

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. SACV 17-00426 JVS (KESx) Date July 19, 2017

Title Kuyou Sports Goods Co. Ltd. v. Fountain, Inc

Present: The Honorable James V. Selna

Karla J. Tunis

Not Present

Deputy Clerk

Court Reporter

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

Not Present

Not Present

**Proceedings: (In Chambers) ORDER DENYING PLAINTIFF’S MOTION
FOR PRELIMINARY INJUNCTION**

Plaintiff Kuyou Sports Goods Co. Ltd. (“Kuyou”) moved for a preliminary injunction against Defendant Fountain Inc. (“Fountain”) asserting that Kuyou’s product infringes Fountain’s patent. Mot., Docket No. 37-5 (“Mot.”). Fountain opposed. Opp’n, Docket No. 38 (“Opp’n”). Kuyou replied. Reply, Docket No. 40 (“Reply”).

For the following reasons the Court **denies** Kuyou’s motion.

I. BACKGROUND

Kuyou is a Chinese company that manufactures and sells sports recreation products. FAC ¶ 2. One of the products Kuyou sells is a full-face snorkeling mask with camera mount. *Id.* at ¶ 13. The snorkeling mask includes a bulbous, undivided viewing glass. *Id.* Kuyou sells this snorkeling mask to online retailers, such as Amazon, eBay, and Ali Baba. Peng Decl., Docket No. 37 ¶ 3. The online retailers then sell the snorkeling mask to end consumers. Mot. at 6:13–16.

Fountain is a company based in Southern California. FAC ¶ 3. Thomas Fountain, founder of Fountain, is the inventor of U.S. Patent No. 9,077,877 (“‘877”). Countercl. ¶ 6. The ‘877 patent is entitled “Active Headwear for Detachably Mounting an Imaging Device.” *Id.* Fountain believes that Kuyou’s snorkeling mask infringes the ‘877 patent. *Id.* at ¶ 10; Answer, Docket No. 41, ¶ 21. In 2016, based on this belief, Fountain began contacting several online retailers of Kuyou’s products, notifying them of the alleged infringement. FAC ¶¶ 14–16. The online retailers removed the snorkel mask from the website and no longer sell the product. *Id.*

Kuyou filed this motion for preliminary injunction, requesting that the Court enjoin

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Fountain from stating to any party that Kuyou’s product infringes Fountain’s patent. Opp’n at 1:5–6.

II. LEGAL STANDARD

The purpose of a preliminary injunction is to preserve the status quo and prevent irreparable injury before a final judgment. Sierra On-Line, Inc. v. Phoenix Software, Inc., 739 F.2d 1415, 1422 (9th Cir. 1984). “A preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion.” Lopez v. Brewer, 680 F.3d 1068, 1072 (9th Cir. 2012) (emphasis in original) (internal quotations and citations omitted).

Federal Rule of Civil Procedure 65 sets forth the procedural requirements for issuing a preliminary injunction, and the Supreme Court has provided several requirements that a movant must establish: (1) a likelihood of success on the merits; (2) a likelihood of irreparable injury in the absence of preliminary relief; (3) the balance of equities favors the plaintiff; and (4) an injunction is in the public interest. Winter v. Nat’l Res. Def. Council, Inc., 555 U.S. 7, 20 (2008).

In the Ninth Circuit, courts may evaluate the Winter factors on a sliding scale: “serious questions going to the merits, and a balance of hardships that tips sharply toward the plaintiff can support issuance of a preliminary injunction, *so long as the plaintiff also shows that there is a likelihood of irreparable injury* and that the injunction is in the public interest.” Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1134–35 (9th Cir. 2011) (italics supplied).

III. ANALYSIS

The Court finds that Kuyou has failed to satisfy two factors required to receive a preliminary injunction. First, Kuyou has failed to prove a likelihood of success on the merits of its claim. Second, Kuyou has failed to show irreparable harm.

1. Kuyou Has Failed to Demonstrate Likelihood of Success on the Merits on its Lanham Act Claim

To obtain a preliminary injunction, the moving party must show that he or she is likely to prevail on the merits of its claim. Winter, 555 U.S. at 20; Garcia v. Google, Inc., 786 F.3d

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733, 740 (9th Cir. 2015).

Kuyou sued Fountain for alleged violation of Section 43(a) of the Lanham Act. See FAC. To succeed on a Section 43(a) Lanham Act claim, a plaintiff must prove several elements: (1) the defendant made a false or misleading statement of fact in commercial advertising about the plaintiff's goods or services; (2) the statement actually deceives or is likely to deceive a substantial segment of the intended audience; (3) the deception is material in that it is likely to influence purchasing decisions; (4) the defendant caused the statement to enter interstate commerce; and (5) the statement resulted in actual or probable injury to the plaintiff. Zenith Elecs. Corp. v. Exzec, Inc., 182 F.3d 1340, 1348, (Fed. Cir. 1999). Additionally, the plaintiff must show that the party making the allegedly offending statements acted in bad faith. Id. at 1353 (finding that "federal patent law bars the imposition of liability [under federal or state law] for publicizing a patent in the marketplace unless the plaintiff can show that the patent holder acted in bad faith."). "[A] patent owner has the right to . . . enforce its patent, and that includes threatening alleged infringers with suit." Concrete Unlimited, Inc. v. Cementcraft, Inc., 776 F.2d 1537, 1538 (Fed. Cir. 1985). But where a patentee makes public allegations of patent infringement in bad faith, this amounts to unfair competition in violation of Section 43(a) of the Lanham Act. Id.

The law presumes that the assertion of a patent is made in good faith; this presumption is overcome only by affirmative evidence of bad faith. Golan v. Pingel Enter., Inc., 310 F.3d 1360, 1371 (Fed. Cir. 2002). A showing of bad faith must be supported with sufficient evidence; suspicions of bad faith, without evidence, are insufficient to justify a preliminary injunction. Judkins v. HT Window Fashions Corp., 514 F. Supp. 2d 753, 765 (W.D. Pa. 2007) aff'd sub nom. Judkins v. HT Window Fashion Corp., 529 F.3d 1334 (Fed. Cir. 2008). To establish bad faith, the party challenging these statements must provide clear and convincing evidence that (1) the infringement allegations are objectively false and (2) that the patentee subjectively made them in bad faith. Golan, 310 F.3d at 1371. The "bad faith" determination is made on a case-by-case basis. Zenith, 182 F.3d at 1354.

Here, to demonstrate a likelihood of success on the merits, Kuyou must offer affirmative evidence that Fountain asserted its infringement allegations in bad faith. See Golan, 310 F.3d at 1371. The Court finds that Kuyou has failed to demonstrate either objective or subjective bad faith.

A. Kuyou Fails to Show Objective Bad Faith

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To establish objective bad faith, Kuyou must prove that Fountain’s infringement claims were “baseless” or objectively unreasonable, such that no reasonable litigant could realistically expect success on the merits. See Golan, 310 F.3d at 1371; Dominant Semiconductors Sdn. Bhd. v. OSRAM GmbH, 524 F.3d 1254, 1260 (Fed. Cir. 2008). Kuyou argues that Fountain’s infringement allegations are baseless because Fountain’s patent claims require multiple elements “plainly absent from Kuyou’s mask.” Id. at 19. Therefore, Kuyou argues that it has satisfied the standard to prove a likelihood of success on the merits. Id. Kuyou argues that a reasonable litigant would find that its snorkel mask lacks several essential elements required by Claim 6 of the ‘877 patent. Opp’n at 12:9. Claim 6 states in pertinent part:

A mounting assembly, suitable for securing an imaging device to a head of a user, said mounting assembly comprising: an integrated headwear frame and attachment base . . . wherein said integrated headwear frame and attachment base further has a *right lens frame and a left lens frame*, wherein the right lens frame is attached to the left lens frame by nosepiece.

Ex. A at 2:57–67 (emphasis added). The parties disagree over the interpretation of the words “right lens frame and a left lens frame.” Kuyou argues that the proposed interpretation requires that the headgear must have *two* separate lens frames, connected together by a nose piece. Reply at 3:20–22. Kuyou contends that, to infringe, the snorkel mask must have both a left lens frame *and* a right lens frame. Mot. at 11. Therefore, Kuyou’s snorkel mask does not infringe because it has only one full-face lens. Id. Conversely, Fountain argues that “right lens frame” should be construed as merely the lens frame located on the right side, and that “left lens frame” should be construed as the lens frame located on the left side. Opp’n at 12:12–20. Fountain contends that there can be a left frame portion and a right frame portion of a single lens frame. Id. Therefore, Kuyou’s snorkel mask infringes the ‘877 patent because it has both a left portion and right portion of the same lens. Id.

At this time, the Court does not rule on whether Kuyou’s snorkel mask actually infringes Fountain’s patent. However, the Court finds that Fountain’s proposed claim interpretation is not objectively baseless or unreasonable. Fountain has made several arguments—using claim language, the claim specifications, case law, and the patent prosecution history—supporting its belief that the snorkel mask infringes on the ‘877 patent,

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either literally or through the Doctrine of Equivalents. See generally Opp'n. As such, Fountain has provided sufficient foundation for why the Kuyou snorkel mask infringes on its interpretation of the patent claim.

At the hearing on the matter, Kuyou again asserted that Fountain's infringement claim was objectively baseless. Kuyou argued that its snorkel mask lacks a nose piece, which is a required element of Fountain's patent. Kuyou argues that this is a clear-cut case of "knew or should have known bad faith." See Zenith, 182 F.3d at 1354. The Court disagrees. Kuyou's snorkel mask does have a mouth and nose piece that connects the right and left portions of the lens together. Therefore, Fountain's interpretation is not objectively unreasonable. Moreover, Fountain has supported its infringement claim with sufficient reasoning and evidence. The Court finds that the infringement assertion is not objectively baseless. This argument does not support a finding of objective bad faith.

Therefore, the Court finds that Kuyou has not established objective bad faith.

B. Kuyou Fails to Show Subjective Bad Faith

Subjective bad faith is shown if the patentee "knows that the patent is invalid, unenforceable, or not yet infringed, yet represents to the marketplace that a competitor is infringing on the patent." See Zenith, 182 F.3d at 1354. The case law is clear that a party must provide affirmative evidence of subjective bad faith; mere suspicions are not enough. See Judkins, 514 F. Supp. 2d at 765. Subjective bad faith is typically found when a party asserts an infringement suit knowing the patent is invalid, or when a party notifies an infringer without intending to file suit. See Golan, 310 F.3d at 1372.

Here, Kuyou has proffered no evidence to support a finding that Fountain knew its infringement allegations were false. Further, Kuyou has proffered no evidence demonstrating that Fountain knew its patent was invalid or unenforceable. Therefore, neither of the scenarios typically indicative of subjective bad faith is present here. See Golan, 310 F.3d at 1372. Moreover, Kuyou's only argument to support a finding of subjective bad faith is that Fountain continues to believe that Kuyou's snorkel mask infringes on its patent, despite Kuyou's notifications to the contrary. Mot. at 18. However, simply because a party has a differing interpretation of a patent claim does not mean that the party subjectively acted in bad faith. See Zenith, 182 F.3d at 1354.

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At the hearing on the matter, Kuyou attempted to prove *objective* bad faith, but failed entirely to address *subjective* bad faith. Kuyou cannot succeed on the merits of its Lanham Act claim without proving *both* objective and subjective bad faith. See Dominant Semiconductors, 524 F.3d at 1264 (holding that bad faith, as required for imposition of liability against patentee for communicating allegations of infringement, includes separate objective and subjective components); Globetrotter Software, Inc. v. Elan Computer Grp., Inc., 362 F.3d 1367, 1376 (Fed. Cir. 2004) (same). Moreover, the law requires Kuyou to advance affirmative, clear and convincing evidence of subjective bad faith. See Judkins, 514 F. Supp. 2d at 765. At best, Kuyou has made only conclusory allegations of subjective bad faith. Kuyou has failed to provide any affirmative evidence of subjective bad faith in its brief or at the hearing on the matter. As a result, Kuyou has failed to demonstrate Fountain acted with bad faith, an essential element of its Lanham Act claim.

As such, Kuyou fails to demonstrate that it is likely to succeed on the merits of its claim. Therefore, the Court cannot grant Kuyou's motion for preliminary injunction.

2. Kuyou Has Not Proffered Sufficient Evidence of Irreparable Harm

To succeed on a motion for a preliminary injunction, a plaintiff must demonstrate evidence sufficient to establish a likelihood of irreparable harm. Herb Reed Enterprises, LLC v. Florida Entm't Mgmt., Inc., 736 F.3d 1239, 1249 (9th Cir. 2013). Irreparable harm is "harm for which there is no adequate legal remedy." Arcsoft, Inc. v. Cyberlink Corp., 153 F. Supp. 3d 1057, 1071 (N.D. Cal. 2015) (quoting Arizona Dream Act Coal. v. Brewer, 757 F.3d 1053, 1068 (9th Cir. 2014)). "[T]he person or entity seeking injunctive relief must demonstrate that irreparable injury is *likely* in the absence of an injunction." Park Vill. Apartment Tenants Ass'n v. Mortimer Howard Tr., 636 F.3d 1150, 1160 (9th Cir. 2011) (emphasis in original) (internal quotations and citations omitted). "An injunction will not issue if the person or entity seeking injunctive relief shows a *mere possibility* of some remote future injury, or a conjectural or hypothetical injury." Id. (emphasis supplied) (internal quotations and citations omitted).

Here, Kuyou advances two theories to support its assertion that it will suffer irreparable harm in the absence of a preliminary injunction. First, Kuyou argues it will suffer lost sales. Second, Kuyou argues it will suffer a loss of goodwill or prospective customers. The Court finds that neither of these assertions establish irreparable harm.

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A. Kuyou’s Lost Sales Do Not Demonstrate Irreparable Harm

The basis of injunctive relief in the federal courts is irreparable harm and inadequacy of legal remedies. L.A. Mem’l Coliseum Comm’n v. Nat’l Football League, 634 F.2d 1197, 1202 (9th Cir. 1980). The possibility that “adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.” Id. (quoting Sampson v. Murray, 415 U.S. 90, 94 (1974)). Therefore, monetary injury is not normally considered an irreparable injury because it can be adequately compensated by remedies available at law. See eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006); L.A. Mem’l Coliseum, 634 F.2d 1197, 1202 (9th Cir. 1980).

Here, Kuyou asserts that it has lost sales due to Fountain’s actions, and as such it has suffered irreparable injury. See Reply at 9–10. However, Kuyou’s lost sales and monetary injury do not provide a basis for irreparable harm. Kuyou has failed to demonstrate that it will not be able to recover for these lost sales at a later date, in the ordinary course of litigation. See L.A. Mem’l Coliseum, 634 F.2d at 1202. Kuyou initially brought claims against Fountain for tortious interference with contractual relations and interference with prospective economic advantage. See Compl., Docket No. 1. Kuyou then amended its complaint to bring a claim of violation of Section 43(a) of the Lanham Act. See FAC ¶ 46. If Kuyou succeeds on the merits of its claim against Fountain, compensatory damages would be available through the ordinary course of litigation. See id. This suggests that monetary relief is adequate. Therefore, the Court finds that Kuyou’s alleged monetary losses cannot be the basis for irreparable harm for this preliminary injunction.

B. Kuyou Fails to Demonstrate Sufficient Evidence to Prove Loss of Goodwill, Reputation, or Customers

Loss of control over business reputation and damage to goodwill can provide a basis for irreparable harm for a preliminary injunction. See, e.g., Stuhlbarg Int’l Sales Co., Inc. v. John D. Brush and Co., Inc., 240 F.3d 832, 841 (9th Cir. 2001). However, intangible injuries, such as loss of control over business reputation, damage to goodwill, and loss of prospective customers, must still be grounded in sufficient evidence. Herb Reed, 736 F.3d at 1250. Conclusory or factually unsupported allegations are insufficient to prove irreparable harm. See id.

Here, Kuyou alleges that there have been “numerous complaints by the retailers to

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Kuyou, and . . . retailers simply now refusing to sell Kuyou’s accused products.” Mot. at 20. Therefore, it has lost customer goodwill and its business reputation. Kuyou argues that it has “painstakingly detailed the loss of goodwill and customers with Kuyou’s customer resellers.” Reply at 9:20–24. The Court disagrees. The Court finds that Kuyou has not detailed the loss of goodwill, and instead has provided only conclusory allegations to support its argument that it has suffered irreparable harm. These conclusory allegations are insufficient to support a finding of irreparable harm.

In Herb Reed, the Ninth Circuit addressed the issue of whether evidence is required to demonstrate irreparable harm as a basis for a preliminary injunction. 736 F.3d at 1250. In Herb Reed, a plaintiff in a trademark infringement suit requested a preliminary injunction enjoining a defendant’s use of its trademark. Id. The plaintiff alleged it had suffered loss of control over business reputation and damage to goodwill. Id. The district court found there was irreparable harm. Id. However, on appeal, the Ninth Circuit held that the district court erred. Id. After combing the record for factual evidence of damage to goodwill, the court found only one email from a potential customer. Id. The email supported a finding of customer confusion, but not irreparable harm. Id. The Ninth Circuit noted that the plaintiff’s conclusory allegations and “platitudes” did not support a finding of irreparable harm. Id. Therefore, the court held that the district court failed to ground its decision in sufficient evidence to establish a likelihood of loss of control over business reputation and good will. Id.

Similarly, here, Kuyou requests the Court find irreparable harm based on mere conclusory allegations. Kuyou gives short shrift to the issue of irreparable harm in its briefs. See generally Mot. and Reply. Instead, Kuyou relies exclusively on the Peng Declaration and attached exhibits to establish that it has suffered irreparable harm. The Peng Declaration makes only three references to any irreparable harm. See Peng Decl. First, Peng states that “Fountain has caused significant harm and lost sales to Kuyou as well as resellers of Kuyou’s products.” Peng Decl. at ¶ 11. Second, Peng states that “Kuyou has lost significant goodwill and diminished reputation with its retailers as a result of Fountain’s conduct.” Id. at ¶ 13. Third, Peng states that “Kuyou will continue to suffer lost sales, will continue to lose retailers willing to sell its full-face mask with camera mount, and will suffer further loss of goodwill and reputation.” Peng Decl., 15. Each of these statements is merely conclusory. Peng fails to state with sufficient evidence her basis for these conclusions.

In its motion, Kuyou alleges that there have been “numerous complaints by the retailers to Kuyou, and retailers simply now refusing to sell Kuyou’s accused products.” Mot. at 20.

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Kuyou does not provide the Court with any of those “numerous complaints.” Instead, Kuyou provides only two additional exhibits as evidence of this allegation. The first exhibit is email correspondence between Kuyou and one of its retailers. See Peng Decl., Ex. P. The email does not support a finding of loss of goodwill or reputation. The email’s sender is simply discussing the situation with Kuyou and asking Kuyou for advice on the matter. See id. The sender does not make any statements from which the Court could infer that she has lost goodwill or damaged Kuyou’s business reputation. Id. The second attached exhibit is a list of businesses that stopped selling Kuyou’s snorkel mask. Peng Decl., Ex. Q. However, this list is evidence of lost sales, but is not necessarily indication of loss of good will or reputation.

At the hearing on the matter, Kuyou asserted that it has suffered irreparable harm because it has lost customers due to Fountain’s infringement allegations. Courts are reluctant to find that lost customers are a type of irreparable harm. See Ebates Performance Mktg., Inc. v. Integral Techs., Inc., No. 12-CV-06488-YGR, 2013 WL 75929, at *2 (N.D. Cal. Jan. 4, 2013) (“Harms such as temporary loss of customers are measurable and are best characterized as economic harms.”); OG Int’l, Ltd. v. Ubisoft Entm’t, No. C 11–04980 CRB, 2011 WL 5079552, at *10 (N.D. Cal. Oct.26, 2012) (“In general, lost customers may be compensated by damages, which weighs against a claim of irreparable harm.”). However, a showing of *permanent* loss of customers may support a finding of irreparable harm. Open Text, S.A. v. Box, Inc., 36 F. Supp. 3d 885, 906 (N.D. Cal. 2014). Here, Kuyou has established that some of its customers have temporarily stopped buying the snorkel mask from Kuyou. However, Kuyou has failed to show that the customers will be *permanently* lost. Additionally, Kuyou has not demonstrated that it will not be able to recover from the temporarily lost customers through the ordinary course of litigation. Therefore, the Court finds that Kuyou’s lost customers are not a basis for irreparable harm here.

Overall, the Court finds that Kuyou has failed to proffer sufficient evidence to support a finding of irreparable harm due to loss of goodwill, reputation, or customers. As such, the Court cannot issue a preliminary injunction absent irreparable harm.

In conclusion, Kuyou has failed to prove two necessary factors to receive a preliminary injunction—likelihood of success on the merits and irreparable harm. Therefore, the Court will not address the additional factors, balance of equities and public interest.

IV. CONCLUSION

