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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

STACKLA, INC., et al.,
Plaintiffs,
v.
FACEBOOK INC., et al.,
Defendants.

Case No. 19-cv-05849-PJH

**ORDER DENYING MOTION FOR
TEMPORARY RESTRAINING ODER**

Re: Dkt. No. 3

United States District Court
Northern District of California

Plaintiffs Stackla, Inc., Stackla, Ltd., and Stackla Pty Ltd.’s (together, “Stackla”) motion for a temporary restraining order came on for hearing before this court on September 25, 2019. Dkt. 3. Plaintiffs appeared through their counsel, Jeffrey Tsai and Isabelle Ord. Defendants Facebook Inc. and Instagram, LLC (together, “Facebook”) appeared through their counsel, Sonal Mehta and Matthew Benedetto. Having read the papers filed by the parties and carefully considered their arguments and the relevant legal authority, and good cause appearing, the court hereby DENIES the motion, for the following reasons.

BACKGROUND

On September 19, 2019, Stackla filed the complaint originating this action against defendants. The complaint asserts nine causes of action: (1) Declaratory Judgment Under 22 U.S.C. § 2201, that Plaintiffs Have Not Violated the Computer Fraud and Abuse Act (18 U.S.C. § 1030); (2) Declaratory Judgment Under 22 U.S.C. § 2201, that Plaintiffs Have Not Violated Cal. Penal Code § 502(c); (3) Intentional Interference with Contract; (4) Intentional Interference with Prospective Economic Advantage; (5) Unfair Competition

1 (Cal. Bus. & Prof. Code §§ 17200, et seq.); (6) Promissory Estoppel; (7) Breach of
2 Contract; (8) Breach of Contract; and (9) Breach of the Implied Covenant of Good Faith
3 and Fair Dealing. Compl., Dkt. 1.

4 Stackla operates a software-as-a-service business and sells annual cloud software
5 subscriptions to clients. Compl. ¶ 23. Its service helps clients find content published to
6 social media platforms such as Facebook, Twitter, YouTube, and Instagram, gain
7 approval to use the content, and then re-purpose it in their own advertising and marketing
8 activities. Mahoney Decl. ¶ 5, Dkt. 3-10.

9 Facebook is a large social-media company and platform, and Instagram is itself a
10 large social-media platform wholly owned by Facebook. Compl. ¶¶ 12–14.

11 Stackla formerly used the Facebook Open Graph Application Programming
12 Interface (“API”), which is developed and offered by Facebook to certain third-party
13 application developers to more easily access data hosted by Facebook. Stackla would
14 use Facebook’s API to identify content uploaded by Facebook users for its clients to use
15 in their advertising materials.

16 Stackla argues that its business requires access to Facebook’s platforms, because
17 “virtually all of Stackla’s clients are heavily and almost exclusively reliant on Facebook
18 and Instagram content to derive value from Stackla’s platform.” Mot. at 3, Dkt. 3.
19 Approximately 80 percent of the content collected by Stackla’s clients comes from
20 postings on Facebook and Instagram. Mahoney Decl. ¶ 13; Compl. ¶ 57.

21 On May 25, 2019, Facebook accepted Stackla into the Facebook Marketing
22 Partner program, and Stackla was presented as an official partner of Facebook on May
23 29, 2019. Mahoney Decl. ¶ 19.

24 In 2015, The Guardian broke a now-famous story involving Cambridge Analytica’s
25 misuse of Facebook data. Tsai Decl., Dkt. 3-1, Ex. E. The Federal Trade Commission
26 later opened an investigation into whether Facebook had violated a prior settlement
27 relating to Facebook user protections. *Id.*, Ex. G. Facebook has been under public
28 scrutiny—including from federal regulators and Congress—relating to the sufficiency of

1 its practices to ensure that the data it has, and the social networking interactions
2 undertaken on its systems, are properly policed and not abused.

3 Around August 7, 2019, Business Insider published an article asserting that
4 Instagram had allowed a third-party advertising user to misuse the platform to advance
5 advertising and/or third party consumer-tracking purposes. See Mahoney Decl. ¶ 24. A
6 subsequent article named Stackla as an offending third-party advertiser. Mahoney Decl.
7 ¶ 25. Stackla denies the truth of the article.

8 On August 30, 2019, Stackla received a “Cease and Desist Abuse of Facebook”
9 letter from Facebook. Mahoney Decl. ¶ 29; Compl. ¶ 49. The letter stated, among other
10 things, that Stackla had breached a Master Subscription Agreement between it and
11 Facebook and that Stackla was suspended as a marketing partner. See Compl. ¶ 51.
12 The letter informed Stackla that it was no longer permitted to access Facebook’s or
13 Instagram’s computer systems. The same day, Stackla’s access to Facebook’s API was
14 terminated. Mahoney Decl. ¶ 30. The Facebook and Instagram accounts of Stackla
15 officers were also terminated, and a number of Stackla’s current and former employees
16 were also barred access. Id.

17 The parties have corresponded since August 30, but Facebook’s denial of access
18 to its systems remains in effect.

19 On September 19, 2019, plaintiffs filed this suit and the present motion for a
20 temporary restraining order.

21 DISCUSSION

22 A. Legal Standard

23 Federal Rule of Civil Procedure 65 provides federal courts with the authority to
24 issue temporary restraining orders and preliminary injunctions. Fed. R. Civ. P. 65(a)–(b).
25 Generally, the purpose of a preliminary injunction is to preserve the status quo and the
26 rights of the parties until a final judgment on the merits can be rendered (see U.S. Philips
27 Corp. v. KBC Bank N.V., 590 F.3d 1091, 1094 (9th Cir. 2010)), while the purpose of a
28 temporary restraining order is to preserve the status quo before a preliminary injunction

1 hearing may be held (see Granny Goose Foods, Inc. v. Bhd. of Teamsters and Auto
 2 Truck Drivers, 415 U.S. 423, 439 (1974)).

3 Requests for temporary restraining orders are governed by the same legal
 4 standards that govern the issuance of a preliminary injunction. See Stuhlberg Int'l Sales
 5 Co., Inc. v. John D. Brush & Co., Inc., 240 F.3d 832, 839 n.7 (9th Cir. 2001).

6 An injunction is a matter of equitable discretion and is “an extraordinary remedy
 7 that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.”
 8 Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 22 (2008); see also Munaf v. Geren,
 9 553 U.S. 674, 689–90 (2008). A preliminary injunction “should not be granted unless the
 10 movant, by a clear showing, carries the burden of persuasion.” Mazurek v. Armstrong,
 11 520 U.S. 968, 972 (1997) (per curiam).

12 “A plaintiff seeking a preliminary injunction must establish that [1] he is likely to
 13 succeed on the merits, that [2] he is likely to suffer irreparable harm in the absence of
 14 preliminary relief, that [3] the balance of equities tips in his favor, and that [4] an
 15 injunction is in the public interest.” Winter, 555 U.S. at 20.

16 Alternatively, “‘serious questions going to the merits’ and a hardship balance that
 17 tips sharply toward the plaintiff can support issuance of an injunction, assuming the other
 18 two elements of the Winter test are also met.” All. for the Wild Rockies v. Cottrell, 632
 19 F.3d 1127, 1132 (9th Cir. 2011). “That is, ‘serious questions going to the merits’ and a
 20 balance of hardships that tips sharply towards the plaintiff can support issuance of a
 21 preliminary injunction, so long as the plaintiff also shows that there is a likelihood of
 22 irreparable injury and that the injunction is in the public interest.” Id. at 1135; see also
 23 Disney Enterprises, Inc. v. VidAngel, Inc., 869 F.3d 848, 856 (9th Cir. 2017).

24 **B. Analysis**

25 Under the both the Winter and Alliance for the Wild Rockies tests, plaintiffs must
 26 demonstrate (1) they are likely to suffer irreparable harm in the absence of the requested
 27 relief, and (2) an injunction is in the public interest. Plaintiffs do not satisfy either of these
 28 requirements, so the motion for a temporary restraining order must be denied. Because

1 plaintiffs must satisfy each of the four factors, the court need not address the balance of
 2 hardships or whether plaintiffs have raised serious questions going to the merits. See All.
 3 for the Wild Rockies, 865 at 1223 (“Because a party seeking a preliminary injunction must
 4 satisfy all four factors under both the Winter and ‘sliding scale’ standards for injunctive
 5 relief, we need not address the remaining three factors.”) (citation omitted); Disney
 6 Enterprises, Inc., 869 F.3d at 856 (“Likelihood of success on the merits ‘is the most
 7 important’ Winter factor; if a movant fails to meet this ‘threshold inquiry,’ the court need
 8 not consider the other factors”).

9 **1. Irreparable Harm**

10 Plaintiffs argue they will be irreparably harmed absent an injunction because
 11 “Stackla’s business will be irretrievably destroyed before any hearing can take place and
 12 any relief on the merits will be too late to save Stackla.” Mot. at 9.

13 Although “[m]onetary damages are not usually sufficient to establish
 14 irreparable harm[,] . . . [t]he threat of being driven out of business is sufficient to
 15 establish irreparable harm.” Am. Passage Media Corp. v. Cass Commc'ns, Inc., 750
 16 F.2d 1470, 1473–74 (9th Cir. 1985). “A plaintiff must do more than merely allege
 17 imminent harm sufficient to establish standing; a plaintiff must *demonstrate* immediate
 18 threatened injury as a prerequisite to preliminary injunctive relief.” Caribbean Marine
 19 Servs. Co. v. Baldrige, 844 F.2d 668, 674 (9th Cir. 1988). “Speculative injury cannot be
 20 the basis for a finding of irreparable harm.” In re Excel Innovations, Inc., 502 F.3d 1086,
 21 1098 (9th Cir. 2007).

22 The court first notes that plaintiffs’ motion seeks a temporary restraining order, the
 23 purpose of which is to address only harms caused by actions likely to occur between the
 24 time of its filing and a preliminary injunction hearing. For that reason, plaintiffs’ argument
 25 that “relief on the merits will be too late” misses the mark. Arguments regarding harm
 26 plaintiffs are likely to suffer caused by conduct occurring after a preliminary injunction
 27 hearing and before a final judgment on the merits are cognizable on a motion for
 28 preliminary injunction.

1 Plaintiffs support their arguments of irreparable harm primarily with a declaration
 2 from Damien William Mahoney, the Chief Executive Officer, director, and shareholder of
 3 one of the plaintiff entities, Stackla Pty. Ltd.¹ Mahoney Decl. ¶ 1. The company he is
 4 CEO and director of, Stackla Pty. Ltd., is the parent company and sole owner of the other
 5 two plaintiff entities. Id. Mahoney elsewhere avers that he is also CEO of the other two
 6 plaintiff entities. Id. ¶¶ 1, 3.

7 Preliminarily, plaintiffs' allegations of imminent harms share a common fatal flaw in
 8 that they merely allege speculative harm—they do not sufficiently demonstrate that it is
 9 likely to occur. Mahoney's declaration—the sole source cited to support plaintiffs'
 10 arguments for irreparable harm—is too speculative to constitute a basis for the
 11 extraordinary relief plaintiffs seek.

12 Mahoney attests to four broad points supporting the imminent harm plaintiffs
 13 allegedly face.

14 First, he declares that “virtually all” of plaintiffs' clients “heavily” rely on Facebook's
 15 platforms when using Stackla's products. Mahoney Decl. ¶¶ 5 (“[t]he vast majority of the
 16 content Stackla relies on for its business, however, comes from Facebook and
 17 Instagram”), 15 (“virtually all of Stackla's clients are heavily and almost exclusively reliant
 18 on Facebook and Instagram content to derive value from Stackla's platform”), 36
 19 (“Facebook and Instagram user content sourced through Stackla is over 80% of the
 20 content curated by Stackla's clients through Stackla's platform.”).

21 Stackla has sufficiently established for purposes of this motion that much—
 22 although admittedly not all—of the work it conducted for clients prior to August 30, 2019
 23 involved accessing Facebook's platforms.

24 Second, Mahoney declares that if Stackla is unable to access Facebook, its
 25 current clients will terminate their existing agreements. Mahoney Decl. ¶¶ 15 (“If Stackla
 26

27 ¹ The court declines to consider plaintiffs' untimely filings, submitted on the literal eve of
 28 the hearing, which were not permitted under the briefing schedule and for which leave to
 file was not sought. See Dkt. 15.

1 does not have access to Facebook and Instagram content, Stackla’s clients will not use
2 Stackla.”), 31 (“to date, Stackla has received over 100 notices from its clients claiming a
3 material breach of its agreement with our clients”), 36 (“[w]ithout injunctive relief, Stackla
4 cannot deliver contractually promised services to its clients and will be forced to terminate
5 its client agreements if Stackla’s clients do not cancel the agreements first. As of the
6 date of this declaration, a majority of Stackla’s customers have already raised their
7 concerns regarding lack of access and Stackla’s breach. If Stackla is not able to cure the
8 breaches and alleviate concern, Stackla’s customer contracts will be terminated.”), 38
9 (“Among Stackla’s clients, those who have not already given notice of material breaches
10 are asking what recourse they have to cancel contracts and receive refunds for license
11 fees.”).

12 Stackla’s strongest argument here would be that it is in material breach of
13 contractual obligations as a result of Facebook’s ban, and its clients have confirmed that
14 they will imminently be rightfully withdrawing from their agreements, resulting in a loss of
15 revenue and client relationships. But, even charitably construed, Stackla merely alleges
16 those conclusions—it does not demonstrate them. For example, Stackla does not
17 identify a single client that it will imminently lose (or even an exemplary client it has
18 already lost), it does not submit a copy of any contract it will breach (or even identify any
19 exemplary contractual term it will breach), and it does not identify any clients who will
20 imminently give notice of material breach (or even an exemplary client of the 100 who
21 have already given such notice). Moreover, the fact that customers have “raised . . .
22 concerns” and “are asking what recourse they have” does not demonstrate a likelihood
23 that they will cease paying Stackla under the terms of their contracts—much less that
24 they will do so imminently. Stackla asks the court to accept as true an allegation that its
25 inability to access Facebook’s platform constitutes the material breach of numerous
26 contracts, and then to speculate that clients expressing concern and asking about
27 Facebook will imminently terminate their relationships with plaintiffs—all before a
28 preliminary injunction hearing is held. Plaintiffs have not not demonstrated that these

1 events are likely to transpire.

2 Third, Mahoney declares that if Stackla is unable to access Facebook, it will lose
3 prospective clients it would otherwise contract with. *Id.* ¶ 38 (“Prospective clients are
4 now questioning their decision to select Stackla and instead choosing its competitors.”).
5 Although it is possible this is true, Stackla has failed to demonstrate its likelihood.
6 Mahoney has not identified prospective customers who have withdrawn from ongoing
7 sales activities. Moreover, Stackla merely alleges but does not demonstrate that
8 Facebook’s ban caused this alleged harm (rather than, for example, prior negative media
9 attention), or that the injunctive relief it seeks would be effective in curing it.

10 Fourth, Mahoney declares that if Stackla is unable to access Facebook, it will
11 “soon” cease to be a going concern. *Id.* ¶¶ 37 (“Stackla relies on receivables from its
12 clients to fund its operations, which are dependent on customers using the Stackla
13 platform to source and acquire content. . . . Without continued access to Facebook and
14 Instagram, Stackla will be deprived of its revenue.”), 38 (“Stackla is losing business every
15 day in which access to Facebook and Instagram is shut off, and this will soon reach a
16 tipping point where Stackla can no longer operate.”).

17 Even if the court found that plaintiffs had adequately demonstrated the likelihood
18 of the above harms, that Stackla will lose existing clients and fail to attract new clients
19 due to Facebook’s ban, Stackla’s request for emergency relief would have to be denied
20 because it has failed to demonstrate that those harms would lead to the irreparable harm
21 it seeks to remedy—its destruction as a business.

22 Mahoney’s averment that “this will soon reach a tipping point where Stackla can
23 no longer operate” is inherently speculative, although it is the precise question at issue in
24 plaintiffs’ motion. Plaintiffs do not offer any indication about their financial strength or the
25 likelihood that they will dissolve as going concerns at any particular point in time. This
26 court cannot hinge a finding that Stackla faces the threat of being driven out of business,
27 caused by conduct likely to occur prior to a preliminary injunction hearing, based on its
28 CEO’s estimate that the company will “soon reach a tipping point[.]” The extraordinary

1 relief of a pre-adjudicatory injunction demands more precision with respect to when
 2 irreparable harm will occur than “soon.” Such vague statements are insufficient evidence
 3 to show a threat of extinction. Am. Passage Media Corp., 750 F.2d at 1474 (statements
 4 that a company has “sustained large losses” in the past and “forecast[s] large losses
 5 again” in the future “are insufficient evidence that [plaintiff] is threatened with extinction”);
 6 see also AboveGEM, Inc. v. Organo Gold Mgmt., Ltd., Case No. 19-cv-04789-PJH, 2019
 7 WL 3859012, at *5 (N.D. Cal. Aug. 16, 2019) (“plaintiff does not offer any indication of
 8 when it would be driven out of business, or underlying financial information that would
 9 demonstrate imminent, irreparable harm”); Int’l Medcom, Inc. v. S.E. Int’l, Inc., Case No.
 10 15-cv-03839-HSG, 2015 WL 7753267, at *5 (N.D. Cal. Dec. 2, 2015) (no irreparable
 11 harm where “the record does not contain non-conclusory evidence sufficient to establish
 12 that (1) [plaintiff’s] survival is a matter of weeks or months, (2) [defendant] caused
 13 [plaintiff’s] financial troubles, and (3) if Plaintiff is ultimately successful,
 14 compensatory damages and injunctive relief would be inadequate”).

15 2. The Public’s Interest

16 Plaintiffs argue that the public interest favors an injunction because one would
 17 prevent the imminent destruction of Stackla’s business, preserve employee jobs, and
 18 generally allow Stackla to continue operating. Additionally, they argue that the public
 19 interest will be served by enjoining defendants’ wrongful conduct. Defendants argue that
 20 the public has an interest in allowing Facebook to exclude those who act impermissibly
 21 on its platform and jeopardize user privacy by, in this instance, automating data collection
 22 and scraping content en masse. Facebook argues that the public has an interest in
 23 allowing it latitude to enforce rules preventing abuse of its platform.

24 The court finds that the public’s interest cautions against issuing injunctive relief at
 25 this time.

26 Plaintiffs’ arguments that the public interest supports enjoining conduct that
 27 violates civil statutes is surely correct, but plaintiffs are seeking pre-adjudicative injunctive
 28 relief. By the very nature of plaintiffs’ request that this court issue the extraordinary

1 remedy of an injunction prior to a determination on the merits (and even prior to hearing
2 this pre-adjudicatory injunctive question on a normal briefing schedule), plaintiffs' appeal
3 to the public interest of enjoining statutory violations begs the question. Moreover, Winter
4 requires that plaintiffs show their likelihood of success on the merits as a separate
5 element, and the court declines plaintiffs' invitation to subsume the distinct element
6 assessing the public's interest into plaintiffs' likelihood of success on the merits. If an
7 argument that a plaintiff is likely prevail on the merits were enough to satisfy the public's
8 interest in an injunction, the public's interest would be a superfluous element in the
9 analysis.

10 On plaintiffs' request for emergency injunctive relief, the court assesses the
11 public's interest given the facts before it on this very abbreviated briefing schedule.
12 Declining injunctive relief at this stage might result in a final award for plaintiffs that is less
13 than fully compensatory, because the business may be defunct due to events that occur
14 between now and when a preliminary injunction might issue following a 35-day briefing
15 schedule. Moreover, some (unspecified number) of plaintiffs' employees may lose their
16 jobs due to events occurring in that time period.

17 Awarding injunctive relief at this stage would compel Facebook to permit a
18 suspected abuser of its platform and its users' privacy to continue to access its platform
19 and users' data for weeks longer, until a preliminary injunction motion could be resolved.
20 Moreover, as precedent within Facebook's policy-setting organization and potentially with
21 other courts, issuing an injunction at this stage could handicap Facebook's ability to
22 decisively police its social-media platforms in the first instance. Facebook's enforcement
23 activities would be compromised if judicial review were expected to precede rather than
24 follow its enforcement actions.

25 Although the public certainly has some interest in avoiding the dissolution of
26 companies and the accompanying loss of employment, Facebook's ability to decisively
27 police the integrity of its platforms is without question a pressing public interest. In
28 particular, the public has a strong interest in the integrity of Facebook's platforms,

1 Facebook’s policing of those platforms for abuses, and Facebook’s protection of its users’
 2 privacy. Congress’s ample attention to such abuse is more than enough to demonstrate
 3 the importance of those interests to the public, as are Facebook’s recent interactions with
 4 the FTC. See generally, Facebook: Transparency and Use of Consumer Data: Hearing
 5 Before the Committee on Energy and Commerce, House Of Representatives, 115th
 6 Cong. (2018); Plaintiff’s Consent Motion for Entry of Stipulated Order for Civil Penalty,
 7 Monetary Judgment, and Injunctive Relief and Memorandum in Support at 2–3, United
 8 States v. Facebook, Inc., Case No. 19-cv-02184-TJK (D.D.C. July 25, 2019), Dkt. 4
 9 (Facebook consenting to \$5 billion civil penalty in action brought by FTC based on, inter
 10 alia, Facebook “[1] maintaining deceptive settings that misled users about how to protect
 11 their information from being shared by Facebook with third-party developers of apps . . .
 12 [2] promising to stop giving app developers access to the data of app users’ Friends
 13 starting in 2014, when in fact many app developers continued to have such access past
 14 that date . . . [and 3] inconsistently enforcing its privacy policies against app developers
 15 who violated those policies”).

16 For the foregoing reasons, the public’s interest favors allowing Facebook’s ban of
 17 allegedly-abusive entities from its platforms to remain in effect pending at least a motion
 18 for preliminary injunction.

19 CONCLUSION

20 For the foregoing reasons, plaintiffs’ motion for a temporary restraining order is
 21 DENIED. Plaintiffs may file a motion for a preliminary injunction by October 9, 2019, on
 22 the normal briefing schedule set out by this court’s local rules and standing orders.

23 **IT IS SO ORDERED.**

24 Dated: September 27, 2019

25 /s/ Phyllis J. Hamilton

26 PHYLLIS J. HAMILTON
 27 United States District Judge