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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

COGNIMEM TECHNOLOGIES, INC.,
and BRUCE MCCORMICK,

Plaintiffs,

v.

GUY PAILLET, et al.,

Defendants.

No. 2:13-cv-00915-MCE-CKD

MEMORANDUM ORDER

Presently before the Court is an Ex Parte Application for a Temporary Restraining Order (“Application”) filed by Plaintiffs CogniMem Technologies, Inc. (“CogniMem”) and Bruce McCormick (“McCormick”) (collectively “Plaintiffs”). (ECF No. 6.) Plaintiffs seek the Court’s order enjoining Defendants Guy Paillet, Anne Menendez and General Vision Services, Inc. (“Defendants”) from taking any actions not in accordance with the Bylaws enacted for CogniMem on May 9, 2013, including removing Plaintiff McCormick as a director, officer or employee of CogniMem and taking any actions to dissolve CogniMem. For the reasons stated below, Plaintiffs’ Application is granted.

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1 **BACKGROUND¹**

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3 Plaintiffs are: (1) CogniMem Technologies Inc. (“CogniMem”), a Delaware

4 corporation with its principal place of business in Folsom, California, and (2) Bruce

5 McCormick, CogniMem’s shareholder, president and director. McCormick owns 33.91%

6 of CogniMem’s outstanding shares. On May 9, 2013, Plaintiffs filed their Complaint

7 alleging claims for (1) violation of the Anti-Cybersquatting Act, 15 U.S.C. § 1125(d);

8 (2) breach of fiduciary duty; (3) fraud; (4) declaratory relief; (5) violation of Cal. Bus. &

9 Prof. Code § 17200; and (6) conversion. The Complaint names the following

10 Defendants: (1) Guy Paillet, a 2.61% shareholder and former director of CogniMem;

11 (2) Anne Menendez, a 2.61% shareholder and former director of CogniMem; (3) General

12 Vision, Inc., a California corporation which owns 52.17% and allegedly controls 66.09%

13 of CogniMem’s shares; (4) Cognitive Silicon Group, Inc., a California corporation which

14 is a parent corporation of General Vision; and (5) Norlitech LLC, a California limited

15 liability company allegedly owned and controlled by Paillet and Menendez. Paillet and

16 Menendez are both officers and directors of General Vision and controlling shareholders

17 in Cognitive Silicon Group.

18 CogniMem originally had four Board of Directors members: Plaintiff McCormick,

19 Defendant Paillet, Defendant Menendez, and Ivo Austin. On April 2, 2013, Austin,

20 Paillet and Menendez resigned from the Board as a result of serious disagreements with

21 McCormick, thus leaving McCormick as the sole director of CogniMem. On May 9,

22 2013, McCormick adopted CogniMem’s bylaws which, among other things, prescribed a

23 specific procedure for amending the bylaws and for calling annual and special

24 shareholder meetings.

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28 ¹ Unless noted otherwise, the relevant facts are derived, at times verbatim, from Plaintiffs’ Complaint, filed on May 9, 2013 (ECF No. 1), and Plaintiffs’ instant Application.

1 On May 15, 2013, General Vision, as CogniMem’s majority shareholder, adopted
2 its own set of CogniMem’s bylaws, which set the Board’s size at three directors, and
3 appointed Menendez and Paillet as directors. On the same day, the newly-appointed
4 directors sent notice for the Board of Directors meeting to McCormick and set the
5 meeting for the next day, May 16, 2013 at 4 p.m. The meeting’s agenda included, inter
6 alia, removal of McCormick as CongiMem’s director and officer and dissolution of
7 CogniMem. To prevent those events from happening, Plaintiffs filed the instant TRO
8 request on May 15, 2013.

9 In their Application, Plaintiffs argue that the bylaws adopted by General Vision are
10 invalid, and that the actions of General Vision, Paillet and Menendez directed at
11 removing McCormick from corporate offices and dissolution of CogniMem are contrary to
12 law and are also prohibited by the bylaws adopted by McCormick for CogniMem on
13 May 9, 2013. Accordingly, Plaintiffs request a temporary restraining order enjoining
14 Defendants from removing McCormick from corporate offices at CogniMem, from
15 dissolving CogniMem and also from taking any other action contrary to the May 9, 2013
16 bylaws. On May 16, 2013, the Court issued an Order setting this matter for hearing on
17 May 22, 2013, directing Defendants to file an opposition to Plaintiffs’ Application no later
18 than May 20, 2013, at 12:00 p.m., and directing Plaintiffs to file a response no later than
19 May 21, 2013, at 12:00 p.m. (ECF No. 8.) Pending the hearing, to preserve the status
20 quo and to prevent irreparable harm to Plaintiffs, the Court enjoined any actions by
21 Defendants directed at removing McCormick from corporate offices at CogniMem and
22 dissolving CogniMem. (Id.)

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1 To date, Defendants have not filed an opposition to Plaintiffs' Application.
2 However, on May 20, 2013, Ivo Austin, who appears to represent Defendant General
3 Vision, informed the Court by email that "Defendants in the above-captioned action will
4 not oppose Plaintiffs' Ex Parte Motion for Temporary Restraining Order." Defendants
5 have not responded to the Court's subsequent request to file a formal statement of non-
6 opposition to Plaintiffs' Application.²

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8 **STANDARD**

9 The purpose of a temporary restraining order is to preserve the relative positions
10 of the parties—the status quo—until a trial on the merits can be conducted. Granny
11 Goose Foods, Inc. v. Teamsters, 415 U.S. 423, 438-39 (1974) (temporary restraining
12 orders "should be restricted to serving their underlying purpose of preserving the status
13 quo and preventing irreparable harm just so long as is necessary to hold a hearing, and
14 no longer"); LGS Architects, Inc. v. Concordia Homes of Nev., 434 F.3d 1150, 1158 (9th
15 Cir. 2006) (quoting Univ. of Tex. v. Camenisch, 451 U.S. 390, 395 (1981)). Issuance of
16 a temporary restraining order as a form of preliminary injunctive relief "is an
17 extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is
18 entitled to such relief." Winter v. Natural Res. Defense Council, 555 U.S. 7, 22 (2008).
19 Plaintiffs have the burden of proving the propriety of such a remedy by clear and
20 convincing evidence. See Mazurek v. Armstrong, 520 U.S. 968, 972 (1997); Granny
21 Goose, 415 U.S. at 441. The propriety of a temporary restraining order hinges on a
22 significant threat of irreparable injury that must be imminent in nature. Caribbean Marine
23 Servs. Co. v. Baldrige, 844 F.2d 668, 674 (9th Cir. 1988).

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28 ² In the absence of any opposition from Defendants, the Court has determined that this matter is suitable
for a decision without oral argument. See E.D. Cal. R. 230(g).

1 In general, the showing required for a temporary restraining order is the same as
2 that required for a preliminary injunction. Stuhlbarg Int'l Sales Co., Inc. v. John D. Brush
3 & Co., Inc., 240 F.3d 832, 839 n.7 (9th Cir. 2001). A plaintiff seeking a temporary
4 restraining order must establish that he is (1) "likely to succeed on the merits;" (2) "likely
5 to suffer irreparable harm in the absence of preliminary relief;" (3) "the balance of
6 equities tips in his favor;" and (4) "a preliminary injunction is in the public interest." Sierra
7 Forest Legacy v. Rey, 577 F.3d 1015, 1021 (9th Cir. 2009) (citing Winter, 555 U.S. at
8 20); see also Am. Trucking Ass'ns, Inc. v. City of L.A., 559 F.3d 1046, 1052 (9th Cir.
9 2009) (adopting the preliminary injunction standard articulated in Winter). "If a plaintiff
10 fails to meet its burden on any of the four requirements for injunctive relief, its request
11 must be denied." Sierra Forest Legacy v. Rey, 691 F. Supp. 2d 1204, 1207 (E.D. Cal.
12 2010) (citing Winter, 555 U.S. at 22). "In each case, courts must balance the competing
13 claims of injury and must consider the effect on each party of the granting or withholding
14 of the requested relief." Winter, 555 U.S. at 24 (quoting Amoco Prod. Co., 480 U.S. 531,
15 542 (1987)).

16 Alternatively, under the so-called sliding scale approach, as long as the Plaintiffs
17 demonstrate the requisite likelihood of irreparable harm and show that an injunction is in
18 the public interest, a preliminary injunction can still issue so long as serious questions
19 going to the merits are raised and the balance of hardships tips sharply in Plaintiffs'
20 favor. Alliance for Wild Rockies v. Cottrell, 632 F.3d 1127, 1134-35 (9th Cir. 2011)
21 (concluding that the "serious questions" version of the sliding scale test for preliminary
22 injunctions remains viable after Winter).

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1 **ANALYSIS**

2 **A. Likelihood of Success on the Merits**

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4 The crux of Plaintiffs' arguments in support of their Application is that General
5 Vision could not lawfully adopt a new set of bylaws for CogniMem and appoint Paillet
6 and Menendez to the Board because those actions are contrary to the May 9, 2013,
7 bylaws adopted for CogniMem by McCormick. Accordingly, Plaintiffs request the Court
8 declare that the bylaws adopted by General Vision are "null and void ab initio" and
9 enjoin Defendants from taking any action contrary to the May 9, 2013, bylaws, including
10 removing McCormick from corporate offices at CogniMem and dissolving CogniMem.
11 (ECF No. 6.)

12 Section 109(b) of the Delaware General Corporation Law ("GCL") provides:

13 After a corporation . . . has received any payment for any of
14 its stock, the power to adopt, amend or repeal bylaws shall
15 be in the stockholders entitled to vote. . . . Notwithstanding
16 the foregoing, any corporation may, in its certificate of
17 incorporation, confer the power to adopt, amend or repeal
18 bylaws upon the directors . . . The fact that such power has
19 been so conferred upon the directors or governing body, as
20 the case may be, shall not divest the stockholders . . . of the
21 power, nor limit their power to adopt, amend or repeal
22 bylaws.

19 8 Del.C. § 109(a). Here, CogniMem's Certificate of Incorporation provides, in relevant
20 part, that "the Board of Directors shall have the power to adopt, amend or repeal the by-
21 laws." (Declaration of Bruce McCormick ("McCormick Decl.") Ex. 1; ECF No. 6-4.)
22 Accordingly, Plaintiff McCormick as CogniMem's sole remaining director could adopt
23 bylaws for CogniMem.

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1 The May 9, 2013, bylaws adopted by McCormick for CogniMem contain the
2 following relevant provisions: (1) the number of directors is set at one, subject to change
3 pursuant to resolution approved by 67% of CogniMem’s stockholders; (2) the bylaws
4 may be amended or repealed at any annual meeting of the stockholders by a vote of
5 67% of the shares represented and entitled to vote at such meeting, or by a unanimous
6 vote of the Board of Directors; (3) special meetings of the stockholders may be called by
7 the Board of Directors, the Chief Executive Officer, or by the stockholders holding not
8 less than 67% of the voting power of the corporation; and (4) written notice of each
9 meeting of stockholders shall be given to each stockholder entitled to vote at the
10 meeting not less than thirty not more than sixty days before such meeting. (McCormick
11 Decl & Ex. 3.)

12 Shortly after the adoption of CogniMem’s bylaws by McCormick, Defendant
13 General Vision, as a majority shareholder of CogniMem, attempted to enact its own set
14 of bylaws for CogniMem, set the size of the Board of Directors at three directors, and
15 appoint Defendants Paillet and Menendez as directors. (Declaration of Brent Lawrence
16 (“Lawrence Decl.”) ¶ 5 & Exs. 4, 5; ECF No. 6-3.) Defendants then set a Board of
17 Directors meeting for the next day, May 16, 2013. (Lawrence Decl. ¶ 6 & Ex. 4.) The
18 meeting’s agenda included, among other things, removal of McCormick from all
19 corporate offices at CogniMem and dissolution of CogniMem. (Id.)

20 As mentioned above, the Delaware GCL provides that the delegation of authority
21 to adopt, amend or repeal bylaws to the board of directors “shall not divest the
22 stockholders . . . of the power, nor limit their power to adopt, amend or repeal bylaws.”
23 8 Del.C. § 109(a). However, relevant for the purposes of Plaintiffs’ instant Application,
24 Section 228(a) of the GCL provides:

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1 Unless otherwise provided in the certificate of incorporation,
2 any action required by this chapter to be taken at any annual
3 or special meeting of stockholders of a corporation, or any
4 action which may be taken at any annual or special meeting
5 of such stockholders, may be taken without a meeting,
6 without prior notice and without a vote, if a consent or
7 consents in writing, setting forth the action so taken, shall be
8 signed by the holders of outstanding stock having not less
9 than the minimum number of votes that would be necessary
10 to authorize or take such action at a meeting at which all
11 shares entitled to vote thereon were present and voted

12 8 Del. C. § 228(a) (emphasis added). Pursuant to the May 9, 2013, bylaws adopted for
13 CogniMem by McCormick, CogniMem’s bylaws may be amended or repealed at any
14 annual meeting of the stockholders by a vote of 67% of the shares represented and
15 entitled to vote at such meeting, or by a unanimous vote of the Board of Directors.
16 (McCormick Decl. ¶ 10 & Ex. 3.) As demonstrated by the documents submitted in
17 support of Plaintiffs’ Application, General Vision owns only 52.17% of CongiMem’s
18 shares, which is insufficient to amend or repeal CogniMem’s bylaws by a shareholders’
19 written consent. (See McCormick Decl. ¶ 4.) Therefore, Defendant General Vision
20 could not amend or repeal the May 9, 2013, bylaws adopted for CogniMem by
21 McCormick.

22 Accordingly, in the absence of any contrary argument from Defendants, the Court
23 concludes that Plaintiffs have carried their burden of demonstrating that they are likely to
24 prevail on the merits of their claims for relief, see Sierra Forest Legacy, 577 F.3d at
25 1021, or, at the very least, raised “serious questions going to the merits” of those claims.
26 Alliance for Wild Rockies, 632 F.3d at 1134-35.

27 **B. Irreparable Injury**

28 To be entitled to a temporary restraining order, a plaintiff must demonstrate
immediate threatened injury. Caribbean Marine Servs. Co., Inc. v. Baldrige, 844 F.2d
668, 674 (9th Cir. 1988). Indeed, a plaintiff “must demonstrate potential harm which
cannot be redressed by a legal or an equitable remedy following a trial.”

1 Ft. Funston Dog Walkers v. Babbitt, 96 F.Supp.2d 1021, 1039 (N.D. Cal. 2000) (citation
2 omitted). “The preliminary injunction must be the only way of protecting the plaintiff from
3 harm.” Id. Generally, the “possibility that adequate compensatory or other corrective
4 relief will be available at a later date, in the ordinary course of litigation, weighs heavily
5 against a claim of irreparable harm.” Sampson v. Murray, 415 U.S. 61, 90 (1974)
6 (citation omitted).

7 Here, Plaintiffs argue that, in the absence of injunctive relief, Plaintiff McCormick
8 “would suffer irreparable harm in that he has invested \$1.7 million in CogniMem . . . and
9 would have no ability to prevent the defendants from devaluing and dissolving the
10 corporation, as they have threatened to do.” (ECF No. 6 at 8.) Although a claim of
11 monetary losses, without more, is not sufficient to demonstrate an irreparable injury, a
12 showing that a company’s very business existence is threatened is sufficient to show
13 irreparable harm. See Am. Passage Media Corp. v. Cass Commc’ns, Inc., 750 F.2d
14 1470, 1474 (9th Cir. 1985) (suggesting that the irreparable injury requirement would be
15 satisfied if plaintiff demonstrates that it is “threatened with extinction” or with “being
16 driven out of business”). Here, the very existence of Plaintiff CogniMem is threatened in
17 the absence of injunctive relief.

18 Additionally, Plaintiffs have sufficiently demonstrates that, in the absence of
19 injunctive relief, they will suffer damages to the goodwill of their business and would lose
20 certain intellectual property rights, including rights to a registered trademark
21 “CogniMem,” which Defendants are allegedly trying to divert to themselves. (ECF No. 6
22 at 8.) The losses alleged by Plaintiffs amount to “irreparable harm” for the purposes of
23 issuing injunctive relief. See, e.g., Rent-A-Center, Inc. v. Canyon Television and
24 Appliance Rental, Inc., 944 F.2d 597, 603 (9th Cir.1991); Stuhlberg Int’l Sales Co. v.
25 John D. Brush & Co., 240 F.3d 832, 841 (9th Cir.2001); Metro-Goldwyn-Mayer Studios,
26 Inc. v. Grokster, Ltd., 518 F.Supp.2d 1197, 1215-19 (C.D. Cal. 2007).

27 Accordingly, the Court concludes that Plaintiffs are likely to suffer irreparable
28 harm in the absence of injunctive relief.

1 **C. Balance of Equities and Consideration of Public Interest**

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In deciding whether to grant an injunction, “courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief . . . pay[ing] particular regard for the public consequences in employing the extraordinary remedy of injunction.” Winter, 555 U.S. at 9. Here, while Plaintiffs would suffer irreparable injury in the absence of a temporary restraining order, Defendants would not suffer any harm by maintaining the status quo. Further, because a temporary restraining order’s reach is narrow and affects only the parties with no impact on nonparties, “the public interest will be at most a neutral factor in the analysis rather than one that factors granting or denying the preliminary injunction.” See Stormans, Inc. v. Selecky, 586 F.3d 1109, 1138-39 (9th Cir. 2009).

In sum, in the absence of any arguments to the contrary from Defendants, the Court finds that Plaintiffs have carried their burden of demonstrating entitlement to a temporary restraining order.

CONCLUSION

For the reasons stated above, Plaintiffs’ Ex Parte Application for a Temporary Restraining Order (ECF No. 6) is hereby GRANTED as follows:

1. Defendants are hereby enjoined from taking any actions to remove Plaintiff McCormick as a director, officer, or employee of CogniMem, taking any actions to dissolve CogniMem, or taking any other actions not in accordance with CogniMem’s Bylaws enacted on May 9, 2013.
2. Plaintiffs are directed to file a motion for preliminary injunction and any supporting documents no later than **May 24, 2013, at 4:00 p.m.**
3. Defendants are directed to file an opposition to Plaintiffs’ motion for preliminary injunction no later than **May 29, 2013, at 4:00 p.m.**

1 4. Plaintiffs may file a response no later than **May 31, 2013, at 4:00 p.m.**

2 5. The hearing on Plaintiffs' motion for preliminary injunction is hereby set for
3 **June 4, 2013, at 10:00 a.m.** in Courtroom 7.

4 6. The parties' failure to comply with the briefing schedule set forth above will
5 result in further orders by this court, including, but not limited to, terminating sanctions.

6 7. The Temporary Restraining Order is to remain in effect until **June 4, 2013**.
7 If Plaintiffs fail to move for a preliminary injunction as directed above, the Court will
8 vacate the instant Temporary Restraining Order without further notice to the parties.

9 8. The hearing on Plaintiffs' Application for a Temporary Restraining Order
10 currently set for May 22, 2013, is hereby VACATED.

11 IT IS SO ORDERED.

12 DATED: May 21, 2013

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MORRISON C. ENGLAND, JR., CHIEF JUDGE
UNITED STATES DISTRICT COURT