff has not devoted any briefing to a comparison of Plaintiff's logo with
22 Defendant's logo, nor submitted any evidence about any perceived similarity between
23 Plaintiff's blue, green, and white logo with a capital "M" and Defendant's logo depicting
24 a circular cellular construct. Neither has Plaintiff submitted any evidence of a similarity
25 of meaning between Plaintiff's and Defendant's marks: Plaintiff has submitted evidence
26 that because "Mirina" can be pronounced like "marina," a hearer would understand
27 "Mirina" to evoke images of water and boating, but this evocation is undercut by the

1 mark's intended connection with micro-RNA. Thus, while the court finds that the marks
2 are similar as to sound, this finding of similarity does not extend to sight (in the sense of
3 logo) or meaning.

4 **4. Evidence of Actual Confusion.**

5 Plaintiff has submitted evidence that, at least on a handful of occasions in casual
6 conversation, there has been some confusion as to whether a speaker was referring to
7 "Mirina" or "Marina." *See* Frey Decl. (Dkt. # 38) ¶ 3; Gray Decl. (Dkt. # 39) ¶ 6; Harris
8 Decl. (Dkt. # 42) ¶ 4; Hooper Decl. (Dkt. # 44) ¶ 3. Plaintiff has also submitted evidence
9 that out of the seven or eight face-to-face conversations a Mirina affiliate had with
10 potential investors at a conference, six of those potential investors initially confused
11 Mirina for Marina Biotech. *See* Durrance Decl. (Dkt. # 56), Ex. 1 at 73. Likewise, a
12 Mirina board member spoke to a potential investor who at first believed that the board
13 member was referring to Defendant, but the board member recognized the confusion and
14 clarified. *See* Le Decl. (Dkt. # 46) ¶ 7; 2d Le Decl. (Dkt. # 47) ¶ 4. That same board
15 member spoke with another person who was also at first confused Plaintiff and
16 Defendant, but then the confusion was clarified. *See* 2d Le Decl. ¶ 6. These instances of
17 confusion total approximately ten or fifteen conversations, and Plaintiff has not provided
18 any evidence that any confusion has led directly to an adverse funding decision. *See*
19 Durrance Decl. (Dkt. # 56), Ex. 2 at 104:14-105:1; 111:4-112:1 (Mirina affiliate's
20 deposition testimony that he does not know of any specific adverse funding decision due
21 to confusion), Ex. 3 at 47:3-11 (same).

22 As Defendant notes, all of the actual confusion described by Plaintiff occurred
23 during conversations, and all of the confusion was cleared up after the confusion became
24 apparent. *See* Def.'s Opp'n at 16. Defendant argues that these instances are not "actual
25 confusion" in the trademark sense because "they describe instances that do not involve
26 marketing channels" or other circumstances where the usage of the mark is controlled by
27 the trademark owner. *Id.* at 17-18.

1 Generally, courts consider evidence of actual confusion to be “persuasive proof
2 that future confusion is likely.” *Sleekcraft*, 599 F.2d at 352. It is true that many of the
3 instances of confusion described by Plaintiff occurred in casual conversation at a
4 memorial service, an environment completely unrelated to marketing by either the
5 Plaintiff or Defendant. But the other instances occurred in conversations between
6 Plaintiff’s affiliates and potential investors, though the confusion was cleared up
7 relatively quickly. Plaintiff has not provided any contextual evidence showing, for
8 example, that confusion occurs in a majority of all marketing conversations, or what
9 percentage of marketing contacts are initiated via interpersonal communication without
10 the use of any printed or graphical marketing materials. Nonetheless, the court finds that
11 the instances of actual confusion demonstrated by Plaintiff’s potential investors do weigh
12 in Plaintiff’s favor.

13 **5. Marketing Channels.**

14 Plaintiff contends that its marketing channels — industry meetings, conferences,
15 and online forums — are the same as Defendant’s. Plaintiff underscores this argument
16 with the evidence of investor confusion at a recent investor forum, arguing that investor
17 familiarity with both Plaintiff and Defendant shows that “the two companies court the
18 same partners and investors.” Plt.’s Reply at 8. The Defendant does not dispute this
19 argument in its briefing.

20 Given that the undisputed evidence in the record shows that Plaintiff and
21 Defendant rely upon at least some of the same marketing channels, the court finds that
22 this factor weighs in Plaintiff’s favor, though notes that the record is not particularly deep
23 as to how the Plaintiff and Defendant actually market themselves in those channels.
24 Though Plaintiff’s evidence of marketing includes a lot of interpersonal communications,
25 there is also evidence in the record that Plaintiff and Defendant also market themselves
26 using printed or graphic materials (see, e.g., French Decl. ¶¶ 12-13 (describing a typical
27 investor pitch for Defendant, which includes sharing printed materials and occasionally a

1 PowerPoint presentation); Scott Decl., Ex. C at 102-103), which would thereby minimize
2 confusion based on the phonetic similarities between Plaintiff and Defendant.

3 **6. Degree of Care.**

4 The parties agree that their customers (investors) are highly sophisticated.
5 *Compare* Def.'s Opp'n at 18 *with* Pltf.'s Reply at 8-9. But, while the Defendant focuses
6 on the high degree of care that must support an investment decision in this field, the
7 Plaintiff focuses on the brief, informal conversations that can result in a decision *not to*
8 *invest* (without disputing that a decision *to invest* would be supported by a high degree of
9 care). *Compare* Def.'s Opp'n at 18-19 *with* Pltf.'s Reply at 8-9. According to Plaintiff,
10 Defendant's use of the "Marina" name has caused potential *Mirina* investors to reject
11 initial networking conversations because they believe they are being approached on
12 behalf of Defendant instead of Plaintiff. Plaintiff claims that this confusion "supports
13 issuance of a preliminary injunction as 'initial interest confusion.'" Pltf.'s Mot. at 19.

14 "Initial interest confusion" occurs when a defendant's use of confusing trademark
15 initially attracts the consumer to the defendant, and this confusion may still be an
16 infringement even if no sale is consummated as a result of the confusion. *See Brookfield*
17 *Commc'ns, Inc. v. West Coast Entm't Corp.*, 174 F.3d 1036, 1062-63 (9th Cir. 1999); *Dr.*
18 *Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1405 (9th Cir. 1997);
19 *Mobil Oil Corp. v. Pegasus Petroleum Corp.*, 818 F.2d 254, 257-58 (2d Cir. 1987).³
20 "Initial interest confusion" has been likened to a "bait and switch" scheme, in that
21 "potential customers are lured away from a trademark holder's product to a competitor's
22 product through the deceptive use of the holder's mark." *Designer Skin, LLC v. S&L*

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25 ³ The court notes that in most of these cases, the products at issue were consumer goods.
26 A purchaser of consumer goods undergoes a very different decisionmaking process than an
27 investor in drug research and development. A "bait and switch"-style scheme would be unlikely
to be successful in the investment context, given the protracted process by which an investor
decides whether to invest.

1 | *Vitamins, Inc.*, 560 F.Supp.2d 811, 818 (D. Ariz. 2008). But in this case, Plaintiff does
2 | not argue that Defendant lures its customers away: it argues instead that Plaintiff has a
3 | harder time making business contacts because the contacts believe the Plaintiff is the
4 | Defendant. Thus, this case is distinguishable from cases where the court has applied an
5 | “initial interest confusion” theory.

6 | Nonetheless, the court finds that the Plaintiff has shown that the investor
7 | community does — to at least some degree — incorporate previous perceptions (and
8 | misperceptions) to influence their willingness to consider investment. *See, e.g.*, Le Decl.
9 | ¶ 7 (describing a potential investor’s initial belief that he had already considered
10 | investing in Plaintiff, but later realized he was thinking of Defendant). Some of
11 | Plaintiff’s other evidence, however, describes the typical investment procedure, which
12 | would minimize or eliminate confusion because the Plaintiff initiates investment
13 | discussions. *See Durrance Decl.* (Dkt. # 56), Ex. 3 at 15:2-7, 79:2-80:9 (describing the
14 | typical investment procedure). Thus, because sophisticated investors make a series of
15 | inquiries before making an ultimate investment decision, and confusion could diminish
16 | their willingness to continue inquiring, the court finds that this factor weighs only slightly
17 | in Plaintiff’s favor. *See Morningside Group Ltd. v. Morningside Capital Group*, 182
18 | F.3d 133 (2d. Cir. 1999) (finding that though investors are a sophisticated group, they
19 | may nonetheless “be confused about the affiliation between two similarly named
20 | companies and might very well alter their behavior based on that confusion”).

21 | **7. Defendant’s Intent.**

22 | The Defendant was aware of Plaintiff’s existence at the time Defendant changed
23 | its name from MDRNA, Inc. to Marina Biotech. *See French Decl.* (Dkt. # 54) ¶ 15
24 | (describing a brief conversation between Plaintiff’s board member and Defendant’s chief
25 | executive officer, before Defendant’s name change). Though Plaintiff’s board member
26 | expressed concern about potential confusion, Defendant’s chief executive officer told
27 | him that he believed that potential customers or partners of either Defendant or Plaintiff

1 would not be confused between the two businesses. *See* French Decl. ¶ 7. Though
2 Plaintiff has not presented any evidence of malice on the part of Defendant or any
3 intentional act of deception on the part of the Defendant, the court finds that this factor
4 nonetheless favors Plaintiff. *See Sleekcraft*, 599 F.2d at 354.

5 **8. Likelihood of Expansion.**

6 The parties do not dispute that both parties intend to expand their product
7 offerings, and there is some indication in the record that Defendant intends to expand into
8 Plaintiff's field of miRNA therapeutics. *See, e.g.,* French Decl., Ex. A at 28 (apparently
9 depicting Defendant's plans to produce microRNA therapeutics by the end of 2011).
10 Thus, this favor weighs in favor of Plaintiff. *See Sleekcraft*, 599 F.2d at 354.

11 The court finds that, on balance, a consideration of the *Sleekcraft* factors weigh
12 somewhat in Plaintiff's favor, though not overwhelmingly so. The record before the
13 court emphasizes phonetic similarity between the two business names and how that
14 similarity leads to confusion in interpersonal conversations, but the court is left with
15 some doubt as to whether this confusion is as widespread, invasive, or detrimental as
16 Plaintiff's selective evidence may make it appear, particularly where the evidence
17 currently before the court shows that Plaintiff's mark is relatively weak. Nonetheless, on
18 that record, the court finds that the Plaintiff has raised serious questions about the
19 likelihood of confusion.

20 **C. Irreparable Harm.**

21 Plaintiff argues that it can be presumed that if it does not obtain an injunction,
22 Plaintiff will lose investment opportunities due to confusion and Plaintiff will lose control
23 of its mark. Defendant questions whether such a presumption is still available post-
24 *Winter*, given that the Supreme Court requires that a plaintiff seeking preliminary
25 injunctive relief demonstrate that "irreparable injury is likely in the absence of an
26 injunction." 129 S.Ct. at 375.

1 Though some district courts in the Ninth Circuit have found that irreparable harm
2 may no longer be presumed upon a finding that a likelihood of trademark infringement
3 has been shown, other courts have displayed significant doubt about that approach. *See*
4 *Aurora World, Inc. v. Ty Inc.*, 719 F. Supp. 2d 1115, 1166-67 (C.D. Cal. 2009)
5 (surveying the Ninth Circuit landscape on the issue). Whereas this court has applied the
6 presumption in a reverse confusion case (see *Masters Software, Inc. v. Discovery*
7 *Comm'ns, Inc.*, 725 F. Supp. 2d 1294 (W.D. Wash. 2010)), the court finds that such
8 application is not warranted here because there are not the same proof problems in a
9 traditional case. Plaintiff has entirely failed to submit any proof beyond speculation as to
10 its reputation or goodwill in the relevant market, which leaves the court with no basis
11 upon which to evaluate any intangible harm. Furthermore, lost sales or business
12 opportunities cannot constitute an *irreparable* harm, because (assuming they exist in this
13 case) even if they were difficult to calculate, they would still constitute monetary,
14 measurable damages. *See Aurora World*, 719 F. Supp. 2d at 1169 (quoting *Reebok*
15 *Intern. Ltd. v. J. Baker, Inc.*, 32 F.3d 1552, 1558 (Fed. Cir. 1994)). Therefore, the court
16 finds that Plaintiff has failed to establish that it would suffer an irreparable injury without
17 an injunction.

18 **D. The Balance of the Hardships and the Public Interest.**

19 Plaintiff argues that “Defendant will suffer no harm” if the court grants an
20 injunction, because Defendant has used the “Marina Biotech” name for only a matter of
21 months. Pltf.’s Mot. at 23. Defendant disputes that, pointing to the costs of “rebranding,
22 regulatory compliance, and any loss of shareholder value” that would have to be borne by
23 the publicly traded company. Def.’s Opp’n at 23. Furthermore, Defendant points to the
24 lack of evidence presented as to Plaintiff’s investment in and marketing of the “Mirina”
25 mark to argue that the balance of hardships favors Defendant. *See, e.g.*, Durrance Decl.
26 (Dkt. # 56), Ex. 2 at 81:11-82:5, 135:4-135:7 (deposition excerpts highlighting lack of
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1 specific evidence about Plaintiff's services), Ex. 3 at 29:15-30:3 (deposition excerpt
2 highlighting lack of specific evidence about Plaintiff's use of "Mirina" mark).

3 The court agrees with Defendant and finds that the balance of hardships do not tip
4 in Plaintiff's favor. There is no evidence in the record from which the court could
5 conclude that Plaintiff would face more serious impact without an injunction than
6 Defendant would face if one were granted, because the record contains no evidence of
7 Plaintiff's reliance upon the "Mirina" mark. Plaintiff is still in the early stages of
8 development as a business (when compared with Defendant), and the court does not have
9 any evidence of reputation or goodwill linked with the "Mirina" name. *See Playmakers,*
10 *LLC v. ESPN, Inc.*, 297 F. Supp. 2d 1277, 1285 (W.D. Wash. 2003) (finding the balance
11 of hardships tipping in favor of defendant where plaintiff "put forth very little in the way
12 of what investments have been made and what hardships may befall" without an
13 injunction).

14 Finally, to whatever minimal degree the public has an interest in this case, then the
15 public interest would favor Plaintiff to the degree that Plaintiff can prevail on its
16 infringement claim, because "[t]he public has an interest in avoiding confusion between
17 two companies' products." *Internet Specialties West, Inc. v. Milon-DiGiorgio Enters.,*
18 *Inc.*, 559 F.3d 985, 993 n. 5 (9th Cir. 2009).

19 Because the court finds that the Plaintiff has raised only serious questions on the
20 merits of its infringement claim, and has failed to establish irreparable harm or that the
21 balance of hardships tips in its favor, the Plaintiff is not entitled to injunctive relief.
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IV. CONCLUSION

For the reasons stated above, the court DENIES Plaintiff's motion (Dkt. # 33).

Dated this 7th day of March, 2011.

A handwritten signature in black ink that reads "Richard A. Jones". The signature is written in a cursive style and is positioned above a solid horizontal line.

The Honorable Richard A. Jones
United States District Judge

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