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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HOMELAND HOUSEWARES, LLC, a California LLC; NUTRIBULLET, LLC, L a California LLC,)	Case No. CV 14-03954 DDP (MANx)
)	
Plaintiff,)	ORDER DENYING EX PARTE
)	APPLICATION FOR ORDER REQUIRING
v.)	PLAINTIFF TO CEASE PUBLICIZING
)	PRELIMINARY INJUNCTION AND ORDER
)	AUTHORIZING "CORRECTIVE NOTICE"
EURO-PRO OPERATING LLC, a Massachusetts LLC,)	[Dkt. No. 35]
)	
Defendants.)	

Before the Court is an ex parte application by Defendant for an order requiring Plaintiff to cease "publicizing" this Court's preliminary injunction in this case, dated August 22, 2014. Defendant also seeks to be allowed to issue a "Court-approved notice" correcting alleged erroneous characterizations of the injunction by Plaintiff.

For the reasons discussed below, the Court denies the application in its entirety.

I. BACKGROUND.

Plaintiff and Defendant are competitors in the home blender market. On May 22, 2014, Plaintiff filed a complaint with this

1 Court alleging, inter alia, that the packaging of Defendant's NUTRI
2 NINJA PRO blender made a number of false representations about
3 Plaintiff's NUTRIBULLET line of blenders.

4 Plaintiff moved for a preliminary injunction against Defendant
5 to prevent, inter alia, sales of the allegedly falsely-labeled
6 product pending the outcome of this litigation. On August 22,
7 2014, this Court issued a preliminary injunction with regard to
8 three claims made on the NUTRI NINJA PRO packaging: "(1) that
9 'NUTRIBULLET' products do not operate at 900 watts; (2) that
10 'NUTRIBULLET' products do not produce 21,000 RPMs; and (3) that
11 'NUTRIBULLET' products do not have "sip & seal" (or drink through)
12 lids." (Order Granting Prelim. Inj., § IV.) Defendant was ordered
13 to remove all three statements from "all NUTRI NINJA PRO products
14 on sale to consumers and from any other Euro-Pro advertisements."
15 Id.

16 Shortly thereafter, Plaintiff sent letters to a number of
17 retailers who carry Defendant's products. The letters notified
18 retailers of the injunction, stated that "retailers . . . who have
19 notice of the injunction must also comply," and declared
20 Plaintiff's intention to "bring[] contempt proceedings against
21 violators." (Decl. Jennifer McCabe, Exhibit A.) The letters
22 stated that the injunction was based on a "finding" that the
23 statements on the packaging were "literally false." The letters
24 also noted that the litigation is ongoing, and that "[Plaintiff]
25 will likely be entitled to monetary damages for every sale" and
26 that "[i]f Euro Pro is unable to pay the damages, then any company
27 in the sales chain can be held liable for the damages." Id.
28 Finally, the letters made retailers aware of another recent case in

1 which a federal court in Pennsylvania also issued a preliminary
2 injunction against Euro-Pro for false advertising. Id.

3 Defendant seeks an order from this Court barring Plaintiff
4 from "publicizing" the injunction or the Pennsylvania case "in any
5 manner whatsoever . . . without limitation," requiring Plaintiff to
6 "immediately provide Euro-Pro and the Court with copies of every
7 letter and other communication it sent to a non-party," and
8 "[a]llowing Euro-Pro to issue a Court-approved notice," correcting
9 what Defendant alleges are "erroneous" representations in
10 Plaintiff's letters. (Ex Parte Appl., § VI.)

11 **II. LEGAL STANDARD.**

12 Defendant does not point the Court to a specific legal theory
13 under which this relief should be granted. However the Court will
14 assume for purposes of this order that the Defendant invokes the
15 Court's broad inherent equitable power to protect its own orders
16 from evasion, abuse and misuse. See, e.g., Porter v. Warner
17 Holding Co., which noted that when a district court's power to
18 enjoin is invoked,

19 all the inherent equitable powers of the District Court are
20 available for the proper and complete exercise of that
21 jurisdiction In addition, the court may go beyond the
22 matters immediately underlying its equitable jurisdiction and
23 decide whatever other issues and give whatever other relief
24 may be necessary under the circumstances.

25 328 U.S. 395, 398 (1946). This Court notes that typically these
26 powers will be invoked against the party enjoined, in a contempt
27 hearing. But it is not outside the power of the court to bind
28 either party in order to ensure the order is effectively carried

1 out. See Nat'l Law Ctr. on Homelessness & Poverty v. U.S. Veterans
2 Admin., 98 F. Supp. 2d 25, 26 (D.D.C. 2000) (holding that the court
3 "retained jurisdiction to permit *any one of the parties to seek*
4 *such further orders* or directions as may be necessary or
5 appropriate for the construction or carrying out of this Decree")
6 (internal quotation marks omitted) (emphasis added).

7 Thus, this Court will be guided by general equitable
8 principles in deciding whether and how to fashion relief necessary
9 to properly enforce and ensure the effectiveness of the preliminary
10 injunction, including, as needed, orders against either party
11 necessary to prevent the abuse of the injunction. These principles
12 include attempting to follow "equity's lodestar that 'justice be
13 done,'" as well as a consideration of the public interest and,
14 where applicable, Congress's policy intent in granting the courts
15 injunctive power in the first place. E.E.O.C. v. Recruit U.S.A.,
16 Inc., 939 F.2d 746, 753-54 (9th Cir. 1991).

17 **III. DISCUSSION.**

18 In this case, justice, the public interest, and the policy
19 undergirding the court's statutory injunctive power do not favor
20 issuing Defendant's proposed orders.

21 First, justice and the public interest might mandate issuing
22 some sort of order if Plaintiff's letters misrepresented the
23 content of the injunctive order, asserting unlikely or spurious
24 claims *in terrorem* in order to chill market demand for Defendant's
25 products. This is, indeed, more-or-less what Defendant alleges.

26 The letter to Amazon.com, submitted by Defendant as a
27 representative sample, asserts that the "injunction is based upon
28 the Judge's finding that the advertising on the box for the NUTRI

1 NINJA PRO contains false statements that are likely to deceive
2 consumers." (McCabe Decl., Exhibit A.) The same paragraph also
3 states that "The Court found that some of the claims on the box
4 were literally false." Id.

5 This language accords, in at least a narrow sense, with the
6 language of the injunctive order: "[I]t follows from this
7 conclusion that three of the statements made in the [packaging] are
8 false." (Order Granting Prelim. Inj., § III.A.1.) And: "Euro-Pro's
9 assertion . . . that the model [manufactured by Plaintiff] lacks
10 these features is literally false." Id. However, were that
11 language taken in isolation, it could create the impression that
12 the Court has made a final judgment on the merits in the case,
13 rather than making a *limited* factual finding for the sole purpose
14 of determining whether to grant a *preliminary* injunction pending
15 the outcome of litigation.

16 Plaintiff's letters do not fall into this trap. Immediately
17 prior to the statements about the Court's "findings," the letter
18 states that it is from attorneys representing Plaintiff "in a false
19 advertising case" and states, correctly, that the injunction is a
20 "preliminary injunction." (McCabe Decl., Exhibit A.) The language
21 is not a model of absolute clarity on this point—it might more
22 advisably have included words like "ongoing" or "pending" in
23 describing the "false advertising case," for example. But it
24 conveys, if infelicitously, the procedural posture of the case.
25 While there is still some danger that the unsophisticated will fail
26 to understand the nuanced difference between a preliminary
27 injunction and a final judgment on the merits, the facts presented
28 seem to show that many of the retailers who have expressed concern

1 following the letters are represented by competent, cautious
2 counsel. (McCabe Decl., Exhibit B (letter from Costco mentioning
3 discussions with in-house counsel and stating that “[i]t looks like
4 there have [sic] already been a preliminary finding made”).)

5 Thus, Plaintiff does not actually misrepresent the language of
6 the injunction itself.

7 Defendant nevertheless alleges that Plaintiff misrepresents
8 the *scope* of the injunction by advising recipients of the letters
9 that “retailers such as Amazon.com who have notice of the
10 injunction must also comply with the Court’s order.” (McCabe
11 Decl., Exhibit A.) Defendant argues that the retailers are not
12 within the scope of the injunction, because they are neither
13 parties nor nonparties who have notice of the injunction and “are
14 in active concert or participation with” the enjoined party. Fed.
15 R. Civ. P. 65(d)(2).

16 Who is in “active concert or participation with” a party is
17 not a fully settled area of law. The Ninth Circuit has not
18 specifically addressed the question of whether retailers who sell a
19 party’s enjoined product are in “active concert” with the party.
20 Other courts appear split on the question. Compare Aevoe Corp. v.
21 AE Tech Co., 727 F.3d 1375, 1384 (Fed. Cir. 2013) (“We find that
22 the S & F Defendants fell within the purview of the original
23 injunction because they were ‘acting in concert’ with AE Tech in
24 connection with the resale of the redesigned products.”), with
25 Paramount Pictures Corp. v. Carol Pub. Grp., Inc., 25 F. Supp. 2d
26 372, 376 (S.D.N.Y. 1998) (“Paramount has not demonstrated that the
27 nonparty retailers and distributors are ‘acting in concert’ with
28 Carol Publishing.”). It should be noted, however, that both Aevoe

1 and Paramount are heavily dependent on their facts: in Aevoe, the
2 retailer had an exclusive distribution agreement with the enjoined
3 party, making it a "privy" of the party, while in Paramount the
4 retailers had completed their purchases of the enjoined products
5 prior to the injunction.

6 And in general the inquiry is likely to always be fact-
7 intensive. Rockwell Graphic Sys., Inc. v. DEV Indus., Inc., for
8 example, noted a line of cases establishing that those who "aid or
9 abet the named parties in a concerted attempt to subvert" the
10 injunction fall within the injunction's power. 91 F.3d 914, 919
11 (7th Cir. 1996). But the court found no bright line dividing those
12 who are "aiding and abetting" the enjoined party from those who are
13 merely in business with the party at arm's length but in a way that
14 incidentally subverts the intent of the injunction. Rather,

15 A court must consider the extent of the alleged "active
16 concert or participation" of third parties with those named in
17 the injunction in determining whether the injunction's
18 prohibitions shall apply to those third parties

19 The resolution of Rockwell's allegations made in support of a
20 finding of contempt necessitated a complete factual inquiry.
21 Id. at 920.

22 Because the inquiry is so fact-specific, and the law still
23 relatively unsettled, this Court cannot say for certain that
24 Plaintiff misrepresents the scope of the injunction. To be sure,
25 Plaintiff puts forward a particular theory of the injunction's
26 reach to nonparties that might not be sustained in an actual
27 contempt hearing. But that is true of a great number of letters
28 warning of potential legal action; often the law is not quite so

1 certain as a potential plaintiff would wish. This does not mean
2 that courts should enjoin or constrain such letters, where the
3 party's legal theory is at least plausible and the potential action
4 is not purely frivolous or harassing.

5 Finally, the intent of Congress in providing the courts the
6 power to grant injunctive relief in Lanham Act cases also does not
7 favor granting Defendant's application. The purpose of the Lanham
8 Act is to "protect[] persons engaged in [commerce within the
9 control of Congress] against unfair competition" POM Wonderful LLC
10 v. Coca-Cola Co., 134 S. Ct. 2228, 2234 (2014). To the extent that
11 Plaintiff's Lanham Act claim is likely meritorious, and therefore
12 justifies the extraordinary measure of preliminary injunctive
13 relief in the first place, it is clear that Plaintiff may
14 aggressively assert the injunction's protection in the marketplace
15 in order not to be subject to unfair competition.

16 This is not to say Defendant's contention that it has been
17 poorly treated is entirely without merit. In particular,
18 Plaintiff's reference in its letters to an unrelated case in the
19 Western District of Pennsylvania, involving a different plaintiff
20 and different facts,¹ served no purpose in asserting its theory of
21 nonparty liability for contempt in this case. That portion of the
22 letter strayed far beyond what was necessary to put retailers on
23 notice of the injunction in this case.

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26 ¹The case apparently referenced is Groupe SEB USA, Inc. v.
27 Euro-Pro Operating LLC, No. CIV.A. 14-137, 2014 WL 2504741 (W.D.
28 Pa. June 3, 2014).

1 The court refrains from ordering Plaintiff to cease making
2 reference to the unrelated case in such letters out of deference to
3 potential speech concerns. However, should Plaintiff elect not to
4 immediately delete the reference, the court will set a hearing on
5 whether the preliminary injunction should be vacated. Plaintiff
6 shall, by 4:30 p.m. tomorrow, advise the Court through the filing
7 of a notice which course it elects to take.

8 Apart from that issue, however, the Defendant's most powerful
9 response to the Plaintiff's letter is likely to be the "preferred
10 First Amendment remedy of 'more speech, not enforced silence,'" United States v. Alvarez, 617 F.3d 1198, 1216 (9th Cir. 2010)
11 aff'd, 132 S. Ct. 2537, 183 L. Ed. 2d 574 (U.S. 2012). Defendant
12 asks that this court "approve" a specific "notice" to retailers
13 calling Homeland's characterization of the injunction "erroneous"
14 and stating that "retailers are not subject to the injunction."
15 (Ex Parte Appl., § VI.) Because, as discussed above, such a
16 determination would be fact-intensive and more appropriately made
17 in the course of a contempt hearing, the Court declines to approve
18 any such statement. Defendant, however, is free to explain the
19 lawsuit, the scope of the injunction, the injunction's timetable,
20 and Defendant's own theory of "active concert or participation" to
21 those retailers who express concern.

22 **IV. CONCLUSION.**

23 Because the Court does not find that it is necessary to issue
24 any of the requested orders in order to protect or enforce its
25 injunctive order, Defendant's ex parte application is denied.
26 However, Plaintiff shall notify the Court by 4:30 p.m. of the day
27 after this order is issued whether it intends to continue making
28

1 reference to the unrelated Pennsylvania case in future letters.

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3 IT IS SO ORDERED.

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6 Dated: September 10, 2014

A handwritten signature in cursive script, appearing to read "Dean D. Pregerson".

DEAN D. PREGERSON
United States District Judge

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