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12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14 OAKLAND DIVISION

15 CROSSFIT, INC.,
16 Plaintiff and Counterdefendant,
17 v.
18 360 FITNESS SUPERSTORE, et al.
19 Defendants and Counterclaimants.
20

Case No. 3:14-cv-00901-JSW

**DEFENDANTS' OPPOSITION TO
PLAINTIFF'S MOTION FOR
PRELIMINARY INJUNCTION**

Hearing Date: August 29, 2014
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1 **INTRODUCTION**

2 The business of plaintiff CrossFit, Inc. (“CrossFit”) is built on a fundamental contradiction.
3 Its revenue model depends on certifying as many trainers as possible (now 87,000 worldwide) and
4 licensing as many affiliate gyms as possible (now 5,500 worldwide), and the value of those
5 certifications and affiliate licenses depends on the strength of the CrossFit brand. But the brand,
6 and the company’s certifications and affiliate licenses, have no content. The “CrossFit” approach
7 to exercise is ubiquitous: As the company’s own spokesperson and the founder of its first affiliate
8 gym both acknowledge, consumers cannot tell the difference between “CrossFit” exercise and any
9 other regime of cross-training. And the company has failed to ensure that its trainers are qualified
10 before they begin to teach others—over a weekend seminar, candidates receive eight hours of
11 training in nine functional movements—and has affirmatively disavowed any desire to exercise
12 control over the quality of the business practices or training that occurs at its affiliate gyms.

13 The source of this contradiction appears to be equal parts philosophical (the company’s
14 founder is a staunch libertarian) and financial (the company does not want the burden, and
15 regulatory oversight, of the franchise business model). But whatever its origin, the company’s
16 approach is inconsistent with the legal standards for trademark protection: A trademark must
17 describe a specific producer, not a generic product. And it must be carefully policed to ensure that
18 it remains a symbol of quality and a controlled source, not a loose moniker describing a collection
19 of independent entities engaged in their own experiments.

20 Apparently aware of the fault lines in its business model, CrossFit has in recent years
21 embarked on a campaign of aggressive litigation against small businesses and individuals such as
22 defendants 360 Fitness Superstore and its owner, Alex Krichevsky (together, “360 Fitness”). 360
23 Fitness sells exercise equipment from two stores in the Bay Area, and describes some of the items
24 on its website as “CrossFit” or “crossfit” equipment. This, CrossFit claims, threatens irreparable
25 injury justifying the extraordinary remedy of a preliminary injunction. Not so. CrossFit’s
26 evidence of harm is inadmissible and irrelevant. The company relies entirely upon a select few
27 Yelp! reviews complaining that 360 Fitness is rude and expensive because it refuses to quote its

1 prices over the phone or display them on its website. But these reviews do not indicate that any of
 2 these consumers believed 360 Fitness was associated with CrossFit, or even had sought out
 3 “CrossFit” equipment. And, even if believed, the negative characteristics they ascribe to 360
 4 Fitness are ones possessed in spades by CrossFit (which uses a vomiting clown as its corporate
 5 logo, and publicly mocks those who suffer injuries from its regimen) and its licensed equipment
 6 seller, Rogue Fitness (which charges as much as \$40,000 for a workout rack).

7 CrossFit cannot show irreparable injury now, and is unlikely to prevail on its claims at
 8 trial. The motion should be denied.

9 STATEMENT OF FACTS

10 360 Fitness sells exercise equipment from two Bay Area stores, and seeks to use the terms
 11 “CrossFit” and “crossfit” to market and sell some of its products. *Ctrl.* ¶¶ 1, 4.¹

12 CrossFit is a Delaware corporation principally engaged in the business of fitness training.
 13 *Compl.* ¶ 5. The company was founded by a man named Greg Glassman, who remains its chief
 14 executive officer. *Id.* ¶ 10. The term “CrossFit” refers to a loosely organized exercise regimen
 15 that may combine elements of aerobic exercises, gymnastic movements, and Olympic weight
 16 lifting. *RJN Exh. 1* at ¶ 3. With the possible exception of “wallball” (which consists of throwing
 17 a medicine ball against a wall), CrossFit did not invent any new exercises, but merely adopted
 18 exercises that had been widely used for decades or hundreds of years, and it employs equipment
 19 such as medicine balls, kettlebells, jump ropes, and Olympic lifting bars widely used in other
 20 sports. *Answer* ¶ 14; *Wolf Depo.* 25:15 – 26:14. CrossFit also does not manufacture equipment,
 21 and has disavowed any intent to do so. *RJN Exh. 1* at ¶ 31; *Gaw Decl., Exh. B* at 7 (Plaintiff does
 22

23
 24 ¹ “Ctrl.” refers to defendants’ First Amended Counterclaims (ECF 22); “Compl.” refers to the
 25 Complaint (ECF 1); “Answer” refers to Plaintiff’s Answer to First Amended Counterclaims (ECF
 26 23); “RJN” refers to the contemporaneous Request for Judicial Notice; “Amato Decl.” refers to the
 27 Declaration of Yuo-Fong Amato (ECF 28-8); “Brenner Decl.” refers to the Declaration of
 Marshall Brenner (ECF 28-1) “Gaw Decl.” refers to the contemporaneous Declaration of
 Randolph Gaw; “Wolf Depo.” refers to the transcript of the August 4, 2014 deposition of Robb
 Wolf attached as Exhibit K to the Gaw Declaration.

1 not sell “CrossFit-branded equipment, nutritional supplements or anything else that would
2 encroach on [its] box owners’ freedom”).

3 Although Glassman began using the term “CrossFit” in commerce in 1985, his company
4 waited until 2004 to register that term as a trademark. Answer ¶ 11. The term “CrossFit” is
5 widely used by the public to refer to any number of cross-training exercise regimens. *Ctrl.* ¶ 15.
6 As CrossFit’s own spokesperson acknowledges, the “CrossFit” workout approach “is now nearly
7 ubiquitous in the fitness world[,]” and consequently “it is so easy to generically refer to everything
8 that looks like CrossFit as CrossFit.” *Gaw Decl.*, Exh. J at 2. And as Robb Wolf, the founder of
9 the first CrossFit affiliate, explained, even though his gym is no longer affiliated with CrossFit,
10 “Everybody calls it I’m going to CrossFit today. . . . [W]hen you see CrossFit being
11 demonstrated on ESPN and then you go see people doing kicking pull-ups with thrusters then you
12 see this thing that looks like CrossFit and that looks like CrossFit so they call it CrossFit.” *Wolf*
13 *Depo.* 146:15-147:3.

14 In deference to Glassman’s libertarian ideology and in order to avoid a franchise business
15 model, CrossFit does not exert any control over the licensees of its trademarks. *See* *Gaw Decl.*
16 *Exh. H* at 2-4; *Wolf Depo.* 18:6 – 21:7, 27:8 – 28:2, 36:20 – 41:24, 59:3 – 61:2, 82:3 – 85:3.
17 Anyone paying the requisite certification and affiliation fees to CrossFit and passing a two-day
18 seminar can open up a CrossFit “box” and operate it however he or she sees fit. *See* *Gaw Decl.*,
19 *Exh. B* at 6; *Wolf Depo.* 59:13 – 61:2. The company has steadfastly refused to implement quality
20 controls over its affiliates, does not supervise the training conducted under its brand name, and has
21 forced out those affiliates who encouraged the company to do so—or even attempted to develop a
22 set of best practices for affiliates’ business operations and physical training. *Wolf Depo.* 54:22 –
23 57:17.

24 ARGUMENT

25 CrossFit’s motion should be denied for two independently sufficient reasons. First, the
26 company has failed to demonstrate that it is likely to suffer irreparable injury in the absence of the
27 extraordinary remedy of a preliminary injunction. The law requires concrete, non-speculative

1 evidence; CrossFit offers inadmissible, cherrypicked Yelp! reviews that do not connect 360
2 Fitness with CrossFit, and that merely criticize 360 Fitness for being “rude” and “expensive”—
3 characteristics shared by CrossFit and its licensed equipment seller, Rogue Fitness. Second, the
4 company is unlikely to prevail on its claims at trial, because its trademarks are generic, and were
5 deliberately abandoned through naked licensing. A preliminary injunction should not issue.

6 **I. LEGAL STANDARDS**

7 “[I]njunctive relief [is] an extraordinary remedy that may only be awarded upon a clear
8 showing that the plaintiff is entitled to such relief.” *Winter v. Natural Res. Defense Council*, 555
9 U.S. 7, 22 (2008). To obtain a preliminary injunction, a plaintiff must establish that it is likely to
10 succeed on the merits, that it is likely to suffer irreparable harm in the absence of preliminary
11 relief, that the balance of equities tips in its favor and that an injunction is in the public interest.
12 *Herb Reed Enterprises, LLC v. Florida Entertainment Management, Inc.*, 736 F.3d 1239, 1247
13 (9th Cir. 2013).

14 **II. CROSSFIT HAS FAILED TO DEMONSTRATE IRREPARABLE INJURY**

15 CrossFit’s motion should be denied, first, because it has not demonstrated irreparable
16 injury. The evidence supporting its claim of immediate harm is inadmissible and irrelevant, and
17 its theory of injury is speculative.

18 “A showing of likely irreparable harm is the single most important prerequisite for the
19 issuance of a preliminary injunction; Plaintiff must make that showing before the other
20 requirement for the issuance of a preliminary injunction need even be considered.” *BoomerangIT,*
21 *Inc. v. ID Armor, Inc.*, No. 5:12-CV-0920 EJD, 2012 WL 2368466, at *3 (N.D. Cal. June 21,
22 2012). Irreparable injury may never be assumed, but must be established through evidence that
23 such injury is likely in the absence of a preliminary injunction. *Herb Reed Enterprises*, 736 F.3d
24 at 1250-51. As explained by the Ninth Circuit:

25 At a minimum, a plaintiff seeking preliminary injunctive relief must demonstrate
26 that it will be exposed to irreparable harm. Speculative injury does not constitute
27 irreparable injury sufficient to warrant granting a preliminary injunction. A
28 plaintiff must do more than merely allege imminent harm sufficient to establish
29 standing; a plaintiff must *demonstrate* immediate threatened injury as a
30 prerequisite to preliminary injunctive relief.

1 *Caribbean Marine Services Co., Inc. v. Baldrige*, 844 F.3d 688, 674 (9th Cir. 1988) (emphasis in
2 original) (internal citations omitted). The required evidence must also specifically address the
3 issue of immediate, irreparable harm as opposed to any other element of plaintiff's cause of action.
4 *See Herb Reed Enterprises*, 736 F.3d at 1250 (reversing preliminary injunction due to lack of
5 irreparable harm and holding that evidence of likely customer confusion by continuing use of
6 allegedly infringing trademark was not evidence of irreparable harm).

7 **A. CrossFit Presents No Competent or Admissible Evidence**

8 CrossFit has presented absolutely no evidence of an irreparable injury that would result
9 from the absence of a preliminary injunction. The company appears to claim that it would suffer
10 some kind of nebulous damage to its business reputation or goodwill by 360 Fitness's continued
11 use of the word "CROSSFIT" on its website. But the "evidence" offered by CrossFit in support of
12 this contention are printouts of reviews from the Yelp! website for 360 Fitness's two store
13 locations. This is not competent or admissible evidence: Yelp! is a platform where anyone with a
14 user account can leave a review about any business listed on Yelp!. *See generally* Gaw Decl. Exh.
15 A. Yelp! does not make any meaningful attempt to verify that a reviewer actually patronized a
16 business or to determine whether a review is truthful. Anyone, even CrossFit's employees, could
17 have authored the purportedly negative reviews about 360 Fitness. False reviews on Yelp! are a
18 known problem with the website, and businesses have sued reviewers for defamation when it turns
19 out those reviewers were never customers of the business that they reviewed. *See, e.g., Yelp, Inc.*
20 *v. Hadeed Carpet Cleaning, Inc.*, 752 S.E.2d 554, 567 (Va. Ct. App. 2014).²

21 A showing of irreparable injury must be based on evidence, not mere allegations. *See*
22 *Herb Reed Enterprises*, 736 F.3d at 1250. CrossFit fails to provide any competent or admissible
23 evidence at all, and so cannot meet its burden of proof to show the existence of likely, imminent
24 irreparable harm in the absence of a preliminary injunction. The motion should be denied.

25
26 _____
27 ² 360 Fitness has contemporaneously filed objections to this evidence.

1 **B. CrossFit’s Theory of Irreparable Harm Is Speculative**

2 Even if the Court were to consider CrossFit’s proffered Yelp! reviews, it should still hold
3 that the company has not made the requisite showing of irreparable injury, because any harm from
4 360 Fitness’s purported use of CrossFit’s trademark is speculative.

5 Not a single review highlighted by CrossFit shows that any customer believed 360 Fitness
6 had an affiliation with CrossFit, or that 360 Fitness was selling CrossFit-branded equipment. *See*
7 Amato Decl. Exh. 14. The vast majority of the negative reviews identified by CrossFit relate to
8 360 Fitness refusing to discount its prices on non-CrossFit-related exercise equipment to meet the
9 whims of those reviewers. CrossFit does not even attempt to explain how 360 Fitness’s pricing
10 decisions on unrelated goods could cause irreparable injury in the absence of a preliminary
11 injunction. And CrossFit cites no authority for its novel proposition that a party is entitled to a
12 preliminary injunction to prevent another from engaging in what is essentially nothing more than
13 rude or unsolicitous behavior.³

14 In lieu of providing a reasonable evidence-based explanation for how 360 Fitness’s
15 supposedly rude behavior or “expensive” pricing⁴ would lead to imminent, likely irreparable
16 injury, CrossFit offers conclusory conjectures that its goodwill may be damaged because
17 customers might associate rude behavior with CrossFit, or that CrossFit would be falsely
18 considered an expensive workout. This is rank speculation, and insufficient to establish
19 irreparable harm. The case of *BoomerangIT* is instructive. There, the court denied a request for a
20 preliminary injunction by a plaintiff claiming that the defendant’s use of the plaintiff’s trademarks
21 would damage its goodwill, because:

22 BoomerangIt did not cite any evidence or authority to show that the claimed loss of
23 good will is real, imminent, and significant, and not just speculative or potential.
24 Additionally, BoomerangIt did not provide any evidence indicating it is likely to

25 ³ CrossFit cannot even make the case that the reviews of 360 Fitness are uniformly negative. 15 of
26 the 32 published reviews give 360 Fitness a 4- or 5-star rating. *See* Amato Decl. Exh. 14.

27 ⁴ The reviews also do not indicate that 360 Fitness itself has ever represented (falsely or otherwise)
that CrossFit equipment is expensive.

1 lose sales or that the amount of those lost sales could not be remedied by monetary
damages.

2 2012 WL 2368466. at *4. *See also Herb Reed Enterprises*, 736 F.3d at 1250 (platitudes of likely
3 harm to business goodwill are not a substitute for actual evidence of irreparable injury); *Dotster,*
4 *Inc. v. Internet Corp. For Assigned Names and Numbers*, 296 F. Supp. 2d 1159, 1163-64 (C.D.
5 Cal. 2003) (“Although the loss of goodwill and reputation are important considerations in
6 determining the existence of irreparable injury, there must be credible and admissible evidence
7 that such damage threatens Plaintiff[’s] business[].”). The leaps of logic that CrossFit attempts in
8 order to establish its claim of irreparable harm cannot serve as the basis for injunctive relief.

9 Finally, CrossFit’s claims that 360 Fitness’s use of its trademarks might cause the public to
10 associate CrossFit with rude behavior or expensive goods are untenable because the public already
11 has those negative associations with CrossFit. This is the company that has as its corporate logo a
12 vomiting clown named “Uncle Pukie.” *See* Gaw Decl. Exh. B at 5; Wolf Depo. 70:23 – 71:13,
13 74:8-11. This is the company whose founder and chief executive officer publicly mocked a
14 CrossFit practitioner for being hospitalized after performing a CrossFit workout and, in response
15 to that incident, created a new corporate logo (“Uncle Rhabdo”) featuring a clown “who stands
16 exhausted before a dialysis machine, his kidneys splattered in a pool of blood.” *See* Gaw Decl.
17 Exh. B at 5-6; Wolf Depo. 71:16 – 73:5, 74:8-14. This is the company whose owner publicly
18 stated “We have a therapy for injuries at CrossFit called STFU. As in, Shut the f-k up.” Gaw
19 Decl. Exh. B at 6; 73:15 – 74:7. This is the company that recently sued a nonprofit organization
20 for publishing a positive study about “CrossFit,” and that has been publicly described in a leading
21 sports publication as “an unsympathetic plaintiff in the court of public opinion” which “seems to
22 channel the spirit of the football players that used to stuff you into a locker.” *See* Gaw Decl. Exh.
23 C at 2. *See also* Wolf Depo. 68:22 – 70:22. As for the issue of expense, Rogue Fitness (which
24 according to CrossFit, is the only licensee of CrossFit-associated exercise equipment), sells
25 “Equipment for CrossFit®” at prices ranging up to \$41,240.60 on its website and has dozens of
26 “Equipment for CrossFit®” listed for hundreds or thousands of dollars. *See* Gaw Decl. Exh. D.

27

1 CrossFit provides no evidence that the prices charged by 360 Fitness are higher than those charged
2 by Rogue Fitness.⁵

3 CrossFit's failure to demonstrate the likely existence of an irreparable injury is dispositive.
4 The motion should be denied.

5 **III. CROSSFIT IS UNLIKELY TO SUCCEED ON THE MERITS**

6 The Court should also deny CrossFit's motion for a preliminary injunction because
7 CrossFit cannot establish that it is likely to succeed on the merits of its claim for trademark
8 infringement. Instead, 360 Fitness is likely to show that the "CrossFit" trademarks are generic and
9 that CrossFit has abandoned its trademarks through naked licensing.

10 **A. CrossFit's Trademarks Are Generic**

11 At trial, 360 Fitness is likely to demonstrate that CrossFit's trademarks are generic,
12 because CrossFit, the media, and the public use those marks to refer to a broad array of products,
13 rather than a single producer.

14 A term is generic if it describes the type of product rather than the producer of that product.
15 Such a term cannot be the subject of trademark protection under any circumstances, even if there
16 is a showing of secondary meaning. *See Filipino Yellow Pages, Inc. v. Asian Journal*
17 *Publications, Inc.*, 198 F.3d 1143, 1146 (9th Cir. 1999). *See also id.* at 1147 (a generic term
18 answers the question "what are you?" instead of the question "who are you?").

19 In essence, CrossFit contends that because it "certifies" trainers on how to provide
20 instruction on common, generic exercises such as push-ups, squats, burpees, weightlifting, and
21 kettlebells, the company has somehow acquired the right to trademark the term and control its
22 usage. Gaw Decl. Exh. J. This cannot be, for two primary reasons.

23 First, the term "CrossFit" is inherently broad and unspecific. It is a composite of two
24 preexisting terms—"cross-training" and "fitness," Wolf Depo. 85:4-17,—and refers to the activity

25 _____
26 ⁵ Incidentally, Rogue Fitness has more or less the same rating on Yelp! as 360 Fitness, and a
27 number of reviews point out the poor customer service offered by Rogue Fitness. *See* Gaw Decl.
Exh. E.

1 of performing a varied exercise routine, as opposed to a unique provider of a service. Gaw Decl.
 2 Exh. J at 6; Wolf Depo. 85:19 – 86:4. CrossFit’s own judicial admissions confirm this. For
 3 example, CrossFit has admitted that:

- 4 • “CrossFit” is a “program [that] delivers a fitness that is by design, broad, general
 5 and inclusive. *Our specialty is not specializing.*” Answer ¶ 13 (emphasis added).
- 6 • Glassman has described “CrossFit” as “a community of dedicated fitness
 7 practitioners. I don’t know that I have a better answer.” *Id.*
- 8 • The “CrossFit” “toolbox contains gymnastics rings, barbells, bumper plates,
 9 dumbbells, parallel bars, pull-up bars, medicine balls, rope, mats, and some odds
 10 and ends like kettlebells, a giant tire, and sandbags. *Our tools and exercises have
 11 long records of distinction outside of and long before CrossFit.* In earlier times
 every ‘gymnasium’ had parallel bars, rings, vaulting horse, dumbbells, barbells,
 12 and heavy bags. The rudiments of gymnastics and weightlifting were taught to all
 school kids. They were also an integral part of military physical training.” *Id.* ¶ 14
 (emphasis added).
- 13 • Glassman has said “CrossFit” “movements are universal motor patterns; they
 14 predate history, all of them . . . they are everywhere, except for gyms.” *Id.*⁶

15 The term “CrossFit” thus falls clearly in the camp of describing “what” it is as opposed to
 16 “who” it is. *See Advertise.com, Inc. v. AOL Advertising, Inc.*, 616 F.3d 974, 978 (9th Cir. 2010)
 17 (holding that ADVERTISING.COM was a generic term because it logically referred to an on-line
 18 advertising company, for which any number of companies could fit that description); *CG Roxane
 19 LLC v. Fiji Water Co. LLC*, 569 F. Supp. 2d 1019, 1027 (N.D. Cal. 2008) (“bottled at the source”
 20 was a generic trademark because it merely described a type of manufacturing for bottled water
 21 instead of identifying the unique source of the water).

22 Second, the use of the term “CrossFit” by CrossFit, in the media, and by the public is
 23 indiscriminate. *See CG Roxane*, 569 F. Supp. 2d at 1027. The case of *Krav Maga Ass’n of
 24 America, Inc. v. Yanilov*, 464 F. Supp. 2d 981 (C.D. Cal. 2006) is particularly apposite. In *Krav
 25 Maga*, the court held that the term “Krav Maga” was generic because it was understood by the
 26 public to generally refer to a type of Israeli martial arts. *Id.* at 987-88. The defendant presented

27 ⁶ *See generally Am. Tit. Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226 (9th Cir. 1988) (statement in
 an answer is a judicial admission).

1 publications and advertisements that referenced “Krav Maga” as a form of martial arts and, more
 2 importantly, failed to reference that type of martial arts “to a particular source of instructional
 3 services particular to [the plaintiff].” *Id.* In response, the plaintiff submitted declarations from its
 4 licensees and former students attesting to the unique association of “Krav Maga” with the plaintiff,
 5 but the court found the declarations to possess little probative value because witnesses that had
 6 close personal or business relations with the plaintiff “do not reflect the views of the purchasing
 7 public.” *Id.* at 988. The same result should obtain here.

8 Glassman, CrossFit’s founder, has explained that from the first time he described his
 9 workout methodology, his goal was to make it a public good, not a narrow reference to his brand.

10 The first time I lectured on [“CrossFit”], the genie was out of the bottle - not just
 11 out of the bottle, but everyone in the room owned the lamp and the rights to rub it
 12 and make the genie come out and do whatever they wanted. So I got a business
 13 built on a business secret that we were trying hard to put in the hands of every soul
 14 on earth that can listen or read. Had nothing to protect, nothing to build a business
 15 around.

16 Gaw Decl. Exh. L.

17 Consistent with this philosophy and Glassman’s libertarian beliefs, the company waited
 18 until 2004 to register the trademark for “CrossFit” even though it had been using that term in
 19 commerce since 1985. *See Answer ¶ 11.* As a result, CrossFit voluntarily allowed the generic
 20 nature of its term to cement its hold upon the public. This is evident from the number of
 21 publications that refer to “CrossFit” as shorthand for cross-training exercises, without providing
 22 any reference to CrossFit the company, its founder, or its certification process. *See* Gaw Decl.
 23 Exhs. F and G. As CrossFit’s own spokesperson, as well as the founder of the company’s first
 24 affiliate gym, have acknowledged, the public cannot distinguish between “CrossFit”-branded
 25 workouts and other workouts. Gaw Decl. Exh. J; Wolf Depo.24:3 – 26:14, 145:21 – 147:8.⁷

26 ⁷ CrossFit may point to its recent and vigorous attempts to enforce its trademark rights by bullying
 27 small businesses that cannot afford the expense of a legal battle. Such efforts, however, cannot
 reverse the previous slide of the term “CrossFit” into genericness in the eyes of the public and the
 law. *Pilates, Inc. v. Current Concepts, Inc.*, 120 F. Supp. 2d 286, 300 (S.D.N.Y. 2000).

1 A very recent article about injuries in the sport pointedly demonstrates the generic nature
 2 of the “CrossFit” term. In late July 2014, ESPN (the sports media conglomerate and broadcaster
 3 of the “CrossFit Games”) published an investigative story about the safety of the “CrossFit”
 4 regimen, which it defined as a varied set of exercises ranging from weightlifting to pushups to
 5 jumping to pull-ups. *See* Gaw Decl. Exh. H at 2. CrossFit responded aggressively, claiming that
 6 the injuries profiled by ESPN were of athletes engaged in non-“CrossFit” workouts, and
 7 complaining that ESPN had failed to understand the difference between “constantly varied
 8 functional movements performed at relatively high intensity” that is “CrossFit,” and “constantly
 9 varied functional movements performed at relatively high intensity” that is not “CrossFit.” *See*
 10 Gaw Decl. Exhs. I & J.⁸ CrossFit’s response only underscores the generic nature of its trademark:
 11 If ESPN itself, possibly the foremost expert on all matters relating to athletics, could not tell the
 12 difference between “CrossFit” and other cross-training exercise regimens, how can an average
 13 member of the public?⁹

14 **B. CrossFit Has Abandoned Its Trademarks Through Naked Licensing**

15 CrossFit is also unlikely to prevail on its infringement claims because it has abandoned its
 16 marks through naked licensing.

17 Trademark owners have a duty to control the quality of their trademarks so that they
 18 “function as a symbol of quality and a controlled source.” *FreecycleSunnyvale v. Freecycle*
 19 *Network*, 626 F.3d 509, 515 (9th Cir. 2010) (quoting *Barcamerica Int’l USA Trust v. Tyfield*
 20 *Importers, Inc.*, 289 F.3d 589, 596 (9th Cir. 2002)). When a trademark holder fails to exercise
 21 adequate quality control over its licensees, it has engaged in naked licensing and may no longer
 22 equitably enforce its trademark rights. *Id.* at 515-16.

23

24 ⁸ These articles are linked on CrossFit’s website and authored by Russell Berger, one of its public
 relations executives. *See* Gaw Decl. Exh. B at 8; Wolf Depo. 107:13-23.

25 ⁹ CrossFit’s response also shows the circular nature of its claim to trademark protection. “All
 26 CrossFit is CVFMHI [constantly varied functional movements performed at relatively high
 intensity], but not all CVFMHI is CrossFit. [¶] What constitutes ‘CrossFit’ is therefore limited to
 27 CVFMHI performed by a party that CrossFit Inc. legally recognizes.” Gaw Decl. Exh. J at 3.

1 For philosophical and economic reasons, CrossFit has chosen not to exercise any control
 2 over its licensees whatsoever. There are over 87,000 certified CrossFit trainers and more than
 3 5,500 affiliates worldwide. *See* Answer ¶ 19. CrossFit supervises none of them. It does not
 4 require them to provide reports on their activities; it does not impose any standards on their
 5 training; it does not require that they teach any set of exercises; it does not respond to customer
 6 complaints; it does not visit their facilities. Wolf Depo. 18:6 – 21:7, 27:8 – 28:2, 36:20 – 41:24,
 7 59:3 – 61:2, 82:3 – 85:3, 103:16 – 104:17. Anyone paying the requisite certification and
 8 affiliation fees and passing a two-day seminar can open up a CrossFit “box” and operate it
 9 however he or she sees fit. *See* Gaw Decl. Exh. B at 6 (“At the end of the day, [CrossFit’s
 10 founder] believes[] the free market will provide all the necessary quality control.”); Ex. H at 2-3
 11 (“We joke all the time that a CrossFit certification only certifies that you have a valid credit
 12 card”); Wolf Depo. 59:13 – 61:2. *See also* Answer ¶¶ 20-21; Brenner Decl. ¶ 8 (“CrossFit opted
 13 not to protect the term ‘WOD’ as a trademark, deciding instead to allow the public [to] use the
 14 term as it wished.”).

15 This failure to enforce quality control is not accidental. To the contrary, it is driven by
 16 Glassman’s libertarian politics, and the company’s desire to avoid a franchise business model.
 17 Wolf Depo. 59:13 – 61:2, 93:24 – 94:19. The company’s belief that quality control is inimical to
 18 its business is so strong that the founder of its first affiliate gym was de-affiliated for encouraging
 19 CrossFit to supervise its boxes, and for attempting to establish a set of business operations and
 20 physical training best practices. Wolf Depo. 54:22 – 57:17. The result of this deliberate neglect
 21 has been increasing complaints, competition among nearby CrossFit affiliates based on price
 22 rather than quality, and widely varying standards of instruction. *See* Gaw Decl. Exh. H at 3-4;
 23 Wolf Depo. 65:11 – 67:5, 131:7 – 135:8.¹⁰

24 In sum, due to CrossFit’s failure—indeed, its principled refusal—to police its licensees in
 25 _____

26 ¹⁰ Even if the vast majority of CrossFit licensees did provide quality instruction, CrossFit would
 27 still have abandoned its trademark by failing to play a meaningful role in holding its licensees to a
 standard of quality. *See Barcamerica*, 289 F.3d at 597-98.


1 any fashion, it has not ensured that the public receives a certain level of quality for the services
2 provided by its licensees, and it has abandoned its trademarks by naked licensing. *See*
3 *FreecycleSunnyvale*, 626 F.3d at 517-18. CrossFit is unlikely to prevail at trial, and the motion for
4 a preliminary injunction should be denied.

5 **CONCLUSION**

6 For the foregoing reasons, defendants 360 Fitness Superstore and Alex Krichevsky
7 respectfully request that the Court deny plaintiff CrossFit, Inc.’s motion for a preliminary
8 injunction.

9
10 Dated: August 8, 2014

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