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19 **UNITED STATES DISTRICT COURT**
20 **CENTRAL DISTRICT OF CALIFORNIA**
21 **SOUTHERN DIVISION**

22 **B.B. GRAHAM & CO. INC.**
23 a California corporation,
24 Plaintiff,
25 v.
26 **KNOW YOUR OPTIONS, INC.,**
27 an Illinois corporation,
28 **BROKERSXPRESS, LCC,** an
Illinois limited liability company,
OPTIONSXPRESS HOLDINGS,
INC. an Illinois Corporation, and
Does 1 to 25, inclusive
Defendants.

Case No. SACV11-102 JST (CWx)

Judge: Hon. Josephine Tucker

Magistrate Judge: Hon. Carla
Woehrle

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
KNOW YOUR OPTIONS INC.'S
MOTION FOR SUMMARY
JUDGMENT OF ALL CLAIMS**

Date: September 26, 2011
Time: 10:00 am
Courtroom: 10A

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1 **I. INTRODUCTION**

2 This is a classic case of a party abusing intellectual property in an attempt to
3 extract a benefit to which it is not entitled. The defendant is Know Your Options,
4 Inc. (“KYO”), a registered investment advisor (“RIA”) with its only office in
5 Chicago, Illinois. Since 2006, KYO has provided services, advice, and education in
6 relation to investment services, including options trading, to its clients. This
7 lawsuit was initiated in late 2010 by B.B. Graham & Co. (“B.B. Graham”), which
8 is engaged in counseling clients in a variety of financial services.

9 All of the claims in B.B. Graham’s Complaint are based on its alleged
10 trademark registration in the slogan “know your options,” which is registered in
11 relation to “financial services in the field of options trading.” But B.B. Graham is
12 estopped from bringing these claims against KYO because it (1) sat on its rights
13 for years before ever contacting KYO, and (2) then failed to act for seventeen
14 months after KYO clearly conveyed to B.B. Graham its understanding and belief
15 that KYO did not infringe B.B. Graham’s invalid mark. B.B. Graham knew of
16 KYO’s intentions to expand and promote its business, but it did nothing while
17 KYO took steps to significantly further the use of its name.

18 B.B. Graham’s claims also fail on their merits. Even if the alleged mark is
19 deemed “incontestable,” it should never have been issued and should now be
20 canceled. It is a generic informational slogan that serves no source-identifying
21 function. Moreover, KYO is not infringing B.B. Graham’s alleged mark because
22 no likelihood of consumer confusion exists. A consumer of financial services in the
23 field of options trading would not think that the services offered by KYO are
24 actually being offered by B.B. Graham.

25 The Court should grant summary judgment in favor of KYO on all of these
26 grounds, each one of which disposes of all counts.

II. ABBREVIATED STATEMENT OF UNCONTROVERTED FACTS

Michael A. Cavanaugh founded and incorporated KYO in October 2006. (Statement of Uncontroverted Facts (“UF”) ¶ 1.) Mr. Cavanaugh did so without any knowledge of plaintiff’s registration. (UF ¶ 12.) As of 2006, several entities other than KYO (and B.B. Graham) had used the slogan “know your options” in the field of options trading. (UF ¶¶ 44-47, 50, 64, 71.)

Starting in 2006, KYO and its founder Michael Cavanaugh began to promote KYO through a variety of outlets, including by speaking at events, participating in panel discussions, and conducting podcasts, webcasts, and webinars on options trading. (UF ¶¶ 4-8.) KYO also began spending significant resources promoting its business through its website and by employing public relations professionals. (UF ¶¶ 2-3, 9.) Since October 2006, KYO has had an Internet presence at <http://www.brokersxpress.com/know-your-options/>. (UF ¶ 2.) On or about September 27, 2007, KYO changed its website to www.knowyouroptionsinc.com, and the previous home page began automatically redirecting to that site. (UF ¶ 3.)

From its inception until May of 2009, KYO had no knowledge of B.B. Graham’s registration. (UF ¶ 12.) In May 2009, B.B. Graham sent KYO a letter, which first informed KYO that B.B. Graham owned U.S. Trademark Registration 2,300,454 for “KNOW YOUR OPTIONS” in the class of “financial services in the field of options trading.” (UF ¶ 13.) Over the next several weeks, the parties’ principals spoke over the phone. (UF ¶¶ 23-25.) During that time, B.B. Graham’s principal (Bruce Edward Graham) represented to Mr. Cavanaugh that B.B. Graham and KYO could co-exist with KYO continuing to use its name, but that B.B. Graham wanted a fee for KYO to license the mark. (UF ¶ 23.) KYO explained that it believed a license was not necessary for several reasons. (UF ¶ 24.) It also told B.B. Graham that in the near future that a KYO employee, Mike Tosaw, planned to

1 publish a book to, among other things, promote KYO. (UF ¶ 25.)

2 On August 7, 2009, counsel for KYO responded in writing to B.B. Graham's
3 letter. (UF ¶ 14.) KYO explained that discontinuance of KYO's use of B.B.
4 Graham's alleged mark was unnecessary at least because (1) the alleged mark had
5 lost significance (or never had significance in the first instance), (2) likelihood of
6 consumer confusion was not present, and (3) any alleged remedy was likely barred
7 by equitable estoppel. (UF ¶ 14.) KYO also informed B.B. Graham that "KYO has
8 been operating since October of 2006 and yet was not contacted by [B.B. Graham]
9 until almost three years after its creation." (UF ¶ 15.) KYO received no response
10 from B.B. Graham until it was served with the Complaint, seventeen months later
11 on January 4, 2011. (UF ¶ 16.)

12 Between August 7, 2009 and January 4, 2011, KYO took significant steps to
13 promote its business. (UF ¶¶ 28-31.) For example, Mr. Tosaw's book was
14 published in May 2010. (UF ¶ 29.) The book refers to KYO by the name "Know
15 Your Options" and lists KYO's website address, www.knowyouroptionsinc.com. .
16 (UF ¶ 30.) Through its mid-2009 communications with KYO, B.B. Graham was
17 well aware of this planned activity before it filed suit approximately seventeen
18 months later. (UF ¶ 23-25.) In the first half of 2010, KYO also went through the
19 process of becoming an RIA by filing various documents with the Financial
20 Industry Regulatory Authority ("FINRA"). (UF ¶ 28.)

21 KYO has promoted its business through numerous public appearances, radio
22 shows, podcasts, webinars, and panel discussions. (UF ¶ 31.) Several of those
23 podcasts and webinars remain available on the web. (UF ¶ 31.) KYO has also
24 invested substantial resources in advertising, its website, and other promotional
25 services, in part by engaging consultants in public relations, search engine
26 optimization, and social media. (UF ¶ 9.) The value of these activities is
27 approximately \$200,000 or more. (UF ¶¶ 18-20.) It would take a significant effort

1 and at least three years to redevelop similar material and goodwill if KYO was
2 forced to use another domain name. (UF ¶¶ 18-21.)

3 At no time has KYO been aware of any actual confusion between itself and
4 B.B. Graham. For instance, no client has ever contacted KYO looking for B.B.
5 Graham. (UF ¶ 76.)

6 Additionally, “know your options” is widely used in conjunction with
7 options trading. Indeed, when “‘know your options’ AND ‘options trading’” is
8 searched on the Internet, over 18,000 results are returned. (UF ¶¶ 34-35.)

9 In light of these indisputable facts, B.B. Graham’s claims cannot stand as a
10 matter of law, and the Court should grant summary judgment.

11 **III. ARGUMENT**

12 **A. Summary Judgment Standard**

13 A party is entitled to judgment as a matter of law when there is no genuine
14 dispute as to any material fact. Fed. R. Civ. P. 56(a). Summary judgment is
15 mandated “against a party who fails to make a showing sufficient to establish the
16 existence of an element essential to that party’s case, and on which that party will
17 bear the burden of proof.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).
18 Once the moving party has shown that the non-moving party lacks sufficient
19 evidence to carry its burden at trial, the non-moving party must produce evidence
20 to support its claim or defense. *Nissan Fire & Marine Ins. v. Fritz Cos.*, 210 F.3d
21 1099, 1102-03 (9th Cir. 2000).

22 **B. Relevance of Alleged Incontestability**

23 Federal registration provides a party with certain rights throughout the
24 United States. Once a trademark has been used continuously for five years, the
25 trademark owner can file for “incontestability” status, which limits the grounds
26 under which the trademark can be invalidated. 15 U.S.C. § 1065. Nevertheless,
27 even an “incontestable” trademark can be challenged during litigation based on

1 several grounds enumerated in the statute. 15 U.S.C. § 1064(3). For example, a
 2 mark that is generic can be canceled even if incontestable. *Reno Air Racing Ass'n*
 3 *v. McCord*, 452 F.3d 1126, 1135 (9th Cir. 2006) (“To be sure, even an
 4 incontestable mark is subject to challenge as generic.”).

5 In this case, even if B.B. Graham’s alleged mark is afforded incontestability,
 6 it should be canceled because it is generic and therefore is not a trademark at all.¹
 7 Moreover, no evidence of infringement is present here.² However, regardless of the
 8 merits of the case, the court should grant summary judgment in KYO’s favor
 9 because B.B. Graham should be barred from bringing its claims due to laches and
 10 equitable estoppel.

11 **C. B.B. Graham is Barred By Laches From Bringing Its Claims**

12 Laches applies where (1) the plaintiff unreasonably delays bringing suit, and
 13 (2) the defendant is prejudiced by the delay. *See Internet Specialties W., Inc. v.*
 14 *Milon-Digiorgio Enters.*, 559 F.3d 985, 990 (9th Cir. 2009). Whether laches
 15 precludes a party from bringing its claims is appropriate for summary judgment.
 16 *See Grupo Gigante S.A. v. Dallo & Co.*, 391 F.3d 1088, 1101-05 (9th Cir. 2004)
 17 (affirming summary judgment that a four year delay prevented the plaintiff’s
 18 trademark claim for injunctive relief). Moreover, a successful laches defense bars
 19 both monetary damages and injunctive relief. *See, e.g., Jarrow Formulas, Inc. v.*
 20 *Nutrition Now, Inc.*, 304 F.3d 829, 837 n.5 (9th Cir. 2002).

21 **1. A Presumption Of Laches Applies Here**

22 A presumption of laches exists where a plaintiff does not file suit within the
 23 applicable statute of limitations. *See Internet Specialties*, 559 F.3d at 990-91. In
 24 the case of a trademark claim in California, the applicable statute of limitations is
 25 four years, and the period is calculated from when the plaintiff knew or should
 26

27 ¹ *See infra* § E.

28 ² *See infra* § F.

1 have known of a potential likelihood of confusion between itself and the defendant
2 allegedly existed. *Id.*

3 KYO incorporated in October 2006. (UF ¶ 1.) At that time, KYO was
4 present on the Internet through several webpages on brokersXpress' website,
5 including without limitation [http://www.brokersxpress.com/know-your-
7 options/letter.aspx](http://www.brokersxpress.com/know-your-
6 options/letter.aspx). (UF ¶ 2.) B.B. Graham would have been able to locate KYO by
8 performing a simple search on the Internet. Thus, had it acted as a reasonably
9 prudent trademark owner policing its mark, it would have known that a potential
10 conflict existed as of October 2006. *See, e.g., E-Systems, Inc. v. Monitek, Inc.*, 720
11 F.2d 604, 607 (9th Cir. 1983) ("Plaintiff ought to have discovered defendant's use
sooner had it been diligently seeking to enforce its mark.").

12 However, B.B. Graham did not contact KYO until May 4, 2009, when it sent
13 a letter regarding its alleged trademark rights. (UF ¶ 13.) In response to the May 4,
14 2009 letter, KYO informed B.B. Graham that it had been using its name since
15 October 2006 and that discontinuance was unnecessary for a number of reasons.
16 (UF ¶¶ 14-15.) Even so, B.B. Graham then waited almost seventeen months (and
17 over four years after the date B.B. Graham had been told (in 2009) that KYO
18 began using its name) before it filed suit in December 2010. (UF ¶ 16.) Because
19 this lawsuit was filed over four years after B.B. Graham should have been aware of
20 KYO was using the name "Know Your Options" a presumption of laches applies.
21 *Internet Specialties*, 559 F.3d at 990.

22 **2. The *E-Systems* Factors Show That Laches Bars B.B.**
23 **Graham's Claims**

24 Even if one assumed, *arguendo*, no presumption of laches, application of the
25 *E-Systems* factors shows laches as a matter of law. The Ninth Circuit applies the *E-*
26 *Systems* factors to determine whether laches exists in a trademark case. The six
27 factors are: 1) the strength and value of trademark rights asserted; 2) plaintiff's

1 diligence in enforcing mark; 3) the harm to the senior user if relief is denied; 4) the
2 good faith ignorance by junior users; 5) competition between senior and junior
3 users; and 6) the extent of harm suffered by the junior user because of the senior
4 user's delay. *E-Systems*, 720 F.2d at 607.

5 Here, these factors overwhelmingly favor KYO. First, B.B. Graham's
6 alleged mark is generic (or at most descriptive).³ B.B. Graham's weak or invalid
7 mark favors a finding of laches. *See Grupo Gigante*, 391 F.3d at 1102.

8 Second, B.B. Graham cannot demonstrate diligence in enforcing its mark.
9 B.B. Graham waited nearly three years after information about KYO was publicly
10 available before contacting KYO regarding the alleged mark. (UF ¶¶ 12-13.) B.B.
11 Graham then waited an almost seventeen months after KYO informed it that the
12 mark had been used since October 2006 to file suit. (UF ¶ 16.) B.B. Graham's lack
13 of diligence in enforcing its mark also favors a finding of laches. *See id.* at 1102-03
14 ("Companies expecting judicial enforcement of their marks must conduct an
15 effective policing effort.") (emphasis in original).

16 Third, given that the level of sophistication of consumers in the relevant
17 field is very high, harm to B.B. Graham from consumer confusion is highly
18 unlikely. (UF ¶¶ 78-79.) The situation here is analogous to that in *E-Systems*,
19 where the court recognized that the plaintiff would not be harmed:

20 Maintaining the status quo will protect Monitek's good faith
21 investment in its tradename and trademark and will not harm free
22 competition. A few consumers may be confused about the source of a
23 product. However, . . . most industrial consumers of E-Systems'
24 ["Montek" products] and Monitek's products are sufficiently
25 sophisticated to distinguish among precision control devices of
26

27 ³ B.B. Graham's alleged mark is an informational slogan, and generic for at least
28 that reason. (*See infra* § E.)

1 varying types which must meet demanding technical specifications.

2 *See id.* at 607. Because B.B. Graham is unlikely to be harmed by KYO's use of the
3 alleged mark, this factor also favors a finding of laches.

4 Fourth, KYO was not aware of B.B. Graham when it adopted its name. (UF
5 ¶ 12.) This demonstrates KYO's good faith in this dispute and favors a finding of
6 laches. *See E-Systems*, 720 F.2d at 607 (“[The defendant, Monitek,] used the name
7 in good faith ignorance of [the plaintiff, Montek]. It would be inequitable to force
8 Monitek to abandon the name completely in light of the extended period over
9 which Montek could have discovered Monitek's use of its name on its products.”).

10 Fifth, even though the parties may be competitors, as explained in detail
11 below, confusion between the parties is highly unlikely, a point that is recognized
12 by B.B. Graham. For example, B.B. Graham has offered KYO a license to
13 continue using the “Know Your Options” name, such that the companies could co-
14 exist.⁴ (UF ¶ 75.) Further, B.B. Graham has neither alleged nor shown evidence of
15 of actual confusion, and KYO is aware of none. (UF ¶¶ 76-77.)

16 Finally, KYO would be significantly harmed if required to discontinue use
17 of its name and its domain name. (UF ¶¶ 18-21.) In fact, the harm that KYO
18 would experience shows it has been prejudiced by B.B. Graham's delay. A
19 defendant demonstrates prejudice by showing “that it has continued to build a
20 valuable business around its trademark during the time that the plaintiff delayed
21 the exercise of its legal rights.” *See Grupo Gigante*, 391 F.3d at 1105. “A
22 defendant may establish prejudice by showing that during the delay, it invested
23 money to expand its business or entered into business transactions based on his
24 presumed rights.” *Miller v. Glenn Miller Prods.*, 318 F. Supp. 2d 923, 944 (C.D.
25 Cal. 2004) (finding laches or estoppel barred plaintiff's claims), *aff'd*, 454 F.3d
26

27 ⁴ Confusion is so unlikely here that summary judgment should also be granted on
28 that issue. (*Infra* § F.)

1 975, 999 (9th Cir. 2006).

2 KYO has built up a tremendous amount of goodwill since the company's
3 inception. Starting in October 2006, KYO, its founder Michael Cavanaugh, and its
4 employees have promoted KYO by speaking at events and as part of panel
5 discussions, conducting podcasts, webcasts, and webinars on options trading. (UF
6 ¶¶ 4-8.) KYO has also spent significant resources promoting its business through
7 its website and by employing public relations professionals. (UF ¶ 9.) The "Know
8 Your Options" name has been specifically used in conjunction with KYO's
9 business, and remains in books and on the Internet, often on third party websites.
10 (UF ¶¶ 10-11.) Indeed, KYO's name is embedded in numerous podcasts and other
11 recordings that are still played today. (UF ¶ 31.) It would be difficult or impossible
12 to change these references to KYO, many of which exist on third party websites
13 not controlled by KYO. (UF ¶ 19.) Moreover, the value of all of KYO's activities
14 is approximately \$200,000 or more. (UF ¶ 20.) It would cost approximately that
15 much (or more) and take at least three years for KYO to develop similar material
16 and goodwill if KYO was forced to discontinue use of its name. (UF ¶¶ 20-21.)

17 Because the *E-Systems* factors overwhelmingly favor KYO, the Court
18 should grant summary judgment in favor of KYO.

19 **D. B.B. Graham Is Estopped From Asserting Its Alleged Rights**
20 **Against KYO**

21 The Court should also find that B.B. Graham is equitably estopped due to
22 B.B. Graham's conduct. Estoppel arises when one party's conduct misleads
23 another to believe that particular rights will not be enforced, and when the second
24 party acts, to its detriment, in reliance upon this belief. *Novell, Inc. v. Weird Stuff,*
25 *Inc.*, No. C92-20467 JW/EAI, 1993 U.S. Dist. LEXIS 6674, *42 (N.D. Cal. May
26 14, 1993) (citing *Saverslak v. Davis-Cleaver Produce Co.*, 606 F.2d 208, 213 (7th
27 Cir. 1979)). Equitable estoppel focuses on the effect of a party's conduct without

1 regard to the party's intent. *Id.* (citing *Saverslak*, 606 F.2d at 213).

2 Equitable estoppel has three elements: (1) a party communicates something
3 in a misleading way, either by words, conduct, or silence; (2) another party relies
4 upon that communication; and (3) the second party would be harmed materially if
5 the first party is later permitted to assert any claim inconsistent with its earlier
6 conduct. *A. C. Aukerman Co. v. R. L. Chaides Constr. Co.*, 960 F.2d 1020, 1041
7 (Fed. Cir. 1992); *see also Lehman v. United States*, 154 F.3d 1010, 1016 (9th Cir.
8 1998).

9 Estoppel applies here because: (1) B.B. Graham led KYO to reasonably
10 believe that B.B. Graham did not intend to enforce its alleged trademark rights
11 against KYO; (2) KYO relied upon B.B. Graham's conduct in expanding and
12 marketing its business; and (3) KYO would be materially prejudiced if B.B.
13 Graham were allowed to proceed with its claim. *Aukerman*, 960 F.2d at 1041.
14 Thus, the court should dismiss B.B. Graham's claims because B.B. Graham is
15 equitably estopped from bringing any claim against KYO as a matter of law. *See*
16 *Aspex Eyewear Inc. v. Clariti Eyewear, Inc.*, 605 F.3d 1305, 1314 (Fed. Cir. 2010)
17 (affirming district court's summary judgment finding of equitable estoppel).

18 **1. B.B. Graham's Misleading Conduct**

19 B.B. Graham misled KYO into believing it would not enforce its alleged
20 rights against KYO. Misleading conduct can stem from inaction where there is a
21 duty to act. *Aukerman*, 960 F.2d at 1028. In this case, B.B. Graham sat on its
22 rights for years before contacting KYO. (UF ¶ 13.) Then, B.B. Graham failed to act
23 for nearly seventeen months after KYO clearly communicated its understanding
24 that KYO was not infringing any of B.B. Graham's alleged rights. (UF ¶ 16.)
25 Moreover, B.B. Graham had been expressly informed of KYO's plans to expand
26 its use of its name in 2010, yet B.B. Graham failed to act. (UF ¶¶ 23-25.)

27 Despite KYO's existence since 2006, B.B. Graham did not contact KYO

1 about its alleged trademark rights until May 4, 2009. (UF ¶¶ 12-13.) Over the next
2 few weeks, Mr. Graham represented to Mr. Cavanaugh that B.B. Graham and
3 KYO could co-exist, and KYO could continue to use its name via a license. (UF ¶
4 23.) In response Mr. Cavanaugh explained that he did not believe a license was
5 necessary. (UF ¶ 24.) Mr. Cavanaugh also expressly informed B.B. Graham, in
6 response to Mr. Graham's questioning, that he planned to expand the use of KYO's
7 name in 2010 (e.g., in a book). (UF ¶ 25.) Yet despite this knowledge, B.B.
8 Graham chose to lay in wait for KYO to further its use, making B.B. Graham's
9 opportunistic timing all the more harmful to KYO. KYO received no further
10 written communication from B.B. Graham until the Complaint in this action was
11 served seventeen months later on January 4, 2011. (UF ¶ 27.)

12 B.B. Graham is equitably estopped from bringing these claims because it
13 failed to police its mark for over two years, then failed to act until at least
14 seventeen months after KYO clearly stated that it did not infringe any of B.B.
15 Graham's alleged rights. *Cf. Edge Games, Inc. v. Elec. Arts, Inc.*, 745 F. Supp. 2d
16 1101, 1118 (N.D. Cal. 2010) (finding that it would greatly prejudice the defendant
17 to issue a preliminary injunction after the plaintiff waited twenty-one months to
18 allow defendant's franchise to expand prior to filing suit). B.B. Graham's inaction
19 was especially misleading given that Mr. Graham knew that Mr. Cavanaugh had
20 already invested significant resources in promoting KYO and intended to invest
21 additional resources to grow and promote KYO in the future.

22 2. KYO Relied on B.B. Graham's Silence

23 Before May 2009, KYO was unaware of B.B. Graham, and B.B. Graham did
24 nothing to inform KYO of its alleged trademark rights despite KYO's increased
25 presence in the market. Additionally, after August 2009, KYO reasonably believed
26 that it was free to use the name "Know Your Options" due to B.B. Graham's
27 silence. KYO's August 2009 letter could not have been more clear in its statement

1 of what KYO believed its rights to be:

2 [V]oluntary discontinuance of KYO's use is unnecessary due to at
3 least (1) the loss in significance of B.B. Graham & Co's ("B.B.
4 Graham") service mark, (2) the absence of any likelihood of
5 confusion, and (3) the likely barring of any alleged remedy by the
6 doctrine of equitable estoppel. . . . This should address any concerns
7 that your client may have. Please do not hesitate to contact me if you
8 wish to discuss this matter further.

9 (UF ¶ 14.) Through its prolonged silence, both before May 2009 and after KYO's
10 letter, B.B. Graham led KYO to believe that B.B. Graham did not intend to enforce
11 its trademark rights against KYO. *See Aspex Eyewear*, 604 F.3d at 1310-11
12 (discussing cases where silence following a cease and desist letter constitutes a
13 basis for finding equitable estoppel).

14 In reliance on this belief, KYO continued to expand its business. (UF ¶ 27.)
15 In the first half of 2010, KYO took the expensive step of registering as an RIA
16 under the name Know Your Options, Incorporated. This process involved filing
17 lengthy documents with FINRA. (UF ¶ 28.) Moreover, after August 2009, KYO
18 promoted its business through numerous public appearances, radio shows,
19 podcasts, webinars, and panel discussions. (UF ¶ 31.) The aforementioned podcasts
20 and webinars remain available on the Internet. (UF ¶ 31.) Additionally, KYO and
21 its executives or employees were quoted or identified in numerous print and online
22 sources, including the Wall Street Journal, and have been quoted on book covers
23 and in books, using KYO's name and website. (UF ¶ 8.) Furthermore, KYO's
24 employee, Mike Tosaw published his book in May 2010 (as KYO's principal had
25 previously told B.B. Graham's principal). (UF ¶¶ 25, 29-30.) It refers to KYO by
26 the name "Know Your Options" and lists KYO's website address
27 www.knowyouroptionsinc.com. (UF ¶ 30.)

1 KYO invested substantial time and money into building and promoting its
2 business between KYO's August 2009 letter and January 2011 when it was served
3 with the lawsuit.

4 **3. Material Prejudice to KYO**

5 If KYO should be prevented from using its name, it will suffer severe
6 economic prejudice as a result of B.B. Graham's misleading conduct. KYO
7 expended considerable resources on promoting its business both before and since
8 August 2009. (UF ¶¶ 2-9, 31.) *See Aspex Eyewear*, 604 F.3d at 1312-13 (affirming
9 district court's finding of material prejudice based on defendant's commercial
10 activities undertaken during period of silence). The value of KYO's activities is
11 approximately \$200,000 or more. (UF ¶ 20.) It would cost approximately that
12 much (or more) and take at least 3 years for KYO to develop similar material and
13 goodwill should KYO be forced to change its name. (UF ¶¶ 20-21.)

14 Although B.B. Graham knew of KYO's intent to publish a book and
15 undertake other expensive promotional activities, B.B. Graham waited silently
16 while KYO invested time, effort, and resources in promoting its business. As a
17 result, KYO will suffer the loss of monetary investments and incur damages which
18 easily could have been prevented by an earlier suit. This is exactly the inequitable
19 result that estoppel seeks to prevent. *See Aukerman*, 960 F.2d at 1033.

20 Accordingly, KYO's motion for summary judgment that B.B. Graham's
21 claims are barred by equitable estoppel should be granted.

22 **E. B.B. Graham's Registration Should Be Canceled Because Its** 23 **Mark Is Generic**

24 Additionally, B.B. Graham cannot prove its claims on their merits because
25 its federal mark is invalid. B.B. Graham's alleged mark should be canceled
26 because it fails to meet the requirements for federal trademark registration. "The
27 purpose of the Lanham Act is to protect consumers against deceptive designations

1 of the origin of goods and, conversely, to enable producers to differentiate their
 2 products from those of others.” *Autodesk, Inc. v. Dassault Systemes Solidworks*
 3 *Corp.*, 685 F. Supp. 2d 1023, 1028 (N.D. Cal. 2009) (citing *Int’l Order of Job’s*
 4 *Daughters v. Lindeburg & Co.*, 633 F.2d 912, 918-19 (9th Cir. 1980)) (emphasis
 5 added). Trademark rights therefore derive from the use of a particular mark in
 6 relation to a particular good or service. In other words, a trademark does not exist
 7 in the abstract. Rather, it must be used in conjunction with a particular good or
 8 service, such that it creates an impression in the mind of a consumer that the good
 9 or service comes from a particular source. *See id.* (“[T]he targeted unauthorized
 10 use of a trademark must be a use ‘in connection with a commercial transaction in
 11 which the trademark is being used to confuse potential consumers.’”) (quoting
 12 *Bosley Med. Inst., Inc. v. Kremer*, 403 F.3d 672, 676 (9th Cir. 2005)).

13 “Know your options” is generic and incapable of serving a trademark
 14 function in relation to the services of “financial services in the field of options
 15 trading.” 15 U.S.C. § 1064(3); *see also Rudolph Int’l v. Realys Inc.*, 482 F.3d 1195,
 16 1197 (9th Cir. 2007) (affirming district court’s finding of genericness on summary
 17 judgment). Importantly, incontestability status does not protect generic terms. *See*
 18 15 U.S.C. § 1065(4); *see also Reno Air Racing Ass’n v. McCord*, 452 F.3d 1126,
 19 1135 (9th Cir. 2006) (“To be sure, even an incontestable mark is subject to
 20 challenge as generic.”).

21 **1. “Know Your Options” Is An Informational Slogan**
 22 **That Provides No Trademark Function**

23 Slogans or informational statements used in conjunction with goods or
 24 services serve no trademark purpose because they do not indicate the source of the
 25 good or service. “Slogans that are considered to be merely informational in nature,
 26 or to be common laudatory phrases or statements that would ordinarily be used in
 27 business or in the particular trade or industry, are not registrable.” *See* TMEP §

1 1209.03(s) (emphasis added). More particularly, “[u]se of a designation or slogan
 2 to convey advertising or promotional information, rather than to identify and
 3 indicate the source of the services, is not service mark use.” TMEP § 1309.02(a).
 4 Indeed, they are frequently denied registration by the trademark office.⁵ Moreover,
 5 even when such slogans make their way onto the Federal Register, such alleged
 6 marks are properly canceled during litigation because they can never serve a
 7 trademark function. *See e.g., In re Melville Corp*, 228 U.S.P.Q. (BNA) 970
 8 (T.T.A.B. 1986) (“Such a highly descriptive and informative slogan should remain
 9 available for other persons or firms to use to describe the nature of their
 10 competitive services.”); *In re Brock Residence Inns, Inc.*, 222 U.S.P.Q. (BNA) 920
 11 (T.T.A.B. 1984) (“Informational expressions may likewise, in appropriate cases, be
 12 found to be unregistrable even upon the Supplemental Register because of their
 13 informational nature.”).

14 B.B. Graham uses “know your options” as a slogan. B.B. Graham readily
 15 concedes this in its advertising and promotional materials. (UF ¶ 32.) As used by
 16 B.B. Graham, the slogan does not act as a source identifier, rather it is merely

17
 18 ⁵ *See* TMEP § 1309.02(a); *see also, e.g., In re Melville Corp.*, 228 U.S.P.Q. (BNA)
 19 970 (T.T.A.B. 1986) (‘BRAND NAMES FOR LESS’ found to be informational
 20 phrase that does not function as a mark for retail store services); *In re Brock*
 21 *Residence Inns, Inc.*, 222 U.S.P.Q. (BNA) 920 (T.T.A.B. 1984) (‘FOR A DAY, A

22 WEEK, A MONTH OR MORE’ so highly descriptive and informational in nature
 23 that purchasers would be unlikely to perceive it as an indicator of the source of
 24 hotel services); *In re Wakefern Food Corp.*, 222 U.S.P.Q. (BNA) 76 (T.T.A.B.
 25 1984) (‘WHY PAY MORE’ found to be a common commercial phrase that does
 26 not serve to identify grocery store services); *In re Gilbert Eiseman, P.C.*, 220
 27 U.S.P.Q. (BNA) 89 (T.T.A.B. 1983) (‘IN ONE DAY’ not used as source identifier
 28 but merely as a component of advertising matter that conveyed a characteristic of
 applicant’s plastic surgery services); *In re European-American Bank & Trust Co.*,
 201 U.S.P.Q. (BNA) 788 (T.T.A.B. 1979) (slogan ‘THINK ABOUT IT’ found to
 be an informational or instructional phrase that would not be perceived as a mark
 for banking services); *In re Restonic Corp.*, 189 U.S.P.Q. (BNA) 248 (T.T.A.B.
 1975) (phrase ‘NICE TO GET HOME TO’ used merely to advertise goods
 manufactured and sold by applicant’s franchisees does not serve to identify
 franchising services).

1 informational. “Know your options” is a familiar expression that an ordinary
2 consumer in the field would take at its ordinary meaning rather than attributing the
3 special meaning of a service mark to it. As such, the phrase is generic in relation
4 to “financial services in the field of options trading.” *See In re Melville Corp.*, 228
5 U.S.P.Q. 970 (T.T.A.B. 1986) (“In an environment where consumers are
6 accustomed to the use by merchants of similar informational phrases, we believe
7 that consumers are not likely to view applicant’s slogan as a service mark but
8 rather as a merchandising slogan using common ordinary words merely to convey
9 information about applicant’s services.”); *In re European-American Bank & Trust*
10 *Co.*, 201 U.S.P.Q. 788 (T.T.A.B. 1979) (“In the instant case, the phrase ‘THINK
11 ABOUT IT’ is a familiar expression, and we believe that the ordinary customer or
12 prospective customer reading applicant’s advertisement would take the phrase at
13 its ordinary meaning rather than attributing thereto the special meaning of a service
14 mark used to distinguish applicant’s banking services from the banking services of
15 others.”).

16 B.B. Graham’s use of the “know your options” in its advertising literature
17 further shows that it is not using the slogan for a trademark purpose.

18 For instance, in numerous places throughout an apparent brochure that it
19 submitted with its “Statement of Use” in order to register or maintain its
20 registration of the slogan, B.B. Graham used the phrases “know your options” and
21 “know their options” within the text in an informational way:

- 22 • “Our company slogan, ‘Know Your Options’ displays not only our
23 desire but also our ability to put you, the client, on the cutting edge of
24 this dynamic approach to trading in the stock market.”
- 25 • “All clients, employees, and strategic partners will *know their options*
26 and thereby effect *a favorable return* from the relationship.”
- 27 • “By utilizing the most advanced technology available and a team

1 approach, coordinated and implemented by a staff of professionals,
2 we ensure that our clients receive quality service and up-to-the-minute
3 market information so that they ‘*know their options.*’” (See UF ¶ 33
4 (all emphasis original)).

5 Such ordinary use of the term shows that B.B. Graham is not using “know your
6 options” in a trademark sense. Thus, the mark should be invalidated. See, e.g.,
7 *MicroStrategy, Inc. v. Motorola, Inc.*, 245 F.3d 335, 341 (4th Cir. 2001)
8 (explaining that a trademark owner must use a mark as a trademark, that is, the
9 mark must be used to identify the source of the goods to potential customers).

10 **2. Use of “Know Your Options” In The Financial**
11 **Services and Options Trading Domain Is So Prolific**
12 **That It Does Not Convey A Single Source**

13 The proliferation of the phrase in the financial services arena, and more
14 particularly in the options trading domain, confirms that the mark is incapable of
15 serving a trademark purpose. See, e.g., *CG Roxanne LLC v. Fiji Water*, 569 F.
16 Supp. 2d 1019, 1027-28 (N.D. Cal. 2008) (finding “BOTTLED AT THE
17 SOURCE” generic for bottled water and finding relevant to the issue of
18 genericness that almost two dozen competitors used the phrase “bottled at the
19 source” on their bottles and fifty other bottled water companies used the phrase to
20 describe their products in websites, advertisements, and marketing); *Classic Foods*
21 *Int’l Corp. v. Kettle Foods, Inc.*, 468 F. Supp. 2d 1181, 1189-91 (C.D. Cal. 2007)
22 (finding “KETTLE” generic in relation to potato chips and considering prolific use
23 of “kettle chips” by others as evidence of genericness).

24 When a Boolean search for “know your options” AND “options trading” is
25 entered on Google.com, over 18,000 results are returned. (UF ¶¶ 34-35.) In many
26 of these results, “Know Your Options” is used as an article title, blog title, book
27 title, or in another informational way to convey information relating to options

1 trading. (UF ¶ 73.) Indeed, several entities and individuals who are competitors,
2 potential competitors or likely competitors of KYO and B.B. Graham in the field
3 of options trading have used the phrase “Know Your Options” in their advertising
4 or promotional materials. (UF ¶¶ 36-68.)

5 For example, Kevin Matras, an employee of Zacks Investment Research, has
6 written a series of weekly articles that are published over 100 weeks dating back to
7 2009, using “Know Your Options” as the series header. (UF ¶¶ 37-42.) Another
8 investment advisor, Mark Wolfinger, has used the moniker “Know Your Options”
9 in conjunction with his column, blog and electronic question and answer forum
10 from 2004 through 2011. (UF ¶¶ 44 -53.) Even large clearing houses such as
11 E*Trade Financial and TD Ameritrade have used the phrase “Know Your Options”
12 in their literature. (UF ¶¶ 64-67.) Further, from March of 2007 to 2011, the *Journal*
13 *of Indexes* magazine has almost always included a column or section titled “Know
14 Your Options” relating to the field of options trading. (UF ¶¶ 69-70.) The “Know
15 Your Options” column has appeared in twenty-five of the twenty-seven *Journal of*
16 *Indexes* magazines during that time. (UF ¶ 69.)

17 “Know Your Options” has also been commonly used with educational
18 materials associated with options trading from 2000 through 2011, including
19 without limitation Christopher Doss, who runs myoptionscommunity.com and
20 optionsprosperity.com. (UF ¶¶ 62-63.) Mr. Doss authored a book titled *Know Your*
21 *Options*, which has been downloaded over 2,000 times. (UF ¶ 62.) Others who
22 have used “know your options” in connection with educational materials, articles,
23 advertisements or promotional materials in the field of options trading include Dan
24 Avidan (an independent investment advisor and broker), John Emery of
25 TradingMarkets.com (a professional trader), Price Headley (founder and CEO of
26 OptionsShark), Thomas McCafferty (author of the book *Options Demystified*
27 (2010)), Business Compass, LLC (in connection with a smart phone (ANDROID)

1 application, Option Suite), PowerOptions software, *The Wall Street Journal's*
 2 Digital Network (*MarketWatch*), CNBC (via Rebecca Darst, Thestreet.com equity
 3 options analyst), *TIME* Magazine Online, Optionetics.com, *Outlook Money*
 4 magazine, the Market Mentalist, The Motley Fool, *Stocks, Futures & Options*
 5 magazine, optionsimple.com, discount-brokers.net and
 6 practicaloptionstrading.com. (UF ¶¶ 54-61; 68; 71.) Because options trading is
 7 complicated, educating potential investors about options trading is a primary
 8 activity of firms that deal in options trading. (UF ¶ 72.) It is through education that
 9 investment advisors gain a reputation and grow their client base. B.B. Graham
 10 even acknowledged this in its Complaint. (UF ¶ 72.)

11 The prolific use of “know your options” indicates that the phrase has already
 12 become generic (if it was ever distinctive) with regard to options trading. *See*
 13 *Freecycle Network, Inc. v. Oey*, 505 F.3d 898 (9th Cir. 2007) (“However, [the]
 14 asserted mark--like all marks--is always at risk of becoming generic and thereby
 15 losing its ability to identify the trademark holder’s goods or services. . . . Such
 16 genericide can occur ‘as a result of a trademark owner’s failure to police the mark,
 17 resulting in widespread usage by competitors leading to a perception of
 18 genericness among the public, who sees many sellers using the same term.’”) (internal citations omitted).

20 With such widespread usage of a prolific informational slogan in the field of
 21 options trading, the Court should conclude as a matter of law that B.B. Graham’s
 22 registration is invalid. Its mark is generic and incapable of serving a trademark
 23 function.

24 **F. There is No Likelihood of Confusion Between KYO and B.B.**
 25 **Graham**

26 Summary judgment should also be granted because B.B. Graham cannot
 27 prove infringement. *See Tie Tech, Inc. v. Kinedyne Corp.*, 296 F.3d 778, 783 (9th

1 Cir. 2002) (plaintiff bears the burden of proving infringement). Although
2 likelihood of confusion is nominally a question of fact, courts will decide the issue
3 as a matter of law when warranted. *See, e.g., Applied Info. Scis. Corp. v. eBay,*
4 *Inc.*, 511 F.3d 966, 973 (9th Cir. 2007); *Survivor Media, Inc. v. Survivor Prods.*,
5 406 F.3d 625 (9th Cir. 2005); *M2 Software, Inc. v. Madacy Entm't*, 421 F.3d 1073,
6 1085 (9th Cir. 2005).

7 The test for “likelihood of confusion” asks whether a “reasonably prudent
8 consumer in the marketplace is likely to be confused as to the origin of the good or
9 service bearing one of the marks.” *Dreamwerks Prod. Grp., Inc. v. SKG Studio*,
10 142 F.3d 1127, 1129 (9th Cir. 1998). To prove infringement, a trademark owner
11 must prove both that it has a valid trademark and confusion is likely. *See*
12 *Brookfield Commc'ns, Inc. v. W. Coast Ent. Corp.*, 174 F.3d 1036, 1046 (9th Cir.
13 1999). Thus, to survive summary judgment, B.B. Graham must show that a
14 genuine issue of material fact exists as to whether reasonably prudent consumers
15 would believe that the services offered by KYO are associated with or sponsored
16 by B.B. Graham. *See M2 Software*, 421 F.3d at 1079-80; *Survivor Media*, 406
17 F.3d at 630.

18 **1. B.B. Graham's Offer to License Its Mark Is Strong**
19 **Evidence Of No Likelihood of Confusion**

20 B.B. Graham cannot prove likelihood of confusion because its actions
21 demonstrate an implicit recognition that there is no likelihood of confusion
22 between itself and KYO. Although B.B. Graham considers KYO to be a
23 competitor, B.B. Graham has previously stated that the two organizations can co-
24 exist, and it has offered KYO a license to continue to use its name. (UF ¶ 74-75.)
25 Courts recognize this willingness to license a mark as strong evidence that no
26 likelihood of confusion exists between two parties:

27 We think it highly unlikely that they would have deliberately created a

1 situation in which the sources of their respective products would be
 2 confused by their customers. . . . It can be safely taken as fundamental
 3 that reputable businessmen-users of valuable trademarks have no
 4 interest in *causing* public confusion.

5 *In re N.A.D. Inc.*, 754 F.2d 996 (Fed. Cir. 1985).

6 **1. The *Sleekcraft* Factors Show No Likelihood Of**
 7 **Confusion**

8 Moreover, B.B. Graham cannot prove likelihood of confusion under the so-
 9 called *Sleekcraft* factors, which are used in the Ninth Circuit. These factors
 10 include: (1) similarity of the conflicting designations; (2) relatedness or proximity
 11 of the two companies' products or services; (3) strength of plaintiff's mark; (4)
 12 marketing channels used; (5) degree of care likely to be exercised by purchasers in
 13 selecting goods; (6) defendant's intent in selecting its mark; (7) evidence of actual
 14 confusion; and (8) likelihood of expansion in product lines. *AMF, Inc. v. Sleekcraft*
 15 *Boats*, 599 F.2d 341, 348-49 (9th Cir. 1979). Here, the *Sleekcraft* factors
 16 overwhelmingly favor KYO, such that no fact finder could find a likelihood of
 17 confusion between the parties.

18 **a. No Actual Confusion Exists Between KYO And**
 19 **B.B. Graham**

20 B.B. Graham has not alleged actual consumer confusion between the parties.
 21 (UF ¶ 77.) Nor is KYO aware of any actual consumer confusion between itself
 22 and B.B. Graham. For example, no consumer or potential consumer has ever
 23 contacted KYO when it was actually looking for B.B. Graham. (UF ¶ 76.) Lack of
 24 actual confusion supports a finding of no likelihood of confusion. *See One Indus.,*
 25 *LLC v. Jim O'Neal Distrib.*, 578 F.3d 1154, 1163 (9th Cir. 2009).

26 **b. B.B. Graham's Alleged Mark Is Weak**

27 Because "Know Your Options" is generic, or at most a merely descriptive
 28

1 slogan, it is an extremely weak mark.⁶ *See Entrepreneur Media, Inc.*, 279 F.3d at
 2 1142 n.3 (“[T]he incontestable status of [plaintiff’s] mark does not require a
 3 finding that the mark is strong.”) (emphasis original). “Know Your Options” is
 4 generic in relation to options trading; however, assuming *arguendo* that the mark is
 5 valid, such slogan marks are weak because they fall into the descriptive category.
 6 *Grupo Gigante*, 391 F.3d at 1102 (“Descriptive or suggestive marks are relatively
 7 weak.”).

8 Moreover the widespread use⁷ of “know your options” further weakens the
 9 mark. *See One Indus.*, 578 F.3d at 1164 (“When similar marks permeate the
 10 marketplace, the strength of the mark decreases.”); *24 Hour Fitness USA, Inc. v.*
 11 *24/7 Tribeca Fitness, LLC*, 447 F. Supp. 2d 266, 272 (S.D.N.Y. 2006) (“24 Hour
 12 faces an uphill battle in establishing that a phrase so commonly used in business is
 13 inherently distinctive.”). Where the market is inundated by products or services
 14 using the particular trademarked phrase, there is a corresponding likelihood that
 15 consumers “will not likely be confused by any two in the crowd.” *Entrepreneur*
 16 *Media*, 279 F.3d at 1144 (citation omitted).

17 **c. A High Degree Of Care Is Exercised By**
 18 **Consumers**

19 The typical consumer in this case is a highly-sophisticated consumer who
 20 will choose an options trading firm only after significant deliberation. (UF ¶¶ 78-
 21 79.) The likelihood of consumer confusion decreases where the consumer is
 22 sophisticated and exercises a high degree of care. *See Sleekcraft*, 599 F.2d at 353.
 23 B.B. Graham has already acknowledged the level of sophistication and complexity
 24 of this field in its Complaint, which states that “[b]ecause of the complexity
 25 inherent in trading options, the Securities and Exchange Commission (“SEC”)

26 ⁶ As explained herein the alleged mark is generic, and therefore not a mark at all.
 27 (*See supra* § E.)

28 ⁷ *see supra* § E.2

1 strongly advises investors to educate themselves about the various types of options,
 2 how basic options strategies work, and the risks involved before trading in
 3 options.” (UF ¶ 79.) Within this context, consumers simply don’t decide whether to
 4 hire a particular advisor lightly.

5 **d. The Primary Marketing Channel Is Referrals**

6 Because of the complexity of the options market, firms that specialize in
 7 options trading rely heavily on referrals for business. In fact, the vast majority of
 8 business of KYO comes from existing clients, referrals, and personal introductions.
 9 (UF ¶ 80.) When the primary marketing channel used is referrals and personal
 10 introductions, confusion is highly unlikely. *See, e.g., Network Automation, Inc. v.*
 11 *Hewlett Packard Co.*, No. CV 08-4675-JFW (RZx), 2009 U.S. Dist. LEXIS
 12 125835, at *31 (C.D. Cal. Sept. 14, 2009) (finding “significance of referrals”
 13 indicative that “confusion [is] less likely”).

14 **e. KYO Intent In Selecting Its Name**

15 Mr. Cavanaugh did not know of B.B. Graham when it selected its name for
 16 its business. (UF ¶ 12.) Therefore, its good faith in selecting its name also favors
 17 no likelihood of confusion. *See Sleekcraft*, 599 F.2d at 354.

18 **f. B.B. Graham’s Alleged Mark Is Not Used in a**
 19 **Way That Would Cause Consumer Confusion**

20 Although superficially KYO’s trade name and B.B. Graham’s slogan are
 21 similar and are both are used in conjunction with similar financial services, no
 22 likelihood of confusion is present here because B.B. Graham uses the alleged mark
 23 as a slogan in conjunction with its trade name, by which it is known in the
 24 marketplace. The Ninth Circuit has explained the importance of how the alleged
 25 mark it used and encountered by consumers:

26 First, although the parties superficially use the identical slogan as a
 27 trademark, consumers will actually encounter the trademarks

1 differently in the marketplace. A critical factor here is that both parties
 2 use the trademark merely as a tagline to their distinctive business
 3 names: as “Critter Clinic—Where Pets Are Family,” and “PetSMART—
 4 Where Pets Are Family.” The emphasis on these housemarks [or trade
 5 names] “has the potential to reduce or eliminate likelihood of
 6 confusion.” 3 J. Thomas McCarthy, *McCarthy on Trademarks and*
 7 *Unfair Competition* § 23:47 (4th ed.1997). See *Norm Thompson*
 8 *Outfitters, Inc. v. General Motors Corp.*, 448 F.2d 1293, 1298 (9th Cir.
 9 1971) (likelihood of confusion mitigated where “the name of the
 10 company invariably accompanied the [trademarked] slogan”).

11 *Cohn v. PetSMART, Inc.*, 281 F.3d 837, 842 (9th Cir. 2002) (affirming summary
 12 judgment of no likelihood of confusion although the marks were “superficially
 13 identical” and “the parties indisputably [sold] related goods and services”).

14 Here, when not used in a sentence (*i.e.*, in an informational way), B.B.
 15 Graham uses the slogan “Know Your Options” in conjunction with its own trade
 16 name. (UF ¶¶ 84-85.).⁸ Therefore, the name “B.B. Graham” rather than the slogan
 17 “Know Your Options” is the way consumers are likely to identify the plaintiff’s
 18 company. See also *Lindy Pen Co., Inc. v. Bic Pen Corp.*, 725 F.2d 1240, 1245 n.4
 19 (9th Cir. 1984) (finding marks not similar where they “are always accompanied by
 20 prominent housemarks and logos, compared to which the marks are themselves
 21 inconspicuous”).

22 Due to, among other things, the absence of any evidence of confusion, the
 23 high level of sophistication in the field, the primary channel through which
 24 business is obtained, and the weakness of the alleged mark, no fact finder could
 25 find a likelihood of confusion exists. Accordingly, summary judgment is

26 _____
 27 ⁸ As explained herein, B.B. Graham most commonly uses “know your options”
 28 within its ordinary meaning and in descriptive sentence. Consumers would be
 even less likely to associate this use with a specific source or company.

1 warranted.

2 **G. All B.B. Graham's Claims Fail Along With Its Federal**
3 **Trademark Infringement Claim**

4 Finally, all of B.B. Graham's claims are based on its Federal Trademark, and
5 therefore, all its claims fail along with its Federal Trademark Infringement claim.
6 *See Jada Toys, Inc. v. Mattel, Inc.*, 518 F.3d 628, 632 (9th Cir. 2008). Therefore,
7 the court should grant summary judgment in favor of KYO on all claims.

8 **IV. CONCLUSION**

9 B.B. Graham has no chance to prevail. Its claims should be barred based on
10 laches and equitable estoppel. Further, B.B. Graham's claims fail on their merits
11 because its alleged trademark is both invalid and not infringed. As B.B. Graham's
12 state law claims rise and fall with its federal trademark claim, those claims also
13 fail. KYO respectfully asks the Court to grant summary judgment in its favor.

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15 Respectfully submitted,

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