

United States District Court
Central District of California

HOTELES DEL CABO S. DE R.L. DE
C.V.,

Plaintiff,

v.

CAPELLA HOTEL GROUP, LLC,
Defendant.

Case No. 2:15-cv-00408-ODW(JPRx)

**ORDER DENYING (1) PLAINTIFF'S
EX PARTE APPLICATION FOR A
TEMPORARY RESTRAINING
ORDER [16], (2) PLAINTIFF'S EX
PARTE APPLICATION FOR
ORDER TO SHOW CAUSE RE:
ISSUANCE OF A PRELIMINARY
INJUNCTION [16], AND
(3) DEFENDANT'S EX PARTE
APPLICATION FOR AN
EXTENSION OF TIME [23]**

I. INTRODUCTION

On January 20, 2015, Plaintiff Hoteles Del Cabo S. De R.L. De C.V. ("Hoteles") filed the instant action against Defendant Capella Hotel Group, LLC ("Capella") alleging two violations of trademark infringement under the Lanham Act, 15 U.S.C. §§ 1125, *et seq.* (ECF No. 1.) Three days later, Hoteles filed an *Ex Parte* Application for a Temporary Restraining Order and an *Ex Parte* Application for Order to Show Cause Re: Issuance of a Preliminary Injunction, both of which are currently pending before the Court. (ECF No. 16.) On January 25, 2015, Capella filed an *Ex*

1 *Parte* Application for Extension of Time to File Opposition. (ECF No. 23.) Hoteles
2 claims that it will suffer irreparable harm to its reputation if Capella’s advertising and
3 social media practices are not immediately enjoined. For the reasons discussed below,
4 the Court **DENIES** (1) Hoteles’ *Ex Parte* Application for a Temporary Restraining
5 Order, (2) Hoteles’ *Ex Parte* Application for Order to Show Cause Re: Issuance of
6 Preliminary Injunction, and (3) Capella’s *Ex Parte* Application for Extension of Time
7 to File Opposition.

8 **II. FACTUAL BACKGROUND**

9 **A. The Contract Dispute**

10 Hoteles is a Mexican corporation and “acting owner” of a luxury resort hotel
11 (the “Resort”) in Cabo San Lucas, Mexico. (ECF No. 18 [“Bogart Decl.”] ¶ 3.)
12 Capella is a Delaware corporation that, in conjunction with an “entity it owns”—
13 WPHG Mexico Operating, L.L.C. (“WPHG”)—operates and markets luxury hotels.
14 (*Id.*) In 2005, the previous owner of the Resort—another Mexican corporation—
15 entered into an Operating Agreement (the “Agreement”) with WPHG whereby WPHG
16 would operate and market the Resort. (*Id.* ¶¶ 3–4.) In 2012, the original owner then
17 assigned its rights under the Agreement to Hoteles. (*Id.* ¶ 5.) The Agreement, set to
18 expire after thirty years, allegedly allows Hoteles the right to terminate the Agreement
19 at any time “for cause.” (*Id.* ¶ 4.) Under the Agreement, the Resort was named and
20 marketed as the “Capella Pedregal.” (*Id.* ¶ 3.) A significant percentage of fees paid to
21 WPHG under the Agreement were for the use of the “Capella” mark. (*Id.* ¶ 7.)
22 Capella has allegedly always held itself out to the public as the operator of the Resort.
23 (*Id.* ¶ 6.)

24 At some point in 2014, Hoteles allegedly discovered that WPHG breached the
25 Agreement by overpaying itself \$2.2 million in fees, creating false financial
26 statements and accounts, and engaging in other misconduct. (*Id.* ¶ 8.) On August, 14,
27 2014, Hoteles allegedly issued WPHG a Notice of Default under the terms of the
28 Agreement. (*Id.* ¶ 9.) WPHG allegedly refused to cure the Default thereby giving

1 Hoteles the right to terminate the Agreement under Section 3.3(a) of the Agreement.
2 (*Id.* ¶ 10.) On November 3, 2014, following the Resort’s closure for repair in the
3 aftermath of Hurricane Odile, Hoteles allegedly delivered WPHG a Notice of
4 Termination of the Operating Agreement. (*Id.* ¶ 12.) The Notice also notified WPHG
5 that Hoteles commenced an arbitration proceeding before the International Chamber
6 of Commerce (“ICC”)—as required under the Agreement—to recover damages from
7 WPHG’s breach of the Agreement. (*Id.* ¶ 12.)

8 On the same night as Hoteles delivered the Notice of Termination, Hoteles
9 allegedly terminated WPHG and Capella’s access to the Resort’s computer systems
10 and installed a completely new management team. (*Id.* ¶ 14.) The termination of the
11 Agreement and installation of new management was allegedly completed in one night.
12 (*Id.*) Hoteles allegedly retained all of the remaining 420 on-site employees at their
13 same titles and compensation. (*Id.* ¶ 15.) The new management created a new name
14 and logo for the Resort—“The Resort at Pedregal”—and began branding the new
15 name on social media and its new website—www.TheResortAtPedregal.com. (*Id.*
16 ¶¶ 16–17.) Hoteles immediately issued a press release announcing that the Resort
17 “had ended its affiliation with the Capella brand” and was re-launching under a new
18 name. (ECF No. 20, Ex. A.)

19 **B. False Representation Allegations**

20 Despite the termination of WPHG and Capella’s role with the Resort, Capella
21 allegedly still maintains a strong internet presence promoting the Resort. Capella
22 allegedly continues to operate a website and social media sites promoting “Capella
23 Pedregal.” (*Id.*) Hoteles claims that the termination of the Agreement requires
24 Capella and WPHG to withdraw any statements in the public domain associating the
25 Resort with their brands. (*Id.* ¶ 32.) Capella’s CEO recently posted on Twitter that
26 “we look forward to serving you and your clients at the Capella Pedregal when it
27 reopens.” (*Id.* ¶ 35.) Hoteles allegedly began sending Capella letters in early
28 November demanding that Capella cease making online representations that suggested

1 it was associated with the Resort. (*Id.* ¶ 30.)

2 Hoteles further alleges that Capella is actively trying to divert business away
3 from Hoteles. According to Hoteles, Capella’s “Capella Pedregal” website contains a
4 message directing visitors to Capella’s “sister property” in Mexico while the Resort is
5 undergoing hurricane repairs. (*Id.* ¶ 36.) On December 17, 2014, Capella allegedly
6 sent e-mails to past Resort guests inviting them to visit Capella’s other resort. (*Id.*
7 ¶ 37.) After months of undergoing hurricane-related repairs, the Resort is set to re-
8 open under the Hoteles management on January 31, 2015.

9 III. LEGAL STANDARD

10 “The standard for issuing a temporary restraining order is identical to the
11 standard for issuing a preliminary injunction.” *Lockheed Missile & Space Co. v.*
12 *Hughes Aircraft Co.*, 887 F. Supp. 1320, 1323 (N.D. Cal. 1995). A court may only
13 grant such relief “upon a clear showing that the plaintiff is entitled to such relief.”
14 *Winter v. Nat’l Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). To prevail, the moving
15 party must show: (1) a likelihood of success on the merits; (2) a likelihood that the
16 moving party will suffer irreparable harm absent preliminary injunctive relief; (3) that
17 the balance of equities tips in the moving party’s favor; and (4) that preliminary
18 injunctive relief is in the public interest (the “*Winter* factors”). *Id.* at 20. “Under
19 *Winter*, plaintiffs must establish that irreparable harm is *likely*, not just possible, in
20 order to obtain a preliminary injunction.” *Alliance for the Wild Rockies v. Cottrell*,
21 632 F.3d 1127, 1132 (9th Cir. 2011) (original emphasis). In the Ninth Circuit,
22 “‘serious questions going to the merits’ and a hardship balance that tips sharply
23 toward the plaintiff can [also] support issuance of an injunction, assuming the other
24 two elements of the *Winter* test are also met.” *Id.* at 1132, 1135 (holding that the
25 “sliding scale” test remains viable “so long as the plaintiff also shows that there is a
26 likelihood of irreparable injury and that the injunction is in the public interest”).

27 A court may only issue an *ex parte* temporary restraining order (“TRO”) if
28 “specific facts in an affidavit or a verified complaint clearly show that immediate and

1 irreparable injury, loss, or damage will result to the movant before the adverse party
2 can be heard in opposition.” Fed. R. Civ. P. 65(b)(1)(A).

3 IV. DISCUSSION

4 Hoteles seeks an *ex parte* TRO that would enjoin Capella from (1) using the
5 “Capella Pedregal” name, (2) promoting the Resort as a Capella-managed property on
6 its website, (3) advertising the Resort through print or e-mail to past Resort visitors,
7 and (4) utilizing the 1-800 phone number associated with the Resort. (ECF No. 16-1.)
8 Hoteles also wants the Court to order Capella to return control of all social media
9 platforms to Hoteles. (*Id.*) Hoteles also wants a preliminary injunction granting these
10 same requests, and requested an order to show cause to expedite the preliminary
11 injunction briefing and argument schedule. (*Id.*)

12 To expediently resolve Hoteles’ request for “immediate” relief, the Court will
13 focus only on the second *Winter* factor—a likelihood that the moving party will suffer
14 irreparable harm absent preliminary injunctive relief. *Winter*, 555 U.S. at 20. Since
15 this is a request for an *ex parte* TRO, Hoteles must also prove that the irreparable
16 harm is “immediate.” See Fed. R. Civ. P. 65(b)(1)(A).

17 Hoteles’ brief is written as though it is only requesting a preliminary injunction.
18 There is almost no mention of immediate and irreparable harm necessitating an *ex*
19 *parte* TRO. Hoteles contends that it “must seek immediate injunctive relief both to
20 prevent future damage to its reputation and goodwill” before the Resort’s re-opening
21 on January 31, 2015. (ECF No. 16 [“Pl. Br.”] at 22.) Hoteles’ only argument in
22 support of this “immediate” need is as follows:

23 Guests who pay top rates to stay in luxury resorts like [the
24 Resort] are unwilling to endure any uncertainty about the
25 level of services they will receive in return, and any
26 suggestion of management turmoil that could result in a
27 deterioration of service significantly undermines the
28 necessary perception of quality for this type of property, and

1 would cause a significant number of prospective guests to
2 book elsewhere.

3 (*Id.* at 8.)

4 The Court is not convinced that this “uncertainty” regarding the level of service
5 or management proves immediacy or irreparability. As an initial matter, the alleged
6 infringing conduct has continued consistently since early November 2014. Hoteles
7 now attempts to convince the Court that despite three months of infringement, the
8 same conduct now presents *immediate* harm. If this harm was truly immediate and
9 irreparable, Hoteles would have sought redress when the irreparable harm began
10 months ago. The Court rejects Hoteles claim that it wanted to first build a full record
11 of infringement before it sought judicial intervention—this argument is unconvincing
12 and cuts against the alleged irreparable nature of the harm.

13 The Court recognizes that the Resort re-opens later this week; however, the re-
14 opening date does not transform months of allegedly unlawful advertising into an
15 immediate harm. Surely the re-opening date was not a surprise for Hoteles. Common
16 sense informs the Court that visitors headed to the Resort this weekend booked their
17 trips weeks (or months) ago, and it is highly unlikely that prospective customers are
18 booking international vacations on a five-day notice. Hoteles does not make any
19 allegations to the contrary. While the alleged irreparable harm is still occurring, the
20 re-opening date is insufficient to transform this past/continuing harm into an
21 *immediate* harm warranting an “extraordinary remedy.” *Winter*, 555 U.S. at 24.

22 The Lanham Act allows for injunctive relief, *see* 15 U.S.C. § 1125(c)(1), and
23 trademark infringement damaging a party’s goodwill is potentially irreparable, *see*
24 *Rent-a-Center, Inc. v. Canyon Television & Appliance*, 944 F.2d 597, 603 (9th Cir.
25 1992) (“We have also recognized that intangible injuries, such as damage to . . .
26 goodwill, qualify as irreparable harm.”). However, an application for an *ex parte*
27 TRO requires proof of harm that is immediate *and* irreparable, and the Court
28 concludes that Hoteles made no such showing. Since Hoteles’ request fails at the

1 second *Winter* factor, the Court does not need to address the remaining factors.

2 **V. CONCLUSION**

3 For the reasons discussed above, the Court hereby **DENIES** Hoteles' *Ex Parte*
4 Application for a Temporary Restraining Order. (ECF No.16.) In analyzing Hoteles'
5 *Ex Parte* Application for an Order to Show Cause Re: Issuance of a Preliminary
6 Injunction, the Court finds that Hoteles made no showing as to why the Court should
7 depart from the traditional motion-practice rules. Hoteles' inability to demonstrate a
8 need for an immediate remedy leads the Court to conclude that Hoteles should comply
9 with Local Rules 6-1 and 7-3. Therefore, the Court hereby **DENIES** Hoteles' *Ex*
10 *Parte* Application for an Order to Show Cause Re: Issuance of a Preliminary
11 Injunction. (ECF No. 16.) The Court also **DENIES** Capella's *Ex Parte* Application
12 for Extension of Time to File Opposition as **MOOT**. (ECF No. 23.)

13 **IT IS SO ORDERED.**

14
15 January 26, 2015

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18 **OTIS D. WRIGHT, II**
19 **UNITED STATES DISTRICT JUDGE**
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