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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JUMBO BRIGHT TRADING LIMITED, a Hong Kong corporation; CHARLES ANTHONY PHILIP POZZI,)	Case No. CV 12-08932 DDP (MANx)
)	
Plaintiffs,)	ORDER DENYING PLAINTIFFS' APPLICATION FOR TEMPORARY RESTRAINING ORDER AND AN ORDER TO SHOW CAUSE RE: PRELIMINARY INJUNCTION
v.)	
THE GAP, INC.,)	[Docket No. 5]
)	
Defendant.)	
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Plaintiffs Jumbo Bright Trading Limited and Charles Anthony Philip Pozzi (collectively "Plaintiffs") have sued The GAP, Inc. ("Defendant") for various claims including trademark infringement, patent infringement, and the right of publicity. See generally Complaint. The dispute arises from Defendant's new Phillip loafers, which are allegedly confusingly similar to Plaintiffs' CP Charles Philip loafers. Id. Presently before the court is Plaintiffs' Ex Parte Application for a Temporary Restraining Order and an Order to Show Cause Re: Preliminary Injunction ("Motion").

1 Because Plaintiffs offer no evidence of irreparable harm, the court
2 DENIES their Motion in its entirety.¹

3 **I. Legal Standard**

4 An *ex parte* Temporary restraining order ("TRO") may be granted
5 when it is shown "that immediate and irreparable injury, loss, or
6 damage will result to the movant before the adverse party can be
7 heard in opposition." Fed. R. Civ. P. 65(b)(1)(A). Courts apply
8 the preliminary injunction factors in deciding whether to grant a
9 TRO. See Stuhlbarq Int'l Sales Co. v. John D. Brushy & Co., 240
10 F.3d 832, 839 n. 7 (9th Cir. 2001). A party requesting a TRO "must
11 establish that he is likely to succeed on the merits, that he is
12 likely to suffer irreparable harm in the absence of preliminary
13 relief, that the balance of equities tips in his favor, and that an
14 injunction is in the public interest." Network Automation, Inc. v.
15 Advanced Sys. Concepts, Inc., 638 F.3d 1137, 1144 (9th Cir. 2011)
16 (citing Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20
17 (2008)). If a plaintiff fails to "clearly show that it is likely
18 to suffer immediate and irreparable harm absent a TRO," a court
19 need not consider the other three factors. ConocoPhillips Co. v.
20 Gonzalez, No. 5:12-CV-00576-LHK, 2012 WL 538266, at *3 (N.D. Cal.
21 Feb. 17, 2012) (quotation omitted). "A TRO is an extraordinary
22 remedy that may only be awarded upon a clear showing that the
23 plaintiff is entitled to such relief." Niu v. United States, 821
24 F. Supp. 2d 1164, 1168 (C.D. Cal. 2011).

25 **II. Irreparable Harm Analysis**

27 ¹The parties appear to dispute whether Defendant received proper service
28 of Plaintiffs' Motion. Because Plaintiffs' Motion is denied, however, the court
need not determine whether proper service occurred.

1 "Speculative injury does not constitute irreparable injury
2 sufficient to warrant granting a preliminary injunction. A
3 plaintiff must do more than merely allege imminent harm sufficient
4 to establish standing; a plaintiff must *demonstrate* immediate
5 threatened injury as a prerequisite to preliminary injunctive
6 relief." Caribbean Marine Serv. Co., Inc. v. Baldrige, 844 F.2d
7 668, 674 (9th Cir. 1988) (emphasis in original, citations omitted).
8 Demonstrating irreparable harm requires evidence. See Winter, 555
9 U.S. at 21.

10 Previously, the Ninth Circuit presumed irreparable harm in
11 trademark infringement cases if a plaintiff showed a likelihood of
12 success on the merits. See Brookfield Commc'ns, Inc. v. W. Coast
13 Entm't Corp., 174 F.3d 1036, 1066 (9th Cir. 1999). However, in
14 Winter the Supreme Court held that, "[i]ssuing a preliminary
15 injunction based only on a possibility of irreparable harm is
16 inconsistent with our characterization of injunctive relief as an
17 extraordinary remedy that may only be awarded upon a clear showing
18 that the plaintiff is entitled to such relief." 555 U.S. at 22.
19 After Winter, the Ninth Circuit made clear that courts could no
20 longer presume irreparable harm after finding a likelihood of
21 success on the merits in copyright cases. Flexible Lifeline Sys.,
22 Inc. v. Precision Lift, Inc., 654 F.3d 989, 998 (9th Cir. 2011).
23 As far as this court is aware, every district court in the Ninth
24 Circuit that has examined the issue after Flexible Lifeline, along
25 with a number that analyzed the issue before that case, has either
26 found or at least suggested that irreparable harm cannot be
27 presumed in trademark cases as well. See e.g. CytoSport, Inc. v.
28 Vital Pharm., Inc., 617 F. Supp. 2d 1051, 1065 (E.D. Cal. 2009)

1 aff'd, Cytosport, Inc. v. Vital Pharm., Inc., 348 F. App'x 288 (9th
2 Cir. 2009); Herb Reed Enters., LLC v. Florida Entm't Mgmt., Inc.,
3 No. 2:12-CV-00560-MMD-GWF, 2012 WL 3020039, at *15 (D. Nev. July
4 24, 2012); BoomerangIt, Inc. v. ID Armor, Inc., No. 5:12-CV-0920
5 EJD, 2012 WL 2368466, at *4 (N.D. Cal. June 21, 2012); Seed Servs.,
6 Inc. v. Winsor Grain, Inc., No. 1:10-CV-2185 AWI GSA, 2012 WL
7 1232320, at *4 (E.D. Cal. Apr. 12, 2012); ConocoPhillips, 2012 WL
8 538266, at *2-3; AFL Telecomms. LLC v. SurplusEO.com, Inc., No. CV
9 11-01086-PHX-FJM, 2011 WL 4102214, at *3 (D. Ariz. Sept. 14, 2011)
10 reconsideration denied, No. CV 11-1086-PHX-DGC, 2011 WL 5547855 (D.
11 Ariz. Nov. 15, 2011); Mortgage Elec. Registration Sys., Inc. v.
12 Brosnan, No. C 09-3600 SBA, 2009 WL 3647125, at *8 (N.D. Cal. Sept.
13 4, 2009); Volkswagen AG v. Verdier Microbus & Camper, Inc., No. C
14 09-00231 JSW, 2009 WL 928130, at *2 (N.D. Cal. Apr. 3, 2009).

15 Plaintiffs first argue that they are entitled to a presumption
16 of irreparable harm, because they have shown a likelihood of
17 success on the merits for their trademark claim. (Plaintiffs'
18 Memorandum of Points and Authorities in Support of Ex Parte
19 Application for a Temporary Restraining Order at 17:19-18:18,
20 Docket No. 10.)² For the reasons discussed, Plaintiffs rely on
21 former law. Plaintiffs, however, do offer some evidence of
22 irreparable harm. Plaintiffs claim that, "[e]very day consumers
23 are buying [Defendant's] loafers assuming they meet Plaintiffs'
24 quality standards and they do not." (Docket No. 10 at 19:1-2.)
25 Although the irreparable harm section of their brief does not cite

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27 ²In violation of local rules, Plaintiffs did not e-file their reply brief.
28 C.D. Cal. L.R. 5-4.1. In light of the time pressures of a TRO motion, the court
exercised its discretion and accepted the brief.

1 it, Plaintiffs have provided a letter that their distributor wrote
2 to Defendant, which claims that Defendant's loafers were confusing
3 customers and diminishing Plaintiffs' sales. (Bates Decl. Ex. O.,
4 Docket No. 10-1.) However, the letter provides no specifics to
5 support these assertions. Id. It does not explain how its author
6 knew customers had been confused, nor does it specify any actual
7 lost revenues that have occurred since Defendant's product was
8 introduced. Id. Indeed, the letter's language seems to express
9 only a speculative concern: "[O]ur customer stores. . . are
10 concerned that this blatant copy of a unique design. . . will
11 infringe on their sales." Id. These conclusory statements do not
12 "demonstrate" that there is an "immediate threatened injury." See
13 Caribbean Marine, 844 F.2d at 674; see also Overstreet ex rel.
14 Nat'l Labor Relations Bd. v. W. Prof'l Hockey League, Inc., No. CV
15 09-0591 PHX ROS, 2009 WL 2905554, at *8 (D. Ariz. Sept. 4, 2009)
16 (explaining that "clear evidence, not speculation" is required to
17 support allegations of "irreparable harm"). Plaintiffs have, thus,
18 not met there burden.³

19 **III. Conclusion**

20 For the reasons discussed, the court DENIES Plaintiffs' Motion
21 in its entirety.

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27 ³Plaintiffs also cite a blog post from July 31, 2012, as proof that
28 Defendant's products will confuse customers. (Memo at 13:25.) Plaintiffs
purport to provide a copy of this post at Exhibit R to the Bates declaration.
No such exhibit, however, could be found by the court.

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The court notes that this denial is without prejudice, and finds that this matter is more suitable for resolution upon a noticed motion for a preliminary injunction.

IT IS SO ORDERED.

Dated: October 25, 2012


DEAN D. PREGERSON
United States District Judge