

1 Mark G. Tratos (Bar No. 1086)
tratosm@gtlaw.com
2 Thomas F. Kummer (Bar No. 1200)
kummert@gtlaw.com
3 Nancy R. Ayala (Bar No. 7146)
ayalan@gtlaw.com
4 Peter Ajemian (Bar No. 09491)
ajemianp@gtlaw.com
5 GREENBERG TRAUERIG, LLP
6 3773 Howard Hughes Parkway
Suite 400 North
7 Las Vegas, Nevada 89169
8 Telephone: (702) 792-3773
Facsimile: (702) 792-9002
9 *Counsel for Plaintiff*

10 UNITED STATES DISTRICT COURT
11 DISTRICT OF NEVADA

12 Teller, an individual,
13 Plaintiff,
14 v.
15 Gerard Dogge (p/k/a Gerard Bakardy), an
individual.
16 Defendant.
17

Case No. 2:12-cv-00591-JCM-GWF

**PLAINTIFF’S MOTION FOR
SUMMARY JUDGMENT AS TO
UNFAIR COMPETITION CLAIM**

18
19
20 Pursuant to Rule 56(f) of the Federal Rules of Civil Procedure, plaintiff Teller,
21 (“Teller”) respectfully moves this court for summary judgment of his unfair competition claim
22 against defendant, Gerard Dogge, (“Dogge”). Plaintiff’s motion is based upon the
23 pleadings and papers on file herein, the following memorandum of points and authorities,
24 as well as the Declaration of Teller and exhibits submitted in support thereof, and any oral

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GREENBERG TRAUERIG, LLP
3773 Howard Hughes Parkway, Suite 400 North
Las Vegas, Nevada 89169
Telephone: (702) 792-3773
Facsimile: (702) 792-9002

1 argument allowed by this court at the time of hearing, all of which are incorporated herein
2 by this reference.

3 DATED this 8th day of July, 2013.

4 GREENBERG TRAURIG, LLP

6 /s/ Mark G. Tratos

7 Mark G. Tratos (Bar No. 1086)

8 Thomas F. Kummer (Bar No. 1200)

9 Nancy Ayala (Bar No. 7146)

10 Peter Ajemian (Bar No. 09491)

11 3773 Howard Hughes Pkwy, Suite 400 North

12 Las Vegas, NV 89169

13 Counsel for Plaintiff

14 **MEMORANDUM OF POINTS AND AUTHORITIES**

15 **I. INTRODUCTION**

16 A celebrity's persona and items associated with the persona are protectable
17 trademarks under the Lanham Act. A celebrity plaintiff may bring an action for unfair
18 competition for the unauthorized use or imitation of his trademark when it would likely
19 confuse the public regarding the source or sponsorship of the infringer's goods or services.

20 In this case, Plaintiff Teller is an internationally famous magician who since 1975 has
21 continuously performed his signature illusion, known as "Shadows." Teller is famous for
22 Shadows with hundreds of articles written about the illusion over three decades. Teller's
23 performance of "Shadows" is so exclusively associated with him that it has become his
24 trademark work. Undoubtedly, anyone who would see an image of a shadow cast by a
25 rose in a vase in a magic performance thinks of Teller's "Shadows." On the other hand,
26 defendant Dogge is an unemployed lounge musician that to date has never performed a
27 single magic trick on stage. Last year, in an attempt to capitalize on the fame and good will
28 of Teller's "Shadows", Dogge uploaded a marketing and sales video on YouTube in which
he performs Teller's trademark "Shadows" illusion (calling it "The Rose and her Shadow"),
boldly refers to Teller's illusion, and uses Teller's name in the meta tags for his video.

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Facsimile: (702) 792-9002

1 Dogge attempted to confuse the public and lead them to believe that he was in fact selling
 2 Teller's signature illusion or that Teller endorsed Dogge's trick in order to sell his own
 3 instructional DVDs and mail-order props for €2,229 Euros or approximately \$3,000.00 US
 4 Dollars.

5 The undisputed facts in this case demonstrate that Dogge used Teller's trademark to
 6 sell his own goods and services and to confuse the public regarding his affiliation with
 7 Teller. There is no genuine issue of material fact underlying Teller's unfair competition
 8 claim against Dogge and, therefore, Teller is entitled to judgment as a matter of law on his
 9 claim.¹

10 **II. STATEMENT OF FACTS**

11 **A. Teller is an Internationally Famous Entertainer and Magician**

12 Teller and his partner, Penn Jillette, are famous in the magic community for creating
 13 innovative magic tricks, and have become well-known in the United States and throughout
 14 the world for their unique brand of entertainment. Penn & Teller have enjoyed major
 15 national and worldwide success, including sold-out runs on Broadway, world tours, Emmy-
 16 winning TV specials, and hundreds of guest appearances on popular television shows.
 17 (See Declaration of Teller ("Teller Decl."), ¶¶ 1-2, attached hereto as **Exhibit 1**; see
 18 *generally* Compilation of Published Articles featuring Penn and Teller ("Articles"), attached
 19 hereto as **Exhibit 2**). Moreover, Penn & Teller have written two national best-selling books,
 20 hosted their own Emmy nominated variety show for the FX network, starred in their own
 21 specials for major networks ABC, NBC and Comedy Central, and produced the critically
 22 acclaimed feature film documentary "The Aristocrats." (Teller Decl., ¶¶ 3-4; see *generally*
 23

24 _____
 25 ¹ This motion relies upon excerpts from Dogge's deposition. At the time of filing, Dogge had not yet reviewed his
 26 deposition transcript and made any changes. If Dogge does so, Teller will supplement or amend this motion as
 27 appropriate. Further, there are several motions currently pending before the court that may affect this motion;
 28 specifically, Teller's motion to enforce this court's orders and to compel, depending on the outcome, may affect the
 evidence available. Teller also has a pending motion for clarification of the minute order dated July 5, 2013, which set
 the hearing date for several pending motions for July 26. Teller requested that the court clarify whether or not this was
 also intended to delay the dispositive motion deadline. Nevertheless, out of an abundance of caution, Teller files his
 dispositive motions today so as to respect the deadline.

1 Ex. 2, Articles). Penn and Teller have had many appearances on “Saturday Night Life”.
2 They have appeared in a PBS special “Penn & Teller Go Public”, a PBS educational series
3 “Behind the Scenes” and have had appearances on two series on British Television.

4 Currently, Penn & Teller are performing their live show regularly at The Rio All-Suite
5 Hotel & Casino in Las Vegas, Nevada (“The Rio”), where it has been running for over
6 eleven years, making it one of the longest running, successful and most-beloved shows in
7 Las Vegas history. (Teller Decl., ¶ 6). Penn & Teller’s long run at The Rio has earned them
8 the prestigious award of “Las Vegas Magicians of the Year” six times, including in 2011.
9 (Id.).

10 **B. Teller has been Entertaining Audiences with his “Shadows” Illusion for**
11 **Three Decades and They Have Loved Every Minute of It.**

12 Teller has created many of the original comedy routines and magic tricks that have
13 been featured in his show over the years. One of Teller’s most successful and lasting
14 original magic tricks is a dramatic pantomime work called “Shadows,” which is the subject
15 of the instant litigation. Teller created the highly innovative and unusual dramatic work
16 “Shadows” in 1975, worked years to perfect the illusion, and obtained a U.S. Copyright
17 Registration for it in 1983. (See **Exhibit 1**, Teller Decl., ¶¶ 7-8; see *also* **Exhibit 2**, Articles,
18 at TELLER000140). “Shadows” has been performed by Teller in Penn & Teller’s show
19 thousands of times, including live and televised performances throughout the United States
20 and the world. In fact, “Shadows” has appeared in every Penn & Teller show performed on
21 and off Broadway and in their national tours. It is the oldest, most successful, most
22 venerated piece of material in continuous use in Penn & Teller’s show, and while other
23 material has come and gone, it has remained as a universal favorite. (See **Exhibit 1** Teller
24 Decl., ¶¶ 10-11; see *also* **Exhibit 2**, Articles, at TELLER000213, TELLER00073,
25 TELLER000266).

26 “Shadows” essentially consists of a spotlight trained on a vase containing a single
27 flower, a rose, which is set on a table. (See **Exhibit 1** Teller Decl., ¶ 9). The light falls in
28 such a manner that the shadow of the real rose is projected onto a white screen positioned

1 | some distance behind it. The magician then enters the otherwise still scene with a large
 2 | knife, and proceeds to use the knife to dramatically sever the leaves and petals of the
 3 | rose's shadow on the screen slowly, one-by-one, whereupon the corresponding leaves of
 4 | the real rose sitting in the vase fall to the ground, breaking from the stem at exactly the
 5 | point where Teller cut the shadow projected on the screen behind it. The effect upon the
 6 | audience is to withers the destruction of the beautiful flower by using a knife upon it's
 7 | shadow. (*Id.*, ¶ 9).

8 | "Shadows," among all of Penn & Teller's repertoire, has an iconic quality as the
 9 | piece with the longest association to Teller himself. It is considered one of the rare new
 10 | plots in the canon of 20th Century magic and is Teller's principal claim to fame in magic
 11 | history. (See Expert Witness Report of Jim Steinmeyer dated April 11, 2013, at 8-10,
 12 | attached hereto as **Exhibit 3**; see also **Exhibit 2**, Articles, at TELLER000254).

13 | **C. "Shadows" is so Unique and Strongly Associated with Teller that It has**
 14 | **Taken on the Status of a Signature Piece, Representing Teller's Trademark**

15 | **1. There is No Work of Magic Matching Teller's "Shadows" Illusion**

16 | According to Expert Witness, Jim Steinmeyer ("Steinmeyer"), magic tricks can be
 17 | described as shorthand "plots" or procedures, in the same way that plays, poems, or novels
 18 | also have "plots." (See **Exhibit 3**, at 3). Teller's "Shadows" illusion is characterized as a
 19 | "sympathetic reaction" plot, specifically the magic trick demonstrates that "what happens to
 20 | one subject happens also, by apparent sympathetic response to the sympathetic subject."
 21 | (*Id.*). Using this classification, Steinmeyer describes Teller's "Shadows" effect in this way:

22 | It consists of two objects, namely 'a flower, and the shadow of that flower on a paper
 23 | screen,' and nature of the reaction is, 'the destruction of the flower, in similar
 24 | reaction.' Hence, we are saying that the flower and the shadow and the flower are
 25 | working together in sympathy, in an apparent magical way. And the destruction of
 26 | the rose is the action of the illusion.

27 | Mr. Steinmeyer's research to find a magic act like Teller's "Shadows" took him as far
 28 | back as the first English book on magic from 1584. (*Id.* at 6) And still, although there are a

1 number of sympathetic effects, involving various small props, he found no plot matching
 2 Teller's "Shadows". (Id. at 7) Specifically, there are no sympathetic effects involving a
 3 flower, and no previous literature of magic involving the willful destruction of the flower. (Id.)
 4 Teller's "Shadows" illusion is clearly one of a kind and strongly associated by other
 5 magicians and the public with Teller.

6 **2. Teller's "Shadows" Uses Creative Symbolism Like No Other**

7 As noted by Mr. Steinmeyer – magic appeals to legendary or fairy tale images and
 8 the magician's acts are enhanced with an appeal to cultural clichés. (Id.) One of the
 9 significant elements of Teller's "Shadows" is the symbol of the flower, the rose. (Id.) Mr.
 10 Steinmeyer emphasizes the unique symbolism used by Teller:

11 In popular culture, we see the flower, the rose as a symbol of beauty, of inviolable
 12 love, of nature's perfection. . . Hence, Teller's "assault" on a rose takes on a special
 13 visceral significance to an audience, in a way that attacking some other plant or
 14 natural object (a tree branch, a banana) does not. We can see this in Teller's
 15 copyright for the scene, in which he portrays himself as the 'murderer.' Clearly, he
 always understood the powerful symbolism of the rose, for in attacking a beautiful
 object, he suggests someone who is performing a dangerous, criminal action.

16 (Id. at 8) Anyone who would see an image of a shadow cast by a rose in a vase in a magic
 17 performance, thinks of Teller's "Shadows." (Id.)

18 **3. Signature Tricks are Incredibly Important to Magicians**

19 It is well known in the world of magic that signature tricks are equally important to a
 20 magician as new or novel acts which attract return business. (Id. at 8-9). Importantly, Mr.
 21 Steinmeyer explains their significance:

22 Of course, the nature of a magic show, like any entertainment, is novelty. So
 23 magicians have always been continually changing their routines, including new
 24 features to attract return business. So the signature effects, the repeat effects, take
 25 on special significance. These represent not only the effects which define the
 personality of that magician, but the pieces so highly regarded that audiences do not
 26 tire of them and, indeed, feel that the performance is not complete unless these
 effects are included."

26 . . .

27 Mr. Steinmeyer explains why and how "Shadows" became Teller's signature trick
 28 and trademark:

1 Teller has been performing “Shadows” since 1975, and has included it in every Penn
 2 and Teller show since its creation. Although the duo have developed a number of
 3 important and influential routines (including popular features like “Casey at the Bat”
 4 and “Needles”) there is no question that “Shadows” has been the longest-used, most
 5 prominent, and most commented-upon routine. It is clearly Teller’s signature effect
 6 and is very closely associated with Teller. In my reviews of Teller’s performances
 7 throughout his career – over a hundred accounts by various reviewers over more
 8 than thirty years – “Shadows” has been featured prominently and had a marked
 9 effect upon Teller’s audiences.

10 As is the nature of all such signature effects, it is included in the performance
 11 because it is strongly associated with the performer, it distinguishes the performer
 12 from other performers or magicians, and it always proves to be a favorite of the
 13 audience. In other words, the value of this routine, to Teller lies in its unique
 14 qualities.

15 (Id.)

16 **4. Teller’s “Shadows” is Highly Respected Within the Magic Industry as
 17 His Trademark Illusion**

18 A professional magician’s signature illusion has, in general, been respected within
 19 the profession as a kind of trademark. (*Id.* at 10). Significantly, no other professional
 20 magician has publicly performed a regular stage performance of “Shadows” without
 21 permission of Teller because it has become so clearly identified with Teller. (**Exhibit 1**,
 22 Teller Decl., ¶ 22 and Steinmeyer Rpt., **Exhibit 3**, at 10-11).

23 **D. Dogge has Misappropriated Teller’s Persona and Signature Illusion to Sell
 24 Mail-Order Props and DVDs**

25 Defendant Gerard Dogge has never been a professional magician. (See deposition
 26 of Gerard Dogge, taken on June 11, 2013 (“Dogge depo.”), at 31:24-33:7, attached hereto
 27 as **Exhibit 4**). The only trick he has ever performed was a vanishing silk trick that he
 28 learned in four minutes and some simple card tricks while wandering table to table in bars
 and cafes. (*Id.*) Over the years, he has made a living performing musical acts in small
 restaurants and cafes. (*Id.* at 17:13-17; 18:7-11). Unable to command much pay as a
 performer, he has often supplemented his income by selling a random variety of household
 products, such as car polish and vacuum cleaners. (*Id.* at 18:7-19:7). Although he has
 sold several CDs of his music at the cafes and bars where he has performed, his music

1 recordings have never been released to the wider public or sold in stores. (Id. at 21:7-
2 22:5). All the songs he has ever performed were covers of other musician's songs
3 because, as Dogge admitted, "Never in my life I was able to write a song." (Id. at 24:2-11).

4 For the last couple of years Dogge has been unemployed, without any real source of
5 income and living on his savings. (Id. at 216:2-23). Dogge claims he overcame cancer and
6 that is why he was unemployed in 2011. He claims he has neither "big contracts" nor "big
7 properties," only "big debts." (See March 28, 2013 emails between Teller and Dogge, at
8 TELLER000014, attached hereto as **Exhibit 5**). During his deposition, Dogge explained
9 that he began having trouble booking his musical act years ago when western European
10 countries such as Belgium and England began to have an influx of workers from what he
11 referred to as "the Eastern Bloc countries." (See **Exhibit 4**, Dogge Depo. at 24:25-26:22).

12 Dogge first became acquainted with "Shadows," in approximately 2007-2008. (Id. at
13 46:4-47:7). Dogge admits to watching a video of Teller performing "Shadows" multiple
14 times before Dogge decided to put together his own prop involving a rose being
15 dismantled. (Id. at 55:16-19). Dogge admits that Teller is famous for Shadows. (See Id. at
16 112:7-21; 177:11-15). Sometime in 2012, after Dogge had finished making his prop, he
17 filmed a marketing video of himself using the prop to perform Teller's "Shadows" and gave
18 his video a similar name - "The Rose and Her Shadow." (See id. at 64:4-9; 67:4-11). Just
19 as in Teller's famous "Shadows" illusion, Dogge's video begins with an image of a vase
20 containing a single rose on a table, with a front spotlight projecting the rose's shadow onto
21 a screen situated several feet behind. (See id. at 68:3-70:16). Just as in Teller's "Shadows"
22 illusion, Dogge entered the otherwise still scene from one side. (See id.) Just as in Teller's
23 "Shadows" illusion, Dogge used the knife to apparently cut at the shadow of the rose where
24 the flower's leaves met its stem, causing the leaves on the actual rose to fall. (See id.)
25 Just as in Teller's "Shadows" illusion, Dogge then works on the other side of the rose's
26 shadow and appeared to cut at the shadow of the leaves on the rose's other side, causing
27 them to fall as well. (See id.) Just as in Teller's "Shadows" illusion, Dogge then put the
28 knife on the shadow of the rose where the petals attached to the stem. (See id.). At the

1 end of Dogge’s video, the words: “A double illusion for the price of one” appeared on the
 2 screen. (*Id.* at 77:14-22; see YouTube screenshot of Dogge, pka Gerard Bakardy,
 3 attached hereto as **Exhibit 6**, at TELLER000071²). Dogge then posted his video to
 4 YouTube and tagged it with the keyword - “Teller.” (See *id.* at TELLER000069; Dogge’s
 5 answer to plaintiff’s second set of requests for admissions, dated March 28, 2013, at
 6 response to request no. 31, at 6, attached hereto as **Exhibit 7**).

7 Dogge informed viewers that his prop was for sale by pasting a textual narrative
 8 below the video stating, “It could be a wonderful and refreshing addition to all your coin or
 9 card tricks.” (See **Exhibit 6** at TELLER000069.). Dogge also created a print
 10 advertisement for his mail-order prop, explaining that the prop came with an instructional
 11 DVD and manual and that the price for all three items was 2,229€, the equivalent to about
 12 \$3,000.00. (See **Exhibit 4**, at 105:19-106:5; Dogge Dutch advertisement and English
 13 translation, attached hereto as **Exhibit 8**). Dogge claims that he priced his prop at this
 14 amount because it was the price he had seen other, unrelated magic props sold for on the
 15 internet. (**Exhibit 4**, at 106:3-21).

16 **E. Defendant’s Unauthorized Use of Teller’s Trademark to Sell His Own Mail-**
 17 **Order DVDs and Props Damages Teller’s Mark and Confuses the Public**

18 Like a few famous magicians of the past, after he retires Teller may license the
 19 performance of “Shadows” to only a highly gifted and truly extraordinary magician who
 20 would use it in a market that in no way overlaps Teller’s. (See **Exhibit 1**, Teller Decl., ¶
 21 22). The “Shadows” illusion is Teller’s trademark magic trick, and very special to him. He
 22 would not allow just anyone to perform it and possibly ruin its significance.

23 As explained by expert witness, Jim Steinmeyer, a magician’s trademark illusion can
 24 be a significant source of income and avenue to continue his legendary status. Mr.
 25 Steinmeyer refers to the legendary Harry Blackstone, Sr. as a prime example – “Harry
 26

27 _____
 28 ² This appears to reference the table which Dogge proposes to sell which bears a striking similarity to the table by the
 Magician Losander.

1 Blackstone Sr. was very well known for a handful of small effects: The Disappearing
2 Birdcage, Dancing Handkerchief, and a pickpocket routine with the audience. These were
3 included in every performance and, indeed, his versions of these tricks were avoided by his
4 fellow professionals. After his retirement, the Birdcage and Handkerchief routines were
5 sold, exclusively, by Blackstone, through magic dealers. This was a mark of recognition of
6 the importance of these effects, and their association with Blackstone. His son, Harry
7 Blackstone Jr., later included these routines in his own shows.” (See **Exhibit 3**,
8 Steinmeyer Rpt., at 9, n.4).

9 In addition, the ability and right to control one’s trademark is critical. Significantly, it
10 has been noted that “if a version of ‘Shadows’ fell into the hands of a less professional or
11 more careless performer, its performance would be detrimental to Teller’s success. It
12 would cease being special and unique in his show, and would lose its value.” (Id. at 11).
13 Moreover, “if a version of ‘Shadows’ was marketed to the magic community, it would impact
14 Teller’s opportunity to profit from the sale of this routine, in the future, to other
15 professionals.” (Id.).

16 Dogge has himself admitted that Teller’s brand will be damaged because of Dogge’s
17 unauthorized use of “Shadows” to sell his own goods and services. Dogge hopes that
18 continued damage to Teller would result in a big pay day for Dogge. When Teller tried to
19 reach a compromise with Dogge prior to filing suit, Dogge responded, “I am really surprised
20 by the low value you assign to the trick that you claim is your signature trick.” (See **Exhibit**
21 **5** at TELLER000013). He continued, “How much is it worth to you, having the knowledge
22 that . . . By selling the newer version, the old version loses its value dramatically. . . . Even
23 protracted lawsuits cannot prevent that ‘damage’ is done.” (Id. at TELLER000014; see also
24 **Exhibit 4**, Dogge Depo., at 157:5-13).

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1 **III. LEGAL ARGUMENT**

2 **A. TELLER IS ENTITLED TO SUMMARY JUDGMENT**

3 **ON HIS UNFAIR COMPETITION CLAIM**

4 FED. R. CIV. P. 56 requires entry of summary judgment when “the pleadings,
5 depositions, answers to interrogatories and admissions on file, together with the affidavits,
6 if any, show that there is no genuine issue as to any material fact and that the moving party
7 is entitled to a judgment as a matter of law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,
8 250, 106 S. Ct. 205 (1986); *Newton v. Uniwest Financial Corp.*, 802 F. Supp. 346, 352 (D.
9 Nev. 1990). “Judgment as a matter of law is appropriate where there is no legally sufficient
10 evidentiary basis for a reasonable jury to find for the nonmoving party.” *Johnson v. Wells*
11 *Fargo Home Mortg., Inc.*, 558 F. Supp. 2d 1114, 1118 (D. Nev. 2008) (citing FED. R. CIV. P.
12 50(a)).

13 Substantive law determines which facts are material. To prevent entry of summary
14 judgment, there must be a legitimate dispute over the facts that will affect the outcome of
15 the lawsuit under governing law. *Anderson*, 477 U.S. at 248, 106 S. Ct. at 2510.
16 Moreover, an issue is not genuine if the evidence presented is self-serving and
17 uncorroborated. “When opposing parties tell two different stories, one of which is blatantly
18 contradicted by the record, so that no reasonable jury could believe it, a court should not
19 adopt that version of the facts for purposes of ruling on a motion for summary judgment.”
20 *Scott v. Harris*, 550 U.S. 372, 380, 127 S. Ct. 1769, 1776 (2007).

21 For summary judgment, the moving party bears the initial burden of demonstrating
22 the absence of a genuine issue of material fact and thereby, is entitled to judgment as a
23 matter of law. FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct.
24 2548, 91 L.Ed.2d 265 (1986). If that burden has been met, the non-moving party must then
25 come forward and establish the specific material facts in dispute to survive summary
26 judgment. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588, 106 S. Ct.
27 1348 (1986). To withstand a properly supported motion, the nonmoving party who bears
28 the burden of proof at trial must come forward with evidence to support the essential

1 elements of its claim. *National Assn. of Gov't Employees v. City Pub. Serv. Bd.*, 40 F.3d
2 698, 712 (5th Cir. 1994) (citing *Celotex*, 477 U.S. at 321-23).

3 The non-moving party's burden is such that it must do more than simply show there
4 is some metaphysical doubt as to the material facts. *Matsushita*, 475 U.S. at 586. The
5 non-moving party must produce enough evidence so that a reasonable trier of fact could
6 return a verdict or judgment for the non-moving party. *Anderson*, 477 U.S. at 248, 106 S.
7 Ct. at 2510. Accordingly, mere disagreement or bald assertions that a genuine issue of
8 material fact exists does not preclude the use of summary judgment. *Harper v. Wallingford*,
9 877 F. 2d 728, 731 (9th Cir. 1989).

10 A court may properly award summary judgment to the plaintiff on an unfair
11 competition claim where the court finds there to be no genuine issues of material fact that
12 the defendant used the celebrity plaintiff's persona without permission to suggest false
13 endorsement or association with the defendant's products. *Branca v. Mann*, Case No. CV
14 11-00584 DDP (PJWX), 2012 WL 3263610, at *5-6 (C.D. Cal. 2012).

15 In this case, there is no genuine issue as to any material fact needed to establish
16 Teller's claim for unfair competition against defendant Dogge. Therefore, Teller is entitled to
17 summary judgment on his unfair competition claim as a matter of law.

18 **B. BACKGROUND OF AN UNFAIR COMPETITION CLAIM**
19 **AS IT APPLIES TO A CELEBRITY'S PERSONA AND TRADEMARK**

20 A claim for unfair competition under the Lanham Act exists when any person "uses
21 in commerce, any word, term, name, symbol, or device, or any combination thereof, or any
22 false designation of origin, false or misleading description of fact, or false or misleading
23 representation of fact, which" . . . "is likely to cause confusion, or to cause mistake, or to
24 deceive as to the affiliation, connection, or association of such person with another, or as to
25 the origin, sponsorship, or approval of his or her goods, services, or commercial activities
26 by another person." 15 U.S.C. § 1125(a)(1). More specifically, a celebrity plaintiff may
27 prove an unfair competition claim where the defendant uses elements of the **celebrity's**
28 **persona** without permission to suggest false association or endorsement of the

1 defendant's goods or services. See *White v. Samsung Electronics Am., Inc.*, 971 F.2d
 2 1395, 1399-1400 (9th Cir. 1992) (holding that a celebrity plaintiff may succeed on a
 3 Lanham Act claim by proving the defendant created a likelihood of consumer confusion as
 4 to whether the plaintiff endorsed or was associated with the defendant's goods or services);
 5 *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1106 (9th Cir. 1992) (same); *Abdul-Jabbar v.*
 6 *General Motors Corp.*, 85 F.3d 407, 410 (9th Cir. 1996) (holding that false endorsement
 7 claims based on the unauthorized use of a celebrity's identity are properly cognizable under
 8 section 43(a), 15 U.S.C. § 1125(a)). Moreover, courts have recognized false endorsement
 9 claims brought by celebrity plaintiffs for the unauthorized imitation of their distinctive
 10 attributes where those attributes amount to an unregistered trademark. *Waits v. Frito-Lay*,
 11 978 F.2d at 1106. Notably, a celebrity's distinctive attributes may include objects or items
 12 that have become so associated with the celebrity that a consumer's mind would
 13 immediately turn to the celebrity upon seeing the item. See *Motschenbacher v. R.J.*
 14 *Reynolds Tobacco Co.*, 498 F.2d 821, (9th Cir. 1974) (holding that the distinctive
 15 decorations a race car driver routinely made to his race car became identifiers of the driver
 16 himself).

17 In such cases, the celebrity needs to show that the defendant created a *likelihood of*
 18 *confusion* regarding whether the plaintiff was endorsing the defendant's goods or services.
 19 *White v. Samsung*, 971 F.2d at 1400. When the claim is brought by a celebrity plaintiff, the
 20 Ninth Circuit has set forth a slightly modified version of the traditional *Sleekcraft*^[1] factors
 21 that courts may consider in determining whether there is the requisite showing of likelihood
 22 of confusion. The court may consider the following eight (8) factors:

- 23 1. the level of recognition that the plaintiff has among the segment of the society for
 24 whom the defendant's product is intended;
- 25 2. the relatedness of the fame or success of the plaintiff to the defendant's product;
- 26 3. the similarity of the likeness used by the defendant to the actual plaintiff;

27
 28 ^[1] *AMF, Inc. v. Sleekcraft Boats*, 599 F.2d 341 (9th Cir. 1979)

- 1 4. evidence of actual confusion;
- 2 5. the marketing channels used;
- 3 6. likely degree of purchaser care;
- 4 7. the defendant's intent in selecting the plaintiff; and
- 5 8. the likelihood of expansion of the product lines.

6 See *Branca v. Mann* 2012 WL 3263610 (C.D. Cal. 2012); see also, *White v.*
 7 *Samsung*, 971 F.2d at 1399-1400. Importantly, these factors are not necessarily of equal
 8 importance nor will all necessarily apply in every case. *Branca v. Mann* 2012 WL 3263610,
 9 at 5 (citing *Fifty-Six Hope Road Music, Ltd.*, 688 F. Supp. 2d 1167).

10 In the instant case, these factors weigh in favor of Teller and Teller is entitled to
 11 summary judgment against Dogge on his unfair competition claim as a matter of law.

12 **1. Factor #1: Teller Has an Extremely High Level of Recognition Among**
 13 **the Group that Dogge Targeted to Sell his Mail-Order Illusion DVDs**
 14 **and Props**

15 If a celebrity enjoys a high level of recognition among the group of people which the
 16 defendant has targeted as potential customers of his goods or services, then it is said that
 17 the celebrity has a strong mark, thus allowing for the possibility of a likelihood of confusion.
 18 *White v. Samsung*, 971 F.2d at 1400 (Vanna white's mark was strong among the television-
 19 viewing public that Samsung had targeted with its advertisement featuring the "Vanna"
 20 robot); *Branca v. Mann* 2012 WL 3263610 (Because the defendant sold products based on
 21 Michael Jackson and his success as an entertainer, his recognition is even greater among
 22 the intended consumers of the defendant's products).

23 In this case, it is undisputed that Teller is an internationally famous magician and
 24 entertainer. (**Exhibit 3**, Steinmeyer Rpt., at 10-12; **Exhibit 1**, Teller Decl., ¶¶ 1-2; **Exhibit 2**,
 25 Articles). In addition, Teller's "Shadows" illusion is his most successful and lasting original
 26 magic trick. (**Exhibit 3**, Steinmeyer Rpt., at 10-12). Teller has performed "Shadows" tens
 27 of thousands of times since 1975, in live performances throughout the United States and
 28 the world. (**Exhibit 1**, Teller Decl., ¶ 10). Importantly, Teller's "Shadows" illusion is one of

1 kind and only associated with Teller. (See **Exhibit 3**, Steinmeyer Rpt., at 3-7). Dogge
2 admits that Teller is famous for his illusion Shadows. (See **Exhibit 4**, Dogge Depo., at
3 112:7-21; 177:11-15). “Shadows” is Teller’s signature trick and so closely associated with
4 him that no other professional magician has performed it on stage as part of their regular
5 routine without Teller’s permission. (See **Exhibit 3**, Steinmeyer Rpt., at 8-10).

6 Dogge’s YouTube advertisement clearly targets a segment of the population that is
7 familiar with Teller and “Shadows.” First, Dogge used the meta tag “Teller” within his
8 YouTube advertisement to redirect any of persons looking for videos featuring Teller to his
9 own website. (See **Exhibit 5**, at p. TELLER000069). Second, the text below Dogge’s
10 video states that his mail-order DVD and props “could be a wonderful and refreshing
11 addition to all your coin or card tricks,” thus showing that he is targeting amateur and
12 professional magicians for his product. *Id.* Those customers would undoubtedly know of
13 Teller and “Shadows.” Third, the very fact that Dogge is performing Teller’s “Shadows”
14 illusion on his YouTube advertisement and offering to sell the instructional DVD and related
15 props for €2,229 Euros, approximately \$3,000, shows that he is targeting Teller’s fans.
16 These people would naturally think they are buying Teller’s “Shadows” illusion.

17 The undisputed facts show that Teller enjoys a high level of recognition among the
18 persons Dogge targeted for his instructional DVD and magic props and, therefore Dogge’s
19 use of Teller’s persona and strong signature work allows for the probability of a likelihood of
20 confusion.

21 **2. Factor #2: Teller and Dogge’s Goods are Closely Related**

22 Dogge and Teller’s “goods” are closely related because Teller is world famous for
23 creating and performing “Shadows” and Dogge used this fame in selling his mail-order
24 DVDs and prop that supposedly enables others to perform Teller’s signature illusion.

25 “In cases concerning confusion over celebrity endorsement, the plaintiff’s ‘goods’
26 concern the reasons for or source of the plaintiff’s fame.” See *White v. Samsung*
27 *Electronics Am., Inc.*, 971 F.2d 1395, 1399-1400 (9th Cir. 1992). The danger of consumer
28 confusion is heightened where the goods offered by the alleged infringer are related to the

1 goods offered by the owner of the marks. *E.&J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d
2 1280, 1291 (9th Cir. 1992).

3 In *Wendt v. Host International, Inc.*, the actors who played Norm and Cliff on the hit
4 television series Cheers brought an unfair competition claim against a company that
5 created animatronic robotic figures based on their likenesses and placed the robots in
6 airport bars modeled after the set from Cheers. 125 F.3d 806, 809 (9th Cir. 1997). In
7 analyzing the relatedness of the parties' goods, the Ninth Circuit held that the goods were
8 "obviously related" because the plaintiffs' "goods" were their fame, largely derived from their
9 roles on Cheers, and the defendant's "goods" were the products sold in the Cheers bars
10 and the bars themselves. *Id.*

11 Here, Teller's fame is based on creating and performing beautiful and unique magic
12 tricks to wide audiences, and there is no dispute that the trick he is most famous for is
13 "Shadows." The undisputed evidence produced in this matter demonstrates that Teller has
14 performed "Shadows" tens of thousands of times, and "that 'Shadows' has been the
15 longest-used, most prominent, and most commented-upon routine" of Teller's (See **Exhibit**
16 **2**, at 8-9). Additionally, the combination of the plot and effect from "Shadows" cannot be
17 found in any other illusion in the history of magic. *Id.* at 6-7.

18 Dogge's "goods" are mail-order illusions including a magic prop and related
19 instructional manual and DVD that instructs purchasers on how to perform the illusion that
20 Teller has spent much of his career making so famous. Because Teller's "goods" consist of
21 performing unique and beautiful magic illusions such as "Shadows," and those are
22 precisely the "goods" that Dogge was attempting to market and sell, Teller and Dogge's
23 "goods" are inextricably related, and this factor weighs heavily toward finding a likelihood of
24 confusion.

25 **3. Factor #3: The Marks Are Nearly Identical**

26 Because Teller's "mark" is his fame from performing illusions such as "Shadows,"
27 and every aspect of Dogge's promotional video was intended to invoke Teller's fame and
28 signature illusion, the "marks" here are practically identical.

1 The unique aspect of “Shadows,” and the aspect that differentiates it from all other
2 illusions in magic’s history, is the use of a “sympathetic reaction” plot to present the
3 destruction of a flower by acting upon its shadow. (See **Exhibit 3**, at 3, 6-7.) Here, Dogge
4 has admitted that his “version” of “Shadows” used an identical “sympathetic reaction” plot
5 and that Dogge’s illusion was therefore a precise replica of Teller’s. (See **Exhibit 4**, Dogge
6 Depo., at 68:3-70:16).

7 What is more, every aspect of Dogge’s promotional video was meant to invoke
8 Teller and imitate Teller’s performance of his signature illusion. Dogge used the precise
9 staging that Teller uses in his performance of “Shadows,” namely, a set comprised of a
10 single table, a single vase, and a single rose front lit so as to project a shadow upon the
11 only other item on stage, a white board placed several feet behind the table. (See **Exhibit**
12 **4**, at 68:5-70:16). Dogge then entered this scene and imitated the gestures and
13 movements that Teller uses in dismantling the rose in “Shadows.” (*Id.*) Because all
14 aspects of Dogge’s promotional video identified Teller, this factor must weigh in Teller’s
15 favor and toward a finding of likelihood of confusion.

16 **4. Factor #4: Consumer Confusion May Be Presumed Due to**
17 **Dogge’s Intentional Use of Teller’s Mark**

18 “When the alleged infringer knowingly adopts a mark similar to another’s, reviewing
19 courts presume that the defendant can accomplish his purpose: that is, that the public will
20 be deceived.” *Sleekcraft*, 599 F.2d at 354. Moreover, “[t]he law in the Ninth Circuit is clear
21 that ‘post-purchase confusion,’ i.e., confusion on the part of someone other than the
22 purchaser who, for example, simply sees the item after it has been purchased, can
23 establish the required likelihood of confusion under the Lanham Act.” *Karl Stortz*
24 *Endoscopy-Am., Inc. v. Surgical Techs., Inc.*, 285 F.3d 848, 854 (9th Cir. 2002); *Levi*
25 *Strauss & Co. v. Blue Bell, Inc.*, 632 F.2d 817, 822 (9th Cir. 1980). Importantly, “actual
26 confusion is not necessary to a finding of likelihood of confusion under the Lanham Act.”
27 *Academy of Motion Picture Arts & Sciences v. Creative House Promotions, Inc.*, 944 F.2d
28 1446, 1456 (9th Cir. 1991).

1 Here, Dogge was well aware that Teller's best-known illusion is "Shadows," as
2 Dogge has called "Shadows," "the most Magical, romantic and beautiful illusion I know" and
3 has admitted that he had seen Teller performing "Shadows" multiple times prior to when
4 Dogge decided to make and market his instructional DVDs and mail-order props. (See
5 **Exhibit 6; Exhibit 4**, at 55:16-19). Dogge admits that Teller is famous for Shadows. (See
6 **Exhibit 4**, at 112:7-21; 177:11-15). Indeed, Teller's association with "Shadows" is the
7 principal reason that Dogge's used the illusion to market his trick, as Dogge has previously
8 argued that his mail-order prop could be used to accomplish any number of different
9 illusions, including those not even using flowers. (See April, 2012 emails between Teller
10 and Dogge, attached hereto as **Exhibit 9**).

11 Even if some consumers would not be confused as to Teller's association with
12 Dogge's mail-order prop upon watching Dogge's marketing video, i.e., at the point of sale,
13 the public would undoubtedly experience post-purchase confusion upon seeing a
14 purchaser use the prop to perform Teller's signature illusion.

15 Moreover, to the extent that Dogge argues there was no actual consumer confusion,
16 the lack of any confusion was the result only of the speed with which Teller acted to protect
17 his persona and signature illusion by immediately requesting that YouTube remove
18 Dogge's videos from its site. That Teller acted quickly to prevent consumer confusion
19 cannot now be used against him in his unfair competition claim.

20 Lastly, Teller has presented clear, overwhelming and unchallenged evidence
21 demonstrating the strong likelihood of consumer confusion. The leading magic consultant
22 and contributing editor to the leading journals in the magic field, Jim Steinmeyer, opined
23 that "Shadows" has become so associated with Teller and Teller's brand, that if it were
24 disseminated in the industry, "it would create confusion as it would automatically be
25 associated with Teller, and most in the market, would assume that it were his individual
26 effect." (See **Exhibit 3**, Steinmeyer Report, at 13.) Because Dogge has presented no
27 evidence or expert report to contradict Jim Steinmeyer's expert opinion, this factor must
28 weigh in Teller's favor.

1 **5. Factor #5: Dogge Used Marketing Channels that Would Cause**
 2 **Consumer Confusion**

3 In reviewing this factor in other false celebrity endorsement or association claims,
 4 the Ninth Circuit has held that where the defendant appropriates the likeness or persona of
 5 the plaintiff because the defendant's target market is likely to be fans of the plaintiff, "there
 6 is at least a likelihood of consumer confusion." *Wendt*, 125 F.3d at 813.

7 Here, this factor weighs in favor of Teller because Dogge appropriated elements of
 8 Teller's persona and "Shadows" illusion because the likely customers of Dogge's
 9 instructional DVDs of Teller's act are the fans of Teller's magic shows and of Teller's
 10 signature illusion. Therefore, pursuant to *Wendt*, there is at least a likelihood of consumer
 11 confusion.

12 Additionally, the marketing channel Dogge used to promote his mail-order prop is a
 13 marketing channel he knew already contained numerous videos of Teller's acts.
 14 Specifically, Dogge has admitted that after he watched Teller's performance of "Shadows"
 15 on YouTube numerous times, Dogge uploaded his marketing video to the exact same
 16 website. (See **Exhibit 4**, at 55:16-19; 65:23-66:15). Moreover, Dogge created a print
 17 advertisement for publication in magic trade show magazines, magazines whose audiences
 18 are most likely to be fans of Teller and familiar with "Shadows." Accordingly, this factor
 19 weighs heavily toward there being a likelihood of confusion.

20 **6. Factor #6: Degree of Care Likely to Be Used by Purchaser Is Low**

21 In applying this factor, courts look to whether consumers will be careful in
 22 determining who is endorsing the particular product involved. See *White*, 971 F.2d at 1400.
 23 In *White*, the Ninth Circuit reasoned that consumers were not likely to be particularly careful
 24 in determining who endorses VCRs, thus making confusion as to their endorsement more
 25 likely. *Id.*

26 Here, much like VCRs, magic-props are non-essential entertainment products,
 27 making consumers less likely to exercise caution in determining who is endorsing the
 28 product. Also, as Dogge admitted, the price of his mail-order prop was in the same range

1 as that of other magic-props for sale over the internet, making it less likely that a consumer
2 would exert any special care in determining actual endorsement before deciding to
3 purchase. (See **Exhibit 4**, Dogge Depo., at 106:3-21). Accordingly, this factor supports
4 there being a likelihood of confusion.

5 **7. Factor #7: Dogge Intentionally Associated Teller with his Product to**
6 **Increase His Sales**

7 The relevant question under this factor is “whether the defendants intended to profit
8 by confusing consumers.” *White*, 971 F.2d at 1400 (internal citations omitted). A court can
9 reasonably infer that a defendant intends to exploit a celebrity’s identity where there are
10 numerous ways the defendant could have marketed its product, but instead chose the
11 marketing route most invocative of the celebrity’s identity. See *Wendt*, 125 F3d at 813.

12 Here, Dogge has admitted to watching Teller perform “Shadows” numerous times
13 prior to when Dogge began promoting his mail-order prop and DVDs and has also admitted
14 to tagging his video advertisement with the metatag, “Teller.” (See **Exhibit 4**, Dogge
15 Depo., at 55:16-19; see *also* **Exhibit 7**, response to request no. 31, at 9). Dogge knew
16 that Teller’s name and signature illusion were highly recognizable and that Teller was one
17 of the leading magicians in the world. Indeed, when Teller first reached out to Dogge
18 concerning the infringement, Dogge responded that “it is really a big honor for me to hear []
19 from such a famous magician.” (See March 23, 2013 email from Gerard Dogge to Teller,
20 attached hereto as **Exhibit 10**).

21 Dogge has also argued that his mail-order materials can be used for illusions entirely
22 distinct from “Shadows,” including illusions that do not rely on a sympathetic effect on a
23 flower, and illusions that do not even involve shadows. (See **Exhibit 9**). This means that
24 Dogge could have created a marketing video demonstrating his prop using any number of
25 other illusions that did not involve the exact elements of “Shadows.” Because Dogge used
26 every aspect of Teller’s signature performance as well as tagging his promotional video
27 with the keyword, “Teller,” there can be no reasonable doubt that Dogge intended to
28 convince consumers that Teller was associated with the products Dogge was selling.

1 Taken together, there was little reason for Dogge to have used Teller's name and
2 signature illusion to market his supposed versatile prop unless he was trying to capitalize
3 on Teller's fame. Dogge's intentional use of Teller's signature illusion leads to a
4 presumption that the public will be deceived by such use and this factor weighs in favor of
5 finding a likelihood of confusion.

6 **8. Factor #8: Dogge Targeted a Market that Is the Natural Extension of**
7 **Teller's Product Line**

8 "Inasmuch as a trademark owner is afforded greater protection against competing
9 goods, a 'strong possibility' that either party may expand his business to compete with the
10 other will weigh in favor of finding that the present use is infringing." *Sleekcraft*, 599 F.2d at
11 534 (citing Restatement of Torts § 731(b)).

12 Although the Ninth Circuit has in the past indicated that this factor does not apply to
13 celebrity-endorsement unfair competition claims, it has since indicated that there are
14 instances where the factor would apply. See *Wendt v. Host International, Inc.*, 125 F.3d
15 806, 813 (9th Cir. 1997). For instance, in *Wendt*, the Ninth Circuit held that the actor who
16 played Cliff in the hit television series *Cheers*, had presented evidence that he intended in
17 the future to appear in advertisements for beer, and this evidence could easily weigh in his
18 favor in the likelihood of confusion analysis where the defendants were using an
19 animatronic robot based on his likeness to promote their *Cheers*-themed airport bars. *Id.*

20 As previously mentioned, once he retires from performing, Teller could license the
21 performance of "Shadows" to a highly gifted magician and/or market and sell the prop he
22 uses in his performances. Licensing signature performances and selling props relating to
23 the same is the natural progression for the careers of many magicians. As explained by
24 expert witness, Jim Steinmeyer, a magician's trademark illusion can be a significant source
25 of income and avenue to continue his legendary status. However, this expansion into the
26 natural trajectory of Teller's product line will be unfairly foreclosed if Dogge is allowed to
27 continue his infringing use of Teller's persona and signature illusion. Therefore, this factor
28 also weighs heavily in Teller's favor.

1 **IV. CONCLUSION**

2 In light of the foregoing, Plaintiff respectfully requests that this Court GRANT Teller's
3 motion for summary judgment on his unfair competition claim.

4 Dated this 8th day of July, 2013

5 GREENBERG TRAURIG, LLP

6 /s/ Mark G. Tratos

7 Mark G. Tratos (Bar No. 1086)

8 Thomas F. Kummer (Bar No. 1200)

9 Nancy Ayala (Bar No. 7146)

10 Peter Ajemian (Bar No. 09491)

11 3773 Howard Hughes Pkwy, Suite 400 North
12 Las Vegas, NV 89169

13 Counsel for Plaintiff
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GREENBERG TRAURIG, LLP
3773 Howard Hughes Parkway, Suite 400 North
Las Vegas, Nevada 89169
Telephone: (702) 792-3773
Facsimile: (702) 792-9002

CERTIFICATE OF SERVICE

Pursuant to Fed. R. Civ. P. 5(b), I hereby certify that on July 8, 2013, service of the foregoing **PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AS TO UNFAIR COMPETITION CLAIM** was made this date through the Court's CM/ECF electronic filing system, via electronic mail and United States mail, postage prepaid to:

Gerard Dogge
Hoevensebaan 2
2950 Kapellen
Belgium - Europe

/s/ Cynthia L Ney
An employee of Greenburg Traurig

GREENBERG TRAURIG, LLP
3773 Howard Hughes Parkway, Suite 400 North
Las Vegas, Nevada 89169
Telephone: (702) 792-3773
Facsimile: (702) 792-9002

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