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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CONSUMERDIRECT, INC., a Nevada corporation,

Plaintiff-Appellee,

v.

ARRAY US, INC., a Delaware corporation,

Defendant-Appellant,

and

PENTIUS, LLC, a Delaware limited liability company; et al.,

Defendants.

No. 22-55420

D.C. No.
8:21-cv-01968-JVS-ADS

MEMORANDUM[*]

Appeal from the United States District Court
for the Central District of California
James V. Selna, District Judge, Presiding

Submitted November 17, 2022[**]
San Jose, California

Before: SCHROEDER, GRABER, and FRIEDLAND, Circuit Judges.

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[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

[**] The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Array appealed a preliminary injunction prohibiting it from using, marketing, advertising, displaying, and providing services to several domain names—and derivatives of these names—that allegedly infringed several of ConsumerDirect's trademarks. After ConsumerDirect stipulated to voluntary dismissal of several of its claims, Array notified us that it was narrowing its appeal. Array stated that the only issue "[l]eft unresolved for this Court's adjudication is whether the portion of the district court's order that extends to 'derivatives' of 'smartcredit' and 'smartcredit.com' is proper." We affirm this part of the preliminary injunction because Array forfeited any challenge to it by failing to sufficiently raise the issue in the district court.

Array now argues that the term "derivatives" is too vague to satisfy the district court's obligation under Rule 65(d) to provide "fair and precisely drawn notice of what the injunction actually prohibits." *Granny Goose Foods, Inc. v. Bhd. of Teamsters*, 415 U.S. 423, 444 (1974); Fed. R. Civ. P. 65(d)(1). In its brief in opposition to the preliminary injunction in the district court, Array contested the scope of the injunction under its discussion of the balance of hardships. Array did not, however, contend that "derivatives" was too vague to give proper notice of the prohibited conduct. Array therefore did not sufficiently raise the issue below.

Although we may hear a forfeited issue under certain circumstances, including when the issue is purely one of law, *Armstrong v. Brown*, 768 F.3d 975,

981 (9th Cir. 2014), we choose not to exercise our discretion to do so in this case. Even in our court, Array has not sufficiently challenged the extension of the injunction to derivatives of the "smartcredit" domains, as opposed to the "creditmonitoring" domains. The issue is thus doubly forfeited. *See United States ex rel. Kelly v. Serco, Inc.*, 846 F.3d 325, 335 (9th Cir. 2017); *Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999).

AFFIRMED.