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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SST RECORDS, INC., a Texas corporation; GREGORY R. GINN, an)	Case No. CV 13-05579 DDP (MANx)
)	
Plaintiff,)	ORDER DENYING PLAINTIFFS' APPLICATION FOR A TEMPORARY RESTRAINING ORDER
)	
v.)	[Docket No. 3]
)	
HENRY GARFIELD aka HENRY ROLLINS, an individual;)	
KEITH MORRIS, an individual;)	
GARY McDANIEL aka CHUCK DUKOWSKI, an individual;)	
DENNIS PAUL CADENA aka DEZ CADENA, an individual; JOHN WILLIAM STEVENSON aka BILL STEVENSON, an individual;)	
and STEPHEN PATRICK O'REILLY aka STEPHEN EGERTON, an individual,)	
)	
Defendants.)	
)	

I. Background

Plaintiffs Gregory Ginn and SST Records (collectively "Plaintiffs") have sued Henry Garfield (a.k.a. Henry Rollins), Keith Morris, Gary McDaniel (a.k.a. Chuck Dukowski), Dennis Cadena, John Stevenson (a.k.a. Bill Stevenson), and Stephen O'Reilly (a.k.a. Stephen Egerton) (collectively "Defendants") for various

1 trademark-related claims, breach of contract, and unfair
2 competition. (See generally Compl. Docket No. 1.) Presently
3 before the Court is Plaintiffs' Application for a Temporary
4 Restraining Order.

5 Plaintiff Ginn and Defendant Rollins allegedly started the
6 band Black Flag in 1976, which the remaining Defendants later
7 joined. (See generally Ginn Decl.) Ginn claims to be the only
8 continuous member of Black Flag. (Id. ¶ 17.) In September 2012
9 Defendants Garfield and Morris allegedly filed a trademark
10 application for the Black Flag mark. (Ginn Decl. ¶¶ 14-17.)
11 Defendants, except Garfield, allegedly have advertised various
12 concerts, the earliest of which appears to have been in May 2013,
13 under the name Flag. (Id. ¶ 19.) This Motion was filed because
14 "defendants have scheduled a series of live performances, using a
15 confusing variation of Black Flag, namely 'Flag' . . . [which]
16 begin on Thursday August 22, 2013." (Memorandum in Support of
17 Motion at 4:7-11.) Based on Plaintiffs' exhibits, this tour
18 appears to have been announced at least in February. (Ginn Decl.
19 Ex. F (The earliest Facebook response to the tour's announcement
20 was in February 2013).

21 **II. Legal Standard**

22 Courts apply the preliminary injunction factors in deciding
23 whether to grant a temporary restraining order ("TRO"). See
24 Stuhlberg Int'l Sales Co. v. John D. Brushy & Co., 240 F.3d 832,
25 839 n. 7 (9th Cir. 2001). A party requesting a TRO "must establish
26 that he is likely to succeed on the merits, that he is likely to
27 suffer irreparable harm in the absence of preliminary relief, that
28 the balance of equities tips in his favor, and that an injunction

1 is in the public interest." Network Automation, Inc. v. Advanced
2 Sys. Concepts, Inc., 638 F.3d 1137, 1144 (9th Cir. 2011) (citing
3 Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008)).

4 Regarding irreparable harm, a court should consider whether
5 the movant "proceeded as quickly as it could have" in seeking a
6 TRO. See Apple, Inc. v. Samsung Electronics Co., Ltd., 678 F.3d
7 1314, 1325 (Fed. Cir. 2012) (analyzing a preliminary injunction).
8 At the TRO stage, courts will consider whether the movant would
9 have been able to file a noticed preliminary injunction motion had
10 it acted diligently. See, e.g., Occupy Sacramento v. City of
11 Sacramento, 2:11-CV-02873-MCE, 2011 WL 5374748, at *4 (E.D. Cal.
12 Nov.4, 2011) (denying application for TRO for twenty-five day
13 delay); Mammoth Specialty Lodging, LLC v. We-Ka-Jassa Inv. Fund,
14 LLC, CIVS10-0864 LKK/JFM, 2010 WL 1539811, at *2 (E.D. Cal. Apr.
15 16, 2010).¹

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18 ¹Many of the cases considering whether the movant had time to
19 file for a preliminary injunction are from the Eastern District of
California, which has the following local rule:

20 In considering a motion for a temporary restraining
21 order, the Court will consider whether the applicant
22 could have sought relief by motion for preliminary
23 injunction at an earlier date without the necessity for
24 seeking last-minute relief by motion for temporary
restraining order. Should the Court find that the
25 applicant unduly delayed in seeking injunctive relief,
26 the Court may conclude that the delay constitutes laches
or contradicts the applicant's allegations of irreparable
injury and may deny the motion solely on either ground.
27 Because this local rule is not based on legal doctrine unique to
the Eastern District, but instead on a commonsense application of
28 laches, the Court finds the Eastern District cases persuasive.
Regardless, at least one Northern District court has considered
delay in deciding to deny a TRO but allow a future noticed motion
for a preliminary injunction. Rosal v. First Fed. Bank of
California, No. C 09-1276 PJH, 2009 WL 837570, at *2 (N.D. Cal.
Mar. 26, 2009).

1 **III. Analysis**

2 In this case, some Defendants filed an allegedly fraudulent
3 trademark application for the Black Flag name in 2012. (Ginn Decl.
4 ¶¶ 14-17.) Defendants appear to have announced their upcoming tour
5 dates, which are the impetus for this TRO, by February of this
6 year. (Id. Ex. F.) Plaintiffs have submitted evidence that
7 Defendants advertised a concert in Las Vegas that was scheduled for
8 last May. (Ginn Decl. ¶ 19.) Plaintiff Ginn has attested that
9 Black Flag fans indicated to him in April 2013 that Defendants' use
10 of the Flag name was causing them confusion. (Id.)

11 A "TRO is an extraordinary remedy." Niu v. United States, 821
12 F. Supp. 2d 1164, 1168 (C.D. Cal. 2011). It is unwarranted here
13 because Plaintiffs could have filed a noticed motion for a
14 preliminary injunction that would have been heard well before the
15 upcoming tour, which begins on August 22. (Ginn Decl. Ex. F.);
16 Cent. Dist. L.R. 6-1 (Parties can notice a motion to be heard
17 within 28 days of service.).

18 By waiting until the eleventh hour to seek injunctive relief,
19 Plaintiffs essentially preclude Defendants from having a meaningful
20 opportunity to be heard. Whether the delay was the result of a
21 litigation tactic or occurred for other reasons, the court has no
22 knowledge. What is true, however, is that absent a sound reason
23 for the delay, due process concerns favor a full and fair airing of
24 the positions of the parties.

25 **IV. Conclusion**

26 For the reasons stated herein, the Motion is DENIED. This

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1 order does not preclude Plaintiffs from filing a motion for a
2 preliminary injunction.

3 IT IS SO ORDERED.

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5 Dated: August 7, 2013

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DEAN D. PREGERSON
United States District Judge