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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

WBS, INC., a California corporation,)	Case No. CV 16-03495 DDP (JCx)
)	
Plaintiff,)	
)	
v.)	ORDER DENYING PLAINTIFF'S APPLICATION FOR A TEMPORARY RESTRAINING ORDER
STEPHEN PEARCY, ARTISTS)	
WORLDWIDE, INC., a California corporation, TOP FUEL NATIONAL, a business of unknown formation,)	[Dkt. 70, 72]
)	
Defendants.)	
)	
_____)	

Presently before the court is Plaintiff WBS, Inc. ("WBS")'s Ex Parte Application for a Temporary Restraining Order. Having considered the submissions of the parties, the court denies the application and adopts the following Order.

I. Background

As explained in further detail by another judge of this court, this case concerns certain trademarks originally associated with the band "Ratt." (Dkt. 69 at 2.) Plaintiff asserts that it obtained the marks in 1997 via an assignment from a partnership

1 comprised of certain members of the band. In 2001, Percy filed
2 suit against WBS in Los Angeles County Superior Court. WBS filed a
3 cross-complaint alleging, among other things, that Percy infringed
4 its RATT marks. In 2002, the state court ruled in WBS' favor on
5 the infringement claim and enjoined Percy from using the RATT mark
6 in his business or on advertisements and from selling or
7 distributing merchandise or recordings bearing the mark absent
8 approval from WBS or "the RATT General Partnership."

9 On May 19, 2016, WBS filed the operative Complaint against
10 Defendants Stephen Percy, Artists Worldwide ("AWW"), and others
11 for (1) trademark infringement, (2) conversion, (3) tortious
12 interference with prospective economic advantage, (4) unfair
13 competition, and (5) breach of contract. (Dkt. 2.) Concurrently
14 with the Complaint, WBS filed an application for a temporary
15 restraining order ("TRO") and order to show cause ("OSC") why a
16 preliminary injunction should not issue against Defendants.
17 Another judge of this court denied WBS's application. (Dkt. 14.)

18 Now, WBS again seeks a temporary restraining order against
19 Percy, alleging that he intends to perform with a band called
20 "RATT" in Minnesota on February 11, 2017. WBS further alleges that
21 another band touring as "RATT," with WBS authorization, has had
22 shows cancelled due to confusion as to its authenticity. WBS seeks
23 a TRO enjoining Percy from using the RATT trademarks allegedly
24 owned by WBS "to promote Percy or any band of which he is a
25 member" and from using the marks on websites, merchandise,
26 marketing materials, and from depleting any revenues Percy has
27 generated from the use of the marks.

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1 **II. Legal Standard**

2 Requests for temporary restraining orders are governed by the
3 same general standards that govern the issuance of a preliminary
4 injunction. See Stuhlbarq Int'l Sales Co., Inc. v. John D. Brush &
5 Co., Inc., 240 F.3d 832, 839 n. 7 (9th Cir. 2001). An injunction
6 is a matter of equitable discretion and is "an extraordinary remedy
7 that may only be awarded upon a clear showing that the plaintiff is
8 entitled to such relief." Winter v. Natural Resources Defense
9 Council, Inc., 555 U.S. 7, 22 (2008).

10 "A plaintiff seeking a preliminary injunction must establish
11 that he is likely to succeed on the merits, that he is likely to
12 suffer irreparable harm in the absence of preliminary relief, that
13 the balance of equities tips in his favor, and that an injunction
14 is in the public interest." Winter, 555 U.S. at 20. Preliminary
15 relief may be warranted where a party: (i) shows a combination of
16 probable success on the merits and the possibility of irreparable
17 harm; or (ii) raises serious questions on such matters and shows
18 that the balance of hardships tips in favor of an injunction. See
19 Arcamuzi v. Continental Air Lines, Inc., 819 F.2d 935, 937 (9th
20 Cir. 1987). "These two formulations represent two points on a
21 sliding scale in which the required degree of irreparable harm
22 increases as the probability of success decreases." Id. Under
23 both formulations, the party must demonstrate a "fair chance of
24 success on the merits" and a "significant threat of irreparable
25 injury" absent the issuance of the requested injunctive relief.²

26
27 ² Even under the "serious interests" sliding scale test, a
28 plaintiff must satisfy the four Winter factors and demonstrate
"that there is a likelihood of irreparable injury and that the
(continued...)

1 Id. A preliminary injunction "should not be granted unless the
2 movant, by a clear showing, carries the burden of persuasion."
3 Mazurek v. Armstrong, 520 U.S. 968, 972 (1997) (citation omitted).

4 **III. Discussion**

5 To prevail on its trademark cause of action, Plaintiff must
6 show that (1) it has "a protectible ownership interest in the mark;
7 and (2) that Defendants' use of the mark is likely to cause
8 consumer confusion." Rearden LLC v. Rearden Commerce, Inc., 683
9 F.3d 1190, 1202 (9th Cir. 2012) (internal quotation omitted).

10 Plaintiff argues first that it is likely to succeed on the merits
11 of its trademark infringement claim because Defendants are subject
12 to collateral estoppel. (Memorandum in Support Of Application
13 ("App") at 5.) A party may be collaterally estopped where "(1) the
14 issue necessarily decided at the previous proceeding is identical
15 to the one which is sought to be relitigated; (2) the first
16 proceeding ended with a final judgment on the merits; and (3) the
17 party against whom collateral estoppel is asserted was a party or
18 in privity with a party at the first proceeding." Hydranautics v.
19 FilmTec Corp., 204 F.3d 880, 885 (9th Cir. 2000).

20 Although Plaintiff's collateral estoppel argument refers to
21 "the legal history of the parties," the argument is unsupported by
22 any citation to the record. (App. at 5-7.) Parties are obligated
23 to present evidence in a manner that would allow this court to
24 evaluate it. See Carmen v. San Francisco Sch. Dist., 237 F.3d
25 1026, 1031 (9th Cir.2001). Furthermore, Plaintiff does not

27 ²(...continued)
28 injunction is in the public interest." Alliance for the Wild
Rockies v. Cottrell, 632 F.3d 1127, 1135 (9th Cir. 2011).

1 identify the issue Percy is estopped from pursuing. To the extent
2 Plaintiff identifies the 2002 state court judgment as the basis for
3 collateral estoppel, it is not clear to the court how a
4 determination that Percy was infringing upon the RATT marks
5 roughly fifteen years ago estops Percy from arguing that his
6 recent activities do not infringe.³

7 Plaintiff's alternative argument regarding likelihood of
8 success on the merits is not well developed. Plaintiff is correct
9 that Percy is not entitled to use the RATT marks simply because he
10 is an original member of the band. See Robi v. Reed, 173 F.3d 736,
11 739-40 (9th Cir. 1999). Although Plaintiff is also correct that a
12 person who remains continuously involved with a musical group often
13 retains the right to use the mark, Plaintiff again cites no
14 evidence in the record to support the suggestion that this
15 principle creates a likelihood that WBS will prevail. Id.

16 Lastly, there appears to be a dispute whether Percy has
17 obtained a license to use the marks. Percy's declaration states
18 that he has received permission from both the RATT General
19 Partnership and WBS to utilize the marks. (Declaration of Stephen
20 Percy ¶¶ 7-9.) Plaintiff objects to Percy's declaration on the
21 ground that Percy lacks personal knowledge. Plaintiff's objection
22 has some merit. Although Percy's declaration states that the
23 facts therein are within his personal knowledge (Percy Decl. ¶ 1),
24 many of his statements, including the specific statements regarding
25 authorization to use the marks, are made as a matter of Percy's

26
27 ³ Plaintiff makes only occasional, general references to the
28 Declaration of Drew H. Sherman to support all of its factual
assertions, including those regarding trademark registrations, the
prior state court litigation, and Percy's recent activities.

1 "current good faith belief and understanding." (Id. ¶¶ 5-9.)
2 Generally, statements made without personal knowledge are entitled
3 to no weight. See, e.g. Bank Melli Iran v. Pahlavi, 58 F.3d 1406,
4 1412-13 (9th Cir. 1995). A declarant's reference to his good faith
5 belief, however, is not necessarily dispositive. Regardless of
6 such boilerplate references, a declarant's personal knowledge may
7 be inferred from his position and the nature of his participation
8 in the matters at issue. In re Kaypro, 218 F.3d 1070, 1075 (9th
9 Cir. 2000); Barthelemy v. Air Lines Pilots Ass'n, 897 F.2d 999,
10 1018 (9th Cir. 1990); Johnson v. Peralta Community College
11 District, No C-94-4255-MMC (PJH), 1997 WL 227903 at * 6 (N.D. Cal.
12 Apr. 28, 1997). Here, it appears beyond dispute that Percy has
13 personal knowledge of at least some of the facts recited on the
14 basis of his "current good faith belief and understanding." It
15 appears undisputed, for example, that Percy was formerly an
16 officer of WBS. (Percy Decl. ¶ 5.) Similarly, the court
17 can infer that Percy is personally aware of the activities of the
18 RATT Partnership, of which Percy is a member, and that Percy is
19 personally aware of authorization that he himself received. (Id.
20 ¶¶ 7-8.) Accordingly, Plaintiff's objections are overruled,
21 without prejudice.

22 **IV. Conclusion**

23 Plaintiff has not made a clear showing that it is likely to
24 succeed on the merits of its trademark infringement claims. The
25 scope of Plaintiff's collateral estoppel is not sufficiently clear,
26 nor is Plaintiff's argument supported by citations to the record.
27 Furthermore, it is unclear whether Percy has obtained
28 authorization to use the marks from the RATT Partnership, WBS, or

1 both, and therefore has an affirmative defense to Plaintiff's
2 infringement claims. Accordingly, Plaintiff's Application for a
3 TRO is denied.⁴

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6 IT IS SO ORDERED.

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9 Dated: February 10, 2017



DEAN D. PREGERSON
United States District Judge

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28 ⁴ Nothing in this Order shall be read to preclude Plaintiff
from seeking preliminary injunctive relief.