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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

OJMAR US, LLC,
Plaintiff,
v.
SECURITY PEOPLE, INC., et al.,
Defendants.

Case No. [16-cv-04948-HSG](#)

**ORDER DENYING PLAINTIFF OJMAR
U.S., LLC'S MOTION FOR
PRELIMINARY INJUNCTION**

Re: Dkt. No. 44

On December 22, 2016, Plaintiff Ojmar U.S., LLC (“Ojmar”) filed its motion for preliminary injunction. Dkt. No. 44 (“Mot.”). On January 5, 2017, Defendants Security People, Inc. and Asil Gokcebay (collectively, “Digilock”) filed their opposition. Dkt. No. 49 (“Opp’n”). On January 12, 2017, Ojmar filed its reply. Dkt. No. 51. Ojmar’s motion seeks to enjoin Digilock from (1) threatening Ojmar or its customers with litigation based on claim 4 of Digilock’s U.S. Patent No. 6,655,180 (“’180 Patent”) and (2) enforcing the provisions of Digilock’s exclusive dealing contracts with three locker original equipment manufacturers (“OEMs”). Mot. at 1–2, 7 & n.1. For the reasons articulated below, the Court **DENIES** Ojmar’s motion.¹

Federal Rule of Civil Procedure 65 allows the court to grant a preliminary injunction to enjoin conduct pending a trial on the merits. Fed. R. Civ. P. 65(a). A preliminary injunction is “an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.” Winter v. Nat. Res. Def. Council, 555 U.S. 7, 22 (2008). To receive a preliminary injunction, a plaintiff “must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest.” Id. at 20. The

¹ The Court finds this matter appropriate for disposition without oral argument and the matter is deemed submitted. See Civil L.R. 7-1(b).

1 Ninth Circuit has held that “a ‘likelihood’ of success per se is not an absolute requirement.”
2 *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1085 (9th Cir. 2014). “Rather, serious questions
3 going to the merits and a hardship balance that tips sharply toward the plaintiff can support
4 issuance of an injunction, assuming the other two elements of the Winter test are also met.” *Id.*
5 (internal quotation marks omitted). However, under either the Winter test or the “serious
6 questions” test, the court may not issue a preliminary injunction unless it finds that “a certain
7 threshold showing is made” as to each of the four elements. *Leiva-Perez v. Holder*, 640 F.3d 962,
8 966 (9th Cir. 2011).

9 Ojmar fails to demonstrate that it is likely to suffer irreparable harm under either asserted
10 ground for a preliminary injunction. Ojmar first seeks to enjoin Digilock from pursuing
11 “baseless” legal action under claim 4 of the ’180 Patent, arguing that Digilock is attempting “to
12 maintain the in terrorem effect on the marketplace for as long as possible.” *Mot.* at 7. However,
13 Ojmar “must do more than merely allege imminent harm sufficient to establish standing”; it “must
14 demonstrate immediate threatened injury as a prerequisite to preliminary injunctive relief.”
15 *Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988) (emphasis in
16 original). Ojmar cannot assert “[s]peculative injury . . . [as] the basis for a finding of irreparable
17 harm. See *in re Excel Innovations, Inc.*, 502 F.3d 1086, 1098 (9th Cir. 2007). Digilock has not
18 filed a claim against Ojmar based on the ’180 Patent since 2015, long before the Patent Trial and
19 Appeals Board (“PTAB”) decision on October 26, 2016 deeming claim 4 unpatentable as written.
20 *Dkt. No. 45 (“Callaway Decl.”) ¶¶ 22–24 & Ex. 14.* Therefore, Ojmar’s allegation that Digilock
21 continues to threaten it with sham litigation is too speculative to establish irreparable harm. See
22 *Baldrige*, 844 F.2d at 674; *in re Excel*, 502 F.3d at 1098.

23 Ojmar next seeks to enjoin Digilock from enforcing exclusive dealing contracts with three
24 OEMs: Legacy Lockers, Ideal Products, and Club Resource Group (“CRG”). *Mot.* at 1–2, 7. The
25 parties entered into these contracts between February and April of 2016. *Callaway Decl. Exs. 16–*
26 *18.* The exclusivity contracts prevent these three OEMs from purchasing, promoting, or
27 recommending electronic keypad locks (“EKLs”) from manufacturers other than Digilock.
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1 Callaway Decl. Ex. 16 (“Digilock Contract”) at 1.² However, the contracts allow the OEMs to
2 supply a competitor’s EKL to an end customer if the customer maintains its request for a non-
3 Digilock product. *Id.* at 4. Ojmar claims that the contracts threaten its survival in the U.S. market,
4 damage customer relationships and goodwill, and obstruct business opportunities.³ *Mot.* at 21.

5 The Court first assesses Ojmar’s assertion that the exclusivity contracts represent “an
6 existential threat to the survival of [its] business.” *Mot.* at 21. While “[t]he threat of being driven
7 out of business is sufficient to establish irreparable harm,” evidence of economic harms or lost
8 profits are typically insufficient to demonstrate that the plaintiff’s business is “threatened with
9 extinction.” See *Am. Passage Media Corp. v. Cass Commc’ns, Inc.*, 750 F.2d 1470, 1473–74 (9th
10 Cir. 1985). Moreover, the plaintiff does not meet its burden where there is not a causal
11 relationship between the defendant’s conduct and the threat of irreparable harm. See *Oakland*
12 *Tribune, Inc. v. Chronicle Pub. Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985) (rejecting plaintiff’s
13 argument for irreparable harm where plaintiff could neither attribute financial losses to
14 defendant’s conduct nor demonstrate foreclosure from the market).

15 Here, Ojmar’s declining sales in 2015 and expected losses in 2016 do not establish a threat
16 to the company’s short-term survival. See *Dkt. No. 44-1 (“Oonk Decl.”) ¶ 23; Int’l Medcom v. S.E.*
17 *Int’l, Inc.*, No. 15-cv-03839-HSG, 2015 WL 7753267, at *5 (N.D. Cal. Dec. 2, 2015) (denying
18 preliminary injunction where plaintiff’s financial trouble did not demonstrate imminent risk to its
19 presence in the market). Losses in 2015 predate the introduction of the exclusivity contracts in
20 early 2016 and should not be considered under this analysis. See *Oonk Decl.* at ¶ 23; *Oakland*
21 *Tribune*, 762 F.2d at 1377 (rejecting plaintiff’s claim for failure to show causation between sales

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23 ² The exclusive dealing contracts are forms with largely identical provisions. See *Callaway Decl.*
24 *Exs. 16–18.* For simplicity, citations are provided to Exhibit 16, though Exhibits 17 and 18
25 contain parallel provisions.

26 ³ Ojmar asserts a narrow definition of the relevant “market” comprised only of EKL locker locks.
27 *Mot.* at 11–12. Digilock contests this definition and argues for a broader characterization of the
28 “market” inclusive of both electronic and mechanical locker locks. *Opp’n* at 9–16. Ojmar fails to
demonstrate irreparable harm even under the narrower definition. Therefore, there cannot be
irreparable harm under the broader definition, as the exclusivity contracts concern only EKLs and
do not implicate the market for mechanical locker locks. The Court uses Ojmar’s narrow
definition in this analysis for convenience and makes no finding as to how the relevant “market”
should be defined.

1 losses and defendant’s conduct). Moreover, Ojmar’s prediction that sales and revenue would not
2 meet “conservative projections” for 2016 is insufficient to support a finding that Ojmar’s existence
3 in the market is threatened. See Oonk Decl. ¶ 23; Am. Passage, 750 F.2d at 1474 (finding that
4 plaintiff’s affidavits regarding sustained and forecasted losses were alone insufficient to show it
5 was “threatened with extinction”).

6 Moreover, Ojmar’s fear of foreclosure from the market is unsupported. While Ojmar
7 claims it “faces being cut off from its customer OEMs and unable to reach end users through the
8 only effective channel to market,” the Court is unconvinced that Ojmar has no alternative avenues
9 for sales. See Mot. at 2. Ojmar asserts that Legacy Lockers, Ideal Products, and CRG together
10 represent 50–60% of the market for EKLs, leaving a considerable portion of the market unaffected
11 by the exclusivity contracts. See Oonk Decl. ¶ 30.⁴ Furthermore, the three OEMs are not bound
12 by the exclusivity provisions if a customer requests an Ojmar EKL product. See Digilock
13 Contract at 4. Ojmar can also market EKLs directly to end customers to generate demand and
14 represents that it has worked closely with end customers in the past. See Oonk Decl. at ¶ 12 (“In
15 our effort to penetrate the market, I built relationships with end customers, architects, and
16 OEMs.”). Additionally, the exclusivity contracts are terminable at will, see Digilock Contract at
17 2, and nothing prevents Ojmar from offering its own contracts to the OEMs, see Am. Passage, 750
18 F.2d at 1473 (finding that plaintiff was not foreclosed from market where it was free to offer its
19 own exclusive or non-exclusive packages to clients). In short, Ojmar has failed to demonstrate
20 that the exclusivity contracts foreclose its access to the market.

21 Ojmar also asserts that the exclusivity contracts will cause irreparable harm by damaging

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23 ⁴ James Oonk, Ojmar’s Sales Director for North America, claims that these three OEMs along
24 with the OEM Hollman represent approximately 70% to 80% of the U.S. market for EKLs. Oonk
25 Decl. ¶ 30. He acknowledges that “Hollman has not actually signed Digilock’s form contract yet,”
26 but nonetheless asserts “that Hollman has continued submitting bids including Digilock locks at
27 competitive pricing and that they [sic] are not planning to display our locks at IHRSA in March
28 2017 – so Hollman is acting as though it has accepted Digilock’s terms.” Id. However, Mr. Oonk
admits elsewhere in his declaration that “Hollman generally did not recommend our locks to their
customers and would supply Ojmar locks only if the customer specifically required it.” Id. ¶ 11.
Rather than demonstrating that Hollman is bound by a contract that it never signed, these facts
suggest that Hollman simply continues to prefer locks other than those sold by Ojmar. Therefore,
the Court is not persuaded that the exclusivity contracts foreclose Ojmar from selling EKLs to
Hollman.

1 its reputation and customer goodwill and obstructing business opportunities. Mot. at 22. As the
2 Ninth Circuit has explained, “[e]vidence of loss of control over business reputation and damage to
3 goodwill could constitute irreparable harm.” *Herb Reed Enters., LLC v. Fla. Entm’t Mgmt., Inc.*,
4 736 F.3d 1239, 1250 (9th Cir. 2013). However, Ojmar fails to provide any non-conclusory
5 statements as to how the exclusivity contracts will damage its reputation or customer goodwill.
6 See Mot. at 22 (“The customer relationships and goodwill that Ojmar was developing with the key
7 locker OEMs in 2012-2014 have been severely damaged and the harm may well become
8 permanent if Digilock is not stopped now.”). This is insufficient to establish likelihood of
9 irreparable harm. See *Herb Reed Enters.*, 736 F.3d at 1251 (“Those seeking injunctive relief must
10 proffer evidence sufficient to establish a likelihood of irreparable harm.” (emphasis added)).

11 Furthermore, loss of prospective business opportunities is generally an economic harm that
12 can be valued and compensated upon later success at trial. See *Am. Passage*, 750 F.2d at 1473–74
13 (“Monetary damages are not usually sufficient to establish irreparable harm.”); *Telephia v. Cuppy*,
14 No. C 04-03508, 2005 WL 588441, at *4 (N.D. Cal. Mar. 11, 2005) (concluding that defendant
15 could be compensated for the value of “the right to work exclusively in the wireless technology
16 market, and to keep defendants from engaging in business relationships in competition with
17 plaintiff”). Ojmar relies on *Celsis In Vitro, Inc. v. CellzDirect, Inc.*, 664 F.3d 922 (Fed. Cir.
18 2012), for the proposition that in some instances “[t]here is no effective way to measure the loss of
19 sales or potential growth—to ascertain the people who did not knock on the door.” See Mot. at 22
20 (quoting *Celsis*, 664 F.3d at 930). However, the Federal Circuit’s central concern in *Celsis* was
21 the inability to evaluate the impact of patent infringement on the plaintiff’s business. See 664 F.3d
22 at 930 (“As its name implies, the irreparable harm inquiry seeks to measure harms that no
23 damages payment, however great, could address.”). There, the plaintiff offered un rebutted expert
24 testimony substantiating the difficulty of quantifying its losses. *Id.* at 930–31. The testimony
25 credited the plaintiff’s product market as the source of this difficulty, given the presence of a
26 single patentee manufacturer with a growth-stage product and the existence of customer buying
27 habits that were particularly sensitive to price erosion. *Id.* at 930. In light of this market dynamic,
28 the Federal Circuit held that the district court did not err in finding that the plaintiff would suffer

1 irreparable harm absent a preliminary injunction. *Id.* at 931. Here, in contrast, Ojmar has
2 provided no similar evidentiary basis for its claim of lost business opportunity. In fact, by
3 asserting both initial and conservative sales projections, Ojmar strongly suggests that its lost
4 business opportunities in the EKL market can be adequately measured, and thus compensated if
5 Ojmar ultimately prevails in this case. See Oonk Decl. ¶¶ 5, 23.

6 Lastly, Ojmar filed its motion for preliminary injunction after a long delay. Despite being
7 aware of the exclusivity contracts in “early 2016,” Ojmar did not file suit until August 22, 2016,
8 and did not file the present motion until December 22, 2016. See *id.* ¶ 28; Dkt. No. 1; Mot. This
9 “long delay before seeking preliminary injunction implies a lack of urgency and irreparable harm.”
10 See *Oakland Tribune*, 762 F.2d at 1377; see also *Eros Tours & Travel, Inc. v. Infinitywaves, LLC*,
11 No. CV 14-5095 PA (PJWX), 2015 WL 11457691, at *3 (C.D. Cal. Feb. 9, 2015) (finding that
12 “delay alone warrant[ed] denial” of plaintiffs’ preliminary injunction motion, where
13 approximately ten months had passed since discovery of defendant’s allegedly unlawful conduct,
14 and nearly six months had passed since plaintiffs filed the action).

15 Having found that Ojmar is unable to show a likelihood of irreparable harm in the absence
16 of a preliminary injunction, the Court does not reach the other elements of the test. See *Leiva-*
17 *Perez*, 640 F.3d at 966 (requiring threshold showing as to all four elements).

18 For the foregoing reasons, Ojmar’s motion for a preliminary injunction is **DENIED**.

19 **IT IS SO ORDERED.**

20 Dated: 7/7/2017

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22 HAYWOOD S. GILLIAM, JR.
23 United States District Judge
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