UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES—GENERAL

Case No. CV 20-8006-MWF (AFMx) **Date: September 16, 2020**
Title: Lollicup USA, Inc. v. Kenny Jin et al.

Present: The Honorable MICHAEL W. FITZGERALD, U.S. District Judge

Deputy Clerk:	Court Reporter:
Rita Sanchez	Not Reported
Attorneys Present for Plaintiff:	**Attorneys Present for Defendant:**
None Present	None Present

Proceedings (In Chambers): ORDER RE: PLAINTIFF'S EX PARTE APPLICATION FOR TEMPORARY RESTRAINING ORDER [6]

Before the Court is Plaintiff Lollicup USA, Inc.'s ("Lollicup") Ex Parte Application for a Temporary Restraining Order (the "Application"), filed on September 8, 2020. (Docket No. 6). On September 9, 2020, Defendants Kenny Jin and Padaya Trading, Inc., (Collectively, "Padaya") filed an Opposition. (Docket No. 8).

The Application is **DENIED *without prejudice***. Lollicup has failed to demonstrate a likelihood of irreparable harm and therefore cannot justify issuance of a Temporary Restraining Order ("TRO").

Federal Rule of Civil Procedure 65 governs the issuance of temporary restraining orders and preliminary injunctions, and courts apply the same standards to both. *Stuhlbarg Intern. Sales Co., Inc. v. John D. Brush & Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001). A preliminary injunction is an "extraordinary and drastic remedy." *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008) (citation and internal quotation marks omitted). A plaintiff seeking injunctive relief must establish that: (1) he is likely to succeed on the merits; (2) he is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of the equities tips in his favor; and (4) an injunction is in the public interest. *Toyo Tire Holdings of Ams. Inc. v. Cont'l Tire N.*

Am., Inc., 609 F.3d 975, 982 (9th Cir. 2010) (citing *Winter v. Nat. Res. Def. Council*, 555 U.S. 7 (2008)).

"A preliminary injunction can take two forms:" prohibitory and mandatory. *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 878 (9th Cir. 2009). "A prohibitory injunction prohibits a party from taking action and 'preserve[s] the status quo pending a determination of the action on the merits.'" *Id*. (quoting *Chalk v. U.S. Dist. Court*, 840 F.2d 701, 704 (9th Cir. 1988)). "A mandatory injunction 'orders a responsible party to take action.'" *Id*. at 879 (quoting *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 484 (1996)) (internal quotation marks omitted). "A mandatory injunction 'goes well beyond simply maintaining the status quo [p]endente lite [and] is particularly disfavored.'" *Id*. (alterations in original) (quoting *Anderson v. United States*, 612 F.2d 1112, 1114 (9th Cir. 1979)) (internal quotation marks omitted). "In general, mandatory injunctions 'are not granted unless extreme or very serious damage will result and are not issued in doubtful cases or where the injury complained of is capable of compensation in damages.'" *Marlyn Nutraceuticals, Inc.,* 571 F.3d at 879 (quoting *Anderson*, 612 F.2d at 1115); *see also Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (mandatory injunction should be denied "unless the facts and law clearly favor the moving party.").

Harm to business goodwill and reputation is unquantifiable and considered irreparable. *See Rent–A–Center, Inc. v. Canyon Tele. & Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991) ("Intangible injuries, such as damage to ongoing recruitment efforts and goodwill, qualify as irreparable harm."); *Optinrealbig.com, LLC v. Ironport Sys., Inc.*, 323 F. Supp. 2d 1037, 1050 (N.D. Cal. 2004) ("Damage to a business's goodwill is typically irreparable injury because it is difficult to calculate.").

Lollicup seeks to enjoin Padaya's sale of children's masks on the Amazon Marketplace that allegedly infringe on Lollicup's intellectual property rights in its Karat brand children's masks. (Application at 1). Lollicup argues that Padaya's efforts to pass off their "copycat" products as Lollicup's will cause irreparable harm that is "difficult if not impossible to quantify." (*Id*. at 2). In particular, Lollicup asserts that negative reviews have been left on the Amazon Marketplace and that such

reviews irreparably harm the Karat brand's goodwill and reputation with the public. (Declaration of Alan Yu ("Yu Decl.") ¶ 5 (Docket No. 6-4)).

Padaya argues that Lollicup cannot show irreparable harm on the basis of a few negative reviews because, taken as a whole, the reviews are overwhelmingly positive. (Opposition at 16). Specifically, Padaya asserts that the listing referenced in Lollicup's declaration has a cumulative average rating of 4.4 out of 5 stars. (Declaration of Lili Jin ("Jin Decl.") ¶ 16 (Docket No. 8-2)). And Padaya argues that some of the negative reviews are not based on its products or conduct, pointing out that the first negative review referenced in the Declaration of Alan Yu complains about the poor quality of an ***authentic Karat brand*** mask. (*See* Yu Decl., Ex A).

Because Lollicup alleges that Padaya is currently engaged in actions that infringe upon Lollicup's rights in Karat brand and seeks an order enjoining Padaya from ***continuing to engage*** in these actions, (*see generally* Application), Lollicup seeks a mandatory injunction. *See Marlyn Nutraceuticals, Inc.*, 571 F.3d at 879 (explaining that a mandatory injunction requires a party to take action). As such, Lollicup's request will be scrutinized under the heightened standard for mandatory injunctions, *i.e.*, "extreme or very serious damage." *Id.*

The Court agrees with Padaya that Lollicup has failed to demonstrate harm to the goodwill and reputation of the Karat brand. Courts have recognized that negative reviews can cause irreparable harm. *See, e.g.*, *Home Comfort Heating and Air Conditioning, Inc. v. Ken Starr, Inc.*, No. CV 18-00469-JLS (DFMx), 2018 WL 3816745 (C.D. Cal. 2018) (negative online reviews and complaints intended for defendant); *Life Alert Emergency Response, Inc. v. LifeWatch, Inc.*, 601 F. App'x 469, 474 (9th Cir. 2015) ("numerous and persistent complaints from would-be customers" along with emails and social media posts from confused consumer); *Grupo Salinas Inc. v. JR Salinas Wheels & Tires Inc.*, SACV 16–1923 JVS (KESx), 2016 WL 9277320, at *6-*7 (a negative Yelp review, "mistakenly diverted" phone calls, and a log containing details of incidents of confusion). But in each of these cases, the plaintiffs presented evidence that a negative review or complaint was expressed directly to the plaintiffs' business or left on the business's Yelp or social media page. Here, Lollicup presents

evidence establishing only that there are negative reviews on Padaya's Amazon page. (Yu Decl., Ex. A). The Court is not persuaded that reviews left on Padaya's Amazon page can constitute irreparable harm to the Karat brand. Because Lollicup offers no other evidence of harm, Lollicup has failed to persuade the court that is has suffered extreme or serious damage to its goodwill and reputation with consumers. *See Puma SE v. Forever 21, Inc.*, No. CV 17-2523 PSG (Ex), 2017 WL 4771003, at *3 (C.D. Cal. June 2, 2017) ("In order to show harm to its brand under Ninth Circuit precedent, Puma must do more than simply submit a declaration insisting that its brand image and prestige have or will be harmed.").

Even if reviews left on Padaya's Amazon page could constitute evidence of harm to Lollicup's brand, Lollicup does not dispute that the reviews on Padaya's Amazon page are overwhelmingly positive. (*See* Jin Decl. ¶ 16). Lollicup points specifically to 30 negative reviews, (Yu Decl., Ex. A), but the product has over 900 total reviews (Declaration of Kenny Jin, Ex A (Docket No. 11). Furthermore, nearly all of the negative reviews complain about the poor quality of the mask strings—but it is unclear whether these putatively faulty masks are authentic Karat brand masks or masks from another supplier. (Yu Decl, Ex. A). There is at least some evidence that the putatively faulty masks are the authentic Karat brand masks, (*see* Yu Decl., Ex A), which cuts against Lollicup's argument that ***Padaya's conduct*** has harmed Lollicup's goodwill and reputation with the public.

Lollicup has failed to show that the negative reviews harm its reputation with the public. Therefore, Lollicup has not demonstrated that Padaya's conduct is likely to cause "extreme or very serious damage" such that a mandatory injunction is warranted. *See Marlyn Nutraceuticals, Inc.*, 571 F.3d at 879 (quoting *Anderson*, 612 F.2d at 1115).

Because this record does not support equitable relief, Lollicup is entitled to neither a TRO nor an OSC re preliminary injunction. Accordingly, the Application is **DENIED *without prejudice.***

Let me drop the third person for a moment. Although I've denied the Application, there potentially is wrongful conduct here. I'm not going to grant summary judgment before any discovery, but I will offer two things to Lollicup. The first is the denial without prejudice. Lollicup may file a motion for preliminary injunction if it gathers additional evidence of harm that is not compensable by damages. The second is a quick case schedule and a prompt trial date, if the pandemic allows. Defendants shall respond to the Complaint on or before **September 28, 2020**. If Defendants intend to file a motion to dismiss, the parties shall meet and confer pursuant to Local Rule 7-3 no later than **September 23, 2020**.

IT IS SO ORDERED.