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10 **SUNTECH POWER HOLDINGS CO., LTD.,**
11 **WUXI SUNTECH POWER CO., LTD., and**
12 **SUNTECH AMERICA, INC.**

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

13 **SUNTECH POWER HOLDINGS CO.,**
14 **LTD., a corporation of the Cayman**
15 **Islands, WUXI SUNTECH POWER**
16 **CO., LTD., a corporation of the**
17 **People's Republic of China; and**
18 **SUNTECH AMERICA, INC., a**
19 **Delaware corporation,**

20 Plaintiffs,

21 vs.

22 **SHENZHEN XINTIAN SOLAR**
23 **TECHNOLOGY CO., LTD., a**
24 **corporation of the People's Republic of**
25 **China, and SUN TECH SOLAR CO.,**
26 **LTD., a Hong Kong corporation**

27 Defendants.

Case No. 08 CV 01582 H NLS

**MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT OF PLAINTIFFS'
MOTION FOR PRELIMINARY
INJUNCTION**

DATE: October 6, 2008

TIME: 10:30 a.m.

CTRM: 13

Hon. Marilyn L. Huff

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1 **I. INTRODUCTION**

2 Plaintiffs Suntech Power Holdings Co., Ltd. and its subsidiaries Suntech
3 America, Inc. and Wuxi Suntech Power Co., Ltd. (collectively "Suntech") are
4 among the world's largest manufacturers and distributors of solar panels or
5 modules. These products are mounted on roofs of homes and buildings and on
6 other structures for converting solar energy into electrical energy. Suntech owns
7 and uses the federally registered SUNTECH trademark and has rights in the
8 unregistered mark SUNTECH in connection with the marketing and sale of its
9 solar energy products, including solar panels or modules.

10 Defendants ShenZhen Xintian Solar Technology Co., Ltd. and its
11 subsidiary Sun Tech Solar Co., Ltd. (collectively "Sun Tech Solar" herein) have
12 adopted and are using and threatening to use the marks SUN TECH and SUN
13 TECH SOLAR in connection with the sale and marketing of solar modules that
14 directly compete with those sold by Suntech.

15 Immediate injunctive relief is essential to protect Suntech's identity and to
16 protect the public from confusion caused by Sun Tech Solar's use of Suntech's
17 SUNTECH marks on identical competing products. Suntech has been and will
18 again be a major exhibitor at the Solar Power International 2008 trade show, the
19 largest solar power industry trade show in the United States. This year, the Solar
20 Power International 2008 trade show will be held in San Diego, October 13-16,
21 2008. Sun Tech Solar has registered and reserved space as an exhibitor at the
22 trade show and will, if not enjoined by this Court, promote its "Sun Tech"
23 products to consumers attending the show.

24 Plainly, use of the identical mark SUNTECH (whether spelled as one word
25 or two) by Suntech and Sun Tech Solar to designate products which are identical
26 and directly competitive is likely to cause confusion or mistake as to the source or
27 affiliation of Sun Tech Solar's products. Customers who sees a SUNTECH solar
28 module and then a SUN TECH SOLAR or SUNTECH solar module will be

1 mistaken that the products emanate from the same source. In fact, actual
2 confusion has already occurred. Suntech has already received phone calls from
3 customers seeking information and quoting prices for "Suntech" products that
4 were apparently sold by Sun Tech Solar, not Suntech. This confusion will
5 irreparably harm Suntech because it will have lost control over the mark by which
6 it is known to the public and the goodwill attached thereto. The need for
7 immediate injunctive relief to prevent extensive, irreparable harm is clear.

8 As early as May of this year, Suntech notified Sun Tech Solar of the
9 likelihood of confusion that would ensue by virtue of its use of an almost
10 identical trademark to that of Suntech on directly competing goods.
11 Unfortunately, Sun Tech Solar has refused to take seriously Suntech's demands
12 that it discontinue its trademark infringement, forcing Suntech to file a complaint
13 against Sun Tech Solar. Suntech is likely to succeed on the merits of its
14 trademark claims against Sun Tech Solar, and the balance of harms tips strongly
15 in Suntech's favor. Accordingly, Suntech requests that the Court grant its motion
16 and issue a preliminary injunction against further acts of trademark infringement.

17
18 **II. FACTUAL BACKGROUND**

19 **A. Suntech, Its Products and Trademarks**

20 Suntech is one of the largest solar module providers in the world. It is a
21 leader in the design and manufacture of solar energy solutions for a wide variety
22 of customers, including commercial and residential. Suntech's solar module
23 products include monocrystalline products, polycrystalline products and building
24 integrated photovoltaic (BIPV) MSK solar design products. These products are
25 sold to homeowners, commercial owners, architects and builders, contractors and
26 installers and dealers. (Efird Decl. ¶ 3)

27 Suntech's products are distributed nationwide. Suntech has sales offices,
28 installation partners and authorized dealers throughout the United States,

1 including in California. (Efird Decl. ¶ 4)

2 Suntech has experienced tremendous growth and commercial success in the
3 United States since it began selling solar products in the U.S. in 2003. While
4 Suntech's sales were modest before 2006, they have grown tremendously since
5 then. In 2006, sales in the U.S. were about \$25 million and in 2007, sales grew to
6 about \$125 million. (Efird Decl. ¶ 5)

7 Wuxi Suntech Power is the owner of United States Trademark Registration
8 No. 3,111,705 for "SUNTECH" and design ("the '705 Registration") shown
9 below:



11
12 The '705 registration issued on July 4, 2006 and contains the following goods
13 description: "Solar batteries; electrical accumulators for vehicles; accumulator
14 boxes; plates for batteries; batteries for lighting; batteries; battery chargers;
15 galvanic batteries; electric batteries, in Class 9." (Efird Decl. ¶ 6; Exhibit A
16 thereto).

17 Suntech Power and Suntech America have the exclusive right and license
18 to use the SUNTECH and design mark in the United States. Suntech Power and
19 Suntech America also use and own the unregistered mark SUNTECH in
20 connection with the sale of solar modules and other solar energy products. (Efird
21 Decl. ¶ 7).

22 Suntech advertises and promotes its products under its registered
23 SUNTECH and design mark and unregistered SUNTECH mark and name
24 (collectively "SUNTECH marks") in a variety of ways. For example, Suntech
25 uses its SUNTECH marks on its letterhead, business cards, forms including
26 invoices, purchase orders and the like, and on its product packaging. (Efird Decl.
27 ¶ 8; Exhibit B thereto). STP (which is recognized as an abbreviation for "Suntech
28 Power") appears on the actual solar modules and other products. The SUNTECH

1 marks also appear on all advertising material including pamphlets and brochures,
2 point of sale materials such as flyers and leaflets, instructions, manuals, trade
3 magazine and newspaper advertisements. (Efird Decl. ¶ 8; Exhibit C thereto).
4 The SUNTECH marks appear on Suntech's website, [http://www.suntech-
6 power.com/](http://www.suntech-
5 power.com/). (Efird Decl. ¶ 8; Exhibit D thereto). The SUNTECH marks also
7 appear on dealer websites and dealer advertising. (Efird Decl. ¶ 8; Exhibit E
8 thereto).

9 Suntech attends and displays its products at ten to twenty trade shows
10 annually, including the Solar Power International trade show and the Green
11 Buildings Conference. At these trade shows, the name and mark SUNTECH is
12 prominently displayed at Suntech's booth and is shown on advertising materials
13 given out at the show as well as on product packaging. (Efird Decl. ¶ 9).

14 Suntech has spent a great deal of time and expense in promoting,
15 advertising and marketing its solar energy products. Marketing, advertising and
16 promotional expenses for the last two years have been at least \$300,000 to
17 \$400,000. Virtually all of the marketing and advertising expenses involve the use
18 of the mark SUNTECH and Design and/or mark and name Suntech. (Efird Decl.
19 ¶ 10).

20 Suntech's products are uniquely recognized and easily distinguished within
21 the industry by virtue of Suntech's extensive sales and promotion. Coupled with
22 the quality of Suntech's products and its customer service, Suntech enjoys strong
23 customer satisfaction and is a leader in the sale and distribution of solar energy
24 products in the United States. (Efird Decl. ¶ 11).

25 **B. Defendants Sun Tech Solar, Their Products and Use Of SUN**
26 **TECH**

27 Sun Tech Solar is using the mark SUN TECH with respect to competitive
28 solar modules that are directed to the same customers as those to which Suntech

1 markets its solar modules. Among other things, Sun Tech Solar uses the marks
2 SUN TECH and SUN TECH SOLAR on solar panels and modules that directly
3 compete with Suntech's solar panels and modules.

4 Suntech became aware of Defendant Sun Tech Solar Company, Ltd. as a
5 result of telephone calls received by Roger Efird, President of Plaintiff Suntech
6 America, from several individuals seeking information about products branded
7 "Sun Tech" that Suntech did not sell, but that a company called Sun Tech Solar
8 sold. It was clear that the callers believed that Suntech was the source of these
9 products. As a result of these calls, Suntech conducted an internet search and
10 located the website of Sun Tech Solar, Co., Ltd. (Efird Decl. ¶ 12).

11 Suntech also became aware of Defendant Sun Tech Solar Company, Ltd.
12 by viewing a list of exhibitors to the Solar Power International 2008 trade show
13 scheduled for October 13-16, 2008 in San Diego, California. (Efird Decl. ¶ 13;
14 Exhibit F thereto). Under the Exhibitor Index, Suntech found the company name
15 Sun Tech Solar Company, Ltd. on the same page as Suntech's name, i.e., Suntech
16 Power Holdings Company, Ltd. Suntech Power Holdings Company, Ltd. and
17 Suntech America will have a substantial booth at this trade show. (Efird Decl. ¶
18 13).

19 By clicking on the name "Sun Tech Solar Company, Ltd." from the
20 Exhibitor List on the trade show's web site, the customer is directed to a page
21 containing information as to the location of the Sun Tech Solar booth, i.e., Booth
22 1813, at the Exhibition Hall of the trade show. The page also contains
23 information concerning the parent company Shenzhen Xintian Solar Technology
24 Company, Ltd. It is indicated that Sun Tech Solar Company, Ltd. is the Hong
25 Kong branch of Shenzhen Xintian Solar. The page also includes a link to the Sun
26 Tech Solar website, www.solarsuntech.com. (Efird Decl. ¶ 14; Exhibit G
27 thereto).
28

1 The Sun Tech Solar website contains web pages describing Sun Tech
2 Solar's products including solar PV (photovoltaic) module products. (Efird Decl.
3 ¶ 15; Exhibit H thereto). The PV module products are “solar batteries” as that
4 term is used in Suntech’s U.S. ‘705 Registration. The Sun Tech Solar solar
5 modules compete directly with Suntech's solar modules. (Efird Decl. ¶¶ 8, 16;
6 Exhibit E thereto).

7 **III. THE COURT SHOULD ISSUE A PRELIMINARY INJUNCTION**
8 **AGAINST FURTHER TRADEMARK INFRINGEMENT**

9 Suntech is entitled to a preliminary injunction so long as it shows either (1)
10 that it is likely to succeed on the merits of this action, and that there is a
11 possibility of irreparable harm if injunctive relief is not granted; or (2) that there
12 are serious questions regarding the merits of Suntech’s claims, and the balance of
13 hardships tips strongly in Suntech’s favor. *See, e.g., Brookfield Communications,*
14 *Inc. v. West Coast Entertainment Corp.*, 174 F.3d 1036, 1046 (9th Cir. 1999). As
15 the Ninth Circuit has explained, “[t]hese are not separate tests, but the outer
16 reaches 'of a single continuum.’” *Dollar Rent A Car, Inc. v. Travelers Indem. Co.*,
17 774 F.2d 1371, 1375 (9th Cir. 1985) (quoting *Benda v. Grand Lodge of the*
18 *International Association of Machinists & Aerospace Workers*, 584 F.2d 308, 315
19 (9th Cir. 1978). Thus, “in any situation, the court must find that there is at least a
20 fair chance of success on the merits . . . and that there is some threat of an
21 immediate irreparable injury.” *Premier Nutrition, Inc. v. Organic Food Bar, Inc.*,
22 475 F. Supp. 2d 995, 1000 (C.D. Cal. 2007).

23 Because Suntech is likely to succeed on the merits, and because the
24 potential harm to Suntech far outweighs any supposed potential harm to
25 Defendants, Suntech submits that it is entitled to an injunction under any standard
26 for granting a preliminary injunction.

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A. Suntech Is Likely To Prevail On The Merits Of Its Trademark Infringement Claims

As an initial matter, to prevail on its trademark infringement claims, Suntech must establish that it owns a valid trademark. As noted above, Suntech holds an incontestable trademark registration for the SUNTECH mark, and that registration constitutes prima facie evidence that the mark is valid. 15 U.S.C. § 1057(b). As a result, Suntech is entitled to a presumption that its registered SUNTECH mark is valid, and Defendants bear the burden of proving invalidity. *See Filipino Yellow Pages, Inc. v. Asian Journal Publs., Inc.*, 198 F.3d 1143, 1146 (9th Cir. 1999). In addition, through its marketing and sales activity described above, and its extensive use of the mark, Suntech has established common law trademark rights in the SUNTECH mark. *See Glow Indus. v. Lopez*, 252 F. Supp. 2d 962, 981 (C.D. Cal. 2002).

The other key issue in any trademark infringement action is “the likelihood of confusion, *i.e.*, whether the similarity of the marks is likely to confuse customers about the source of the products.” *Brookfield.*, 174 F.3d at 1053 (citations omitted). In *AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348-349 (9th Cir. 1979), the Ninth Circuit provided the following “non-exhaustive” list of factors that are relevant in “determining whether confusion between related goods is likely:

1. strength of the mark;
2. proximity or relatedness of the goods;
3. similarity of the marks;
4. evidence of actual confusion;
5. marketing channels used;
6. type of goods and the degree of care likely to be exercised by the purchaser;
7. defendant’s intent in selecting the mark; and

1 8. likelihood of expansion of the product lines."

2 In determining likelihood of confusion, courts within the Ninth Circuit
3 typically apply what has come to be known as the *Sleekcraft* test. *Mattel, Inc. v.*
4 *MCA Records, Inc.*, 28 F. Supp. 2d 1120, 1141 (C.D. Cal. 1998), *aff'd*, 296 F.3d
5 894 (9th Cir. 2002). *See also, Entrepreneur Media, Inc. v. Smith*, 279 F.3d 1135,
6 1140 (9th Cir. 2002) (the *Sleekcraft* test is intended to guide the court in
7 determining likelihood of confusion); *GoTo.com, Inc. v. Walt Disney Co.*, 202
8 F.3d 1199, 1205 (9th Cir. 2000) ("We have developed eight factors, the so-called
9 *Sleekcraft* factors, to guide the determination of a likelihood of confusion"); *Sony*
10 *Pictures Entertainment, Inc. v. Fireworks Entertainment Group, Inc.*, 156 F.
11 Supp. 2d 1148, 1161 and n.19 (C.D. Cal. 2001) (citing the *Sleekcraft* likelihood of
12 confusion test).

13 At the same time, courts have discouraged an overly mechanistic approach
14 to determining likelihood of confusion. Not all of the *Sleekcraft* factors have
15 equal weight, and not every factor will be at issue in every case. *See Thane*
16 *International, Inc. v. Trek Bicycle Corporation*, 305 F.3d 894, 901 (9th Cir.
17 2002). And finding confusion involves more than just counting how many
18 *Sleekcraft* factors favor each party: a court should instead use those factors for
19 guidance as part of an overall analysis of whether the alleged trademark
20 infringement is likely to confuse. *Id.* ("[t]he list of factors is not a scorecard —
21 whether a party 'wins' a majority of the factors is not the point").

22 Applying these principles here, it is evident that Suntech is likely to
23 succeed on the merits of its trademark claims. Every *Sleekcraft* factor favors
24 Suntech, and there is a high likelihood of confusion that can be remedied only by
25 injunctive relief.

26 **1. The Suntech Mark Is Strong**

27 A strong mark is one that is likely to make a consumer think a product or
28 service comes from a particular source. *See, e.g., Official Airline Guides v. Goss*,

1 6 F.3d 1385, 1392 (9th Cir. 1993) (“the stronger a mark, the more likely it is that
2 consumers will think that a product or service comes from a particular source”).

3 For purposes of determining strength, marks can be placed in any one of
4 several categories, which are referred to, in increasing order of distinctiveness, as
5 generic, descriptive, suggestive, arbitrary, or fanciful. *See, e.g., Kendall-Jackson*
6 *Winery, Ltd. v. E. & J. Gallo Winery*, 150 F.3d 1042, 1047 (9th Cir. 1998). A
7 generic term can never be protected as a trademark. A descriptive term is entitled
8 to trademark protection if it has acquired secondary meaning (that is, that the
9 mark has become distinct of the trademark owner’s goods in commerce). *Filipino*
10 *Yellow Pages*, 198 F.3d at 1147. Suggestive, arbitrary and fanciful marks,
11 “because their intrinsic nature serves to identify a particular source of a product,
12 are deemed inherently distinctive and are entitled to protection.” *Two Pesos, Inc.*
13 *v. Taco Cabana, Inc.*, 505 U.S. 763, 768 (1992).

14 The mark SUNTECH is not generic for any of the goods or services that
15 Suntech provides, nor does it describe those goods and services. Therefore, the
16 mark is arbitrary or fanciful, and entitled to strong protection as related to the
17 goods and services that are provided under the mark (including those concerning
18 hybrid and other automotive technology).

19 Marks that are suggestive or descriptive “may be strengthened by such
20 factors as extensive advertising, length of exclusive use, public recognition and
21 uniqueness.” *Accuride International, Inc. v. Accuride Corp.*, 871 F.2d 1531,
22 1536 (9th Cir. 1989). As explained above, Suntech has used the mark exclusively
23 in the field of providing services to the solar energy market for several years. The
24 industry recognizes the SUNTECH mark, and understands that the mark is
25 associated with Suntech.

26 For all of these reasons, the SUNTECH mark is strong, and this *Sleekcraft*
27 factor strongly favors Suntech.

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2. The Goods And Services Are Related

Suntech provides goods and services to the solar energy market, under its common law and registered SUNTECH marks. Those goods include solar panels or modules.

Sun Tech Solar uses the marks SUN TECH and SUN TECH SOLAR — which incorporate Suntech’s entire SUNTECH mark — with regard to the marketing and sales of the identical, competing products. Sun Tech Solar also uses the registered domain name <http://www.solarsuntech.com>, which is confusingly similar to Suntech’s domain name, <http://www.suntechpower.com>. (Efird Decl., ¶¶ 8, 14, 15 and Exhibits D and H)

Thus, the two companies both provide the same products to the same customers. The parties’ respective goods and services are not just closely related, but are the same. Hence, the second *Sleekcraft* factor, like the first, strongly favors Suntech.

3. The Marks Are Similar

Suntech’s registered trademark is SUNTECH. Sun Tech Solar is using that mark in its entirety -- "SUN TECH" and "SUN TECH SOLAR." Thus, the marks are not just similar, but they are essentially identical. *See, e.g., Playboy Enterprises Inc. v. Netscape Communications Corp.*, 354 F.3d 1020, 1028 (9th Cir. 2004) (marks were similar even though one was singular and the other was plural). In fact, the marks here are much more similar than the marks the Ninth Circuit found similar in *Sleekcraft* itself. *See Sleekcraft*, 599 F.2d at 351 (“[s]tanding alone the words Sleekcraft and Slickcraft are the same except for two inconspicuous letters ...[t]o the eye, the words are similar”).

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4. **Suntech’s Evidence Of Actual Confusion Is Strong Evidence That Consumers And The Public Also Are Likely To Be Confused In The Future**

Evidence of actual confusion is not necessary to prove a likelihood of confusion, and the absence of such evidence does not mean that confusion is unlikely to occur in the future. *Sleekcraft*, 599 F.2d at 353; *GoTo.com, Inc.*, 202 F.3d at 1208. Here, there is evidence of actual customer confusion - callers inquiring to Suntech about "SUNTECH" products that originated from Sun Tech Solar, not Suntech.

5. **The Parties Use Similar Marketing Channels**

Suntech markets its solar modules on its website, www.suntech-power.com. Sun Tech Solar markets its solar modules on its website www.solarsuntech.com that incorporates the entire SUNTECH mark. More significantly, as noted above, both parties market directly to the same customers. In addition, both parties market their products at solar trade shows, including the upcoming Solar Power International 2008 trade show. This *Sleekcraft* factor also strongly favors Suntech.

6. **The Type of Goods And Degree Of Care Factor Supports Finding A Likelihood Of Confusion**

Sun Tech Solar likely will argue that the solar energy industry is a sophisticated market, and that solar panels are relatively expensive products that are the subject of a higher degree of care, thus lessening the likelihood of confusion. However, any such contention fails, for at least two reasons.

First, "confusion may often be likely even in the case of expensive goods sold to discerning customers." *Brookfield*, 174 F.3d at 1060. "The effect of purchaser care, although relevant, will be less significant than, or largely dependent upon, the similarity of the marks at issue." *Daddy’s Junky Music Stores, Inc. v. Big Daddy’s Family Music Center*, 109 F.3d 275, 286 (6th Cir.

1 1997). Thus, where marks are similar, even a knowledgeable, careful consumer
2 could assume that the parties are affiliated. *Id. See also, Champions Gold Club*
3 *v. Champions Golf Club*, 78 F.3d 1111, 1120-21 (6th Cir. 1996) (golfers paying
4 \$15,000 to join private clubs might be confused as to whether one “Champions”
5 club was affiliated with another club using the same name). Here, the marks are
6 the same so even a sophisticated consumer might assume that Suntech and Sun
7 Tech Solar are the same company, or are affiliated with each other.

8 Second, purchaser care does nothing to dispel initial confusion, a type of
9 confusion actionable under the Lanham Act. “Initial interest confusion” arises
10 where when the junior user uses the senior user's mark “in a manner calculated to
11 capture initial consumer attention, even though no actual sale is finally completed
12 as a result of the confusion.” *Brookfield*, 174 F.3d at 1062 (quoting *Dr. Seuss*
13 *Enterprises, L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1405 (9th Cir.
14 1997). Even when the confusion is cured before a sale takes place, “initial
15 interest confusion impermissibly capitalizes on the goodwill associated with a
16 mark and is therefore actionable trademark infringement.” *Playboy*, 354 F.3d at
17 1025.

18 Therefore, this factor, like all of the others, favors Suntech.

19 **7. Defendants Are Trading Intentionally On Suntech’s Mark**

20 The SUNTECH mark was registered July 4, 2006. Thus, Sun Tech Solar
21 has had constructive knowledge of the SUNTECH mark before they began using
22 the mark in the U.S.. *See Brookfield*, 174 F.3d at 1059 (trademark registration
23 provides constructive notice to the world of the registrant's mark). The “intent”
24 factor favors the party alleging trademark infringement where the defendant
25 adopted its mark with constructive notice of the plaintiff’s trademark rights. *Id.*;
26 *see also, Surfivor Media, Inc. v. Survivor Prods.*, 406 F.3d 625, 634 (9th Cir.
27 2005).

28 If Defendants do not intend to trade on the goodwill that Suntech has built

1 in connection with the SUNTECH mark, they could select another mark.
2 Defendants' parent company name is Shenzhen Xintian Solar Technology Co.,
3 Ltd. Defendants could have chosen any number of other marks, but instead they
4 chose to use Suntech's.

5 **8. The Likelihood Of Expansion Also Favors Suntech**

6 Because Suntech and Sun Tech Solar's products, marketing and distribution
7 channels and customers are the same, the *Sleekcraft* "expansion" factor is
8 irrelevant. *See Playboy*, 354 F.3d at 1029. But even if Sun Tech Solar could
9 raise some question about the relatedness of the goods and services the parties
10 currently provide, they cannot dispute that the expansion factor would favor
11 Suntech.

12 In summary, all eight *Sleekcraft* factors strongly favor finding a likelihood
13 of confusion, and Suntech is likely to prevail on the merits of its trademark
14 infringement action against Defendants.

15 **9. Likelihood of Confusion In The Internet Context**

16 Because Suntech and Sun Tech Solar both use the internet extensively as a
17 channel of marketing and trade, special combinations of the *Sleekcraft* factors and
18 other factors apply to this case:

19 We have held that "in the context of the Web," the three most
20 important *Sleekcraft* factors in evaluating a likelihood of confusion
21 are (1) the similarity of the marks, (2) the relatedness of the goods or
22 services, and (3) the parties' simultaneous use of the Web as a
23 marketing channel. *GoTo.Com*, 202 F.3d at 1205. When this
24 "controlling troika," *id.* at 1205, or internet trinity, "suggests
25 confusion is ...likely," *id.* at 1207, ***the other factors must "weigh
26 strongly" against a likelihood of confusion*** to avoid the finding of
27 infringement. *Brookfield*, 174 F.3d at 1058.

28 *Interstellar Starship Servs. v. Epix, Inc.*, 304 F.3d 936, 942 (9th Cir. 2002)

1 (emphasis added).

2 Here, as explained above, Sun Tech Solar is using the entire "SUNTECH"
3 mark, the goods are identical and both parties use the internet as a marketing
4 channel. Each of these factors, therefore, strongly favors Suntech. Because the
5 other factors do not weigh strongly against a likelihood of confusion, Suntech is
6 likely to prevail.

7 **B. The Balance Of Hardships Tips Strongly In Suntech's Favor**

8 In a trademark infringement action, "[o]nce the plaintiff has demonstrated a
9 likelihood of confusion, it is ordinarily presumed that the plaintiff will suffer
10 irreparable harm if injunctive relief is not granted." *Metro Pub. v. San Jose*
11 *Mercury News*, 987 F.2d 637, 640 (9th Cir. 1993) (citing *Vision Sports, Inc. v.*
12 *Melville Corp.*, 888 F.2d 609, 612 n.3 (9th Cir. 1989)). Because Suntech has
13 established a likelihood of confusion, it is entitled to this presumption, and that
14 should be sufficient reason for the Court to issue a preliminary injunction.

15 In addition to this "presumptive" harm, Suntech faces actual irreparable
16 harm if Defendants are permitted to continue their willful infringement. Suntech
17 has spent years developing a reputation in the solar energy industry, and depends
18 for its business on its reputation and the attendant goodwill it now enjoys. That
19 reputation and goodwill are likely to be harmed irreparably if Sun Tech Solar is
20 allowed to confuse consumers, the trade and the public. (Efird Decl., ¶ 16).
21 Courts in this Circuit have held repeatedly that damage to goodwill qualifies as
22 irreparable harm in a preliminary injunction analysis. *See, e.g., Rent-A-Center,*
23 *Inc. v. Canyon Television and Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir.
24 1991) (district court did not err in finding that "intangible injuries" such as harm
25 to advertising efforts and goodwill were difficult to valuate and thus constituted
26 irreparable harm).

27 In comparison to the presumptive and actual irreparable harm that Suntech
28 faces if an injunction is not granted, Defendants will not be harmed at all if they

1 are enjoined from further infringing Suntech's mark. The only thing they will be
2 prohibited from doing is using the name "Suntech" for their business. Changing
3 their website and promotional materials will cost little, if anything. And any
4 purported harm to Defendants would be far outweighed by the potential
5 irreparable harm that Suntech faces — particularly in light of the strong
6 likelihood that Suntech will succeed on the merits of its trademark claims.¹

7 **IV. CONCLUSION**

8 Defendants are using Suntech's entire SUNTECH mark in connection with
9 the sale of solar modules that compete directly with those offered by Suntech.
10 Consumers not only are likely to be confused by Defendants' trademark
11 infringement — they already have been confused. Suntech faces much more
12 significant harm if injunctive relief is not granted than Defendants would suffer if
13 they are forced to stop infringing Suntech's marks. This is a clear case for
14 injunctive relief, and Suntech therefore requests that the Court grant its motion
15 and issue a preliminary injunction prohibiting Defendants (and those acting in
16 concert with them) from continuing to infringe the SUNTECH mark.

17
18 DATED: September 5, 2008

Respectfully submitted,
CHRISTIE, PARKER & HALE, LLP

20
21 By 
22 David A. Dillard
G. Warren Bleeker

23 Attorneys for Plaintiffs,
24 SUNTECH POWER HOLDINGS CO.,
LTD., WUXI SUNTECH POWER CO.,
25 LTD., and SUNTECH AMERICA, INC.

26
27 ¹ For the same reason, Suntech submits that any bond that is required in
28 connection with the preliminary injunction be in a de minimus amount. *See*
Fed.R.Civ.P. 65(c).

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CERTIFICATE OF SERVICE

I certify that on September 5, 2008, pursuant to Federal Rules of Civil Procedure, a true and correct copy of the foregoing document described as **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION** was served on the parties in this action by **ELECTRONIC MAIL & FACSIMILE** addressed as follows:

SHENZHEN XINTIAN SOLAR TECHNOLOGY CO., LTD. E-mail: styujiang@yahoo.com Facsimile: 011-86-755-28959162	SUN TECH SOLAR CO., LTD. E-mail: leonli@solarsuntech.com solar-xintian@163.com Facsimile: 852-2776-6274
--	--

I declare that I am employed by a member of the bar of this Court, at whose direction this service was made.

Executed on September 5, 2008 at Pasadena, California.



Roxanne Gaines

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1 **CERTIFICATE OF SERVICE**

2
3 I certify that on September 5, 2008, pursuant to Federal Rules of Civil
4 Procedure, a true and correct copy of the foregoing document described as
5 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS'**
6 **MOTION FOR PRELIMINARY INJUNCTION** was served on the parties in this action
7 by **HAND DELIVERY** addressed as follows:

8 SUN TECH SOLAR CO., LTD.
9 FlatB, 2/F, Lung Wa Building
10 22 Fuk Wa St.
11 Sham Shui Po
12 Kowloon
13 Hong Kong
14 E-mail: leonli@solarsuntech.com
15 solar-xintian@163.com
16 Facsimile: 852-2776-6274

17 I declare that I am employed by a member of the bar of this Court, at
18 whose direction this service was made.

19 Executed on September 5, 2008 at Pasadena, California.

20 _____
signature

21 RG PAS812051.1-* -09/5/08 12:56 PM