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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

PROTECTMARRIAGE.COM -
YES ON 8, a PROJECT OF
CALIFORNIA RENEWAL,

NO. CIV. S-10-132 LKK/DAD

Plaintiff,

v.

O R D E R

COURAGE CAMPAIGN, COURAGE
CAMPAIGN INSTITUTE,

Defendants.

_____/

This is a trademark dispute. Plaintiff seeks a temporary restraining order enjoining defendant from using the allegedly infringing mark. For the reasons stated below, the court concludes that plaintiff is unlikely to overcome the conclusion that defendant's use of the mark is protected under the First Amendment, in that the use is relevant to an expressive parody and the use is not explicitly misleading. Plaintiff's motion is therefore denied.

I. BACKGROUND

In 2008, the California Electorate passed Proposition 8, which amended the state constitution to provide that "Only marriage

1 between a man and a woman is valid or recognized in California.”
2 California Constitution Art. I, § 7.5. Plaintiff California
3 Renewal is a nonprofit corporation which operates
4 “ProtectMarriage.com - Yes on 8.” Plaintiff helped place
5 Proposition 8 on the ballot, campaigned for Proposition 8’s
6 passage, and has since informed the public about challenges to
7 Proposition 8 and raised funds to defend against such challenges.
8 Perhaps most recently, plaintiff has intervened as a defendant in
9 a federal constitutional challenge to Proposition 8 currently being
10 tried in the Northern District of California, Perry v.
11 Schwarzenegger, 09-cv-02292.

12 In all of the above activities, plaintiff has used a logo it
13 refers to as the “ProtectMarriage Trademark.” This logo depicts
14 four stylized silhouettes: two larger figures, one in pants and one
15 in a dress, standing on either side of two smaller figures, also
16 one in pants and one in a dress. Thus, the logo represents a
17 heterosexual family. All four figures have their arms raised.
18 This graphic is often, but not always, presented in blue, under an
19 arcing banner reading “Yes on 8 Protect Marriage.” In this banner,
20 the 8 is centered and in larger type. Plaintiff submits the
21 following rendition:

22 ////
23 ////
24 ////
25 ////
26 ////



10 Defendant is a nonprofit organization that supports a right

11 to homosexual marriage. Thus, plaintiff and defendant have

12 opposing views on Proposition 8. When trial in Perry v.

13 Schwarzenegger began on January 11, 2010, defendant began operating

14 a website dedicated to providing coverage of the trial,

15 prop8trialtracker.com. Prop8trialtracker.com uses a logo

16 admittedly derived from the "ProtectMarriage" logo. The

17 prop8trialtracker logo also features four stylized silhouettes.

18 While plaintiff's logo depicts the "parent" figures in pants and

19 a dress, both "parent" figures in defendant's logo wear dresses,



suggesting same-sex parents. The text in

the banner in defendant's logo has been

replaced to read "Prop 8 Trial Tracker."

On January 19, 2010 (the day the TRO was

filed), the image appeared on the website

as the image to the left.

1 Defendant has filed an opposition to plaintiff's motion. The
2 court concludes that no hearing on the matter is necessary, and
3 resolves the motion on the papers.¹

4 **II. STANDARD**

5 Fed. R. Civ. P. 65 provides authority to issue either
6 preliminary injunctions or temporary restraining orders.
7 Ordinarily, a plaintiff seeking a preliminary injunction must
8 demonstrate that it is "[1] likely to succeed on the merits, [2]
9 that he is likely to suffer irreparable harm in the absence of
10 preliminary relief, [3] that the balance of equities tips in his
11 favor, and [4] that an injunction is in the public interest." Am.
12 Trucking Ass'ns v. City of Los Angeles, 559 F.3d 1046, 1052 (9th
13 Cir. 2009) (quoting Winter v. Natural Res. Def. Council, 129 S. Ct.
14 365, 374 (2008)). The requirements for a temporary restraining
15 order are largely the same. Stuhlberg Int'l Sales Co. v. John D.
16 Brush & Co., 240 F.3d 832, 839 (9th Cir. 2001); see also Wright and
17 Miller, 11A Fed. Prac. & Proc. Civ. § 2951 (2d ed.).

18 In the trademark context, however, the likelihood of success
19 on the merits largely determines the remaining factors. The Ninth
20 Circuit has held that in trademark cases, "irreparable injury may
21 be presumed from a showing of likelihood of success on the merits."
22 Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co., 571 F.3d
23 873, 877 (9th Cir. 2009) (quotations omitted). This presumption
24 in turn influences the balancing of hardships. Id. Finally,

25 _____
26 ¹ Because the court denies the request for a TRO, the court
does not address whether venue is proper in this district.

1 "avoiding confusion to consumers," the goal of trademark
2 protection, is itself a public interest that is often demonstrated
3 by likelihood of success. Internet Specialties West, Inc. v.
4 Milon-Digiorgio Enters., 559 F.3d 985, 993 (9th Cir. 2009). Both
5 Marlyn Nutraceuticals and Internet Specialties West were decided
6 subsequent to Winter, and cited Winter in their analysis.
7 Accordingly, the court's analysis is limited to the first Winter
8 factor.

9 III. ANALYSIS

10 Plaintiff's complaint alleges claims under section 43(a) of
11 the Lanham Act, 15 U.S.C. § 1125(a), and under California unfair
12 competition and common law trademark infringement. Plaintiff's
13 motion for a temporary restraining order refers only the to Lanham
14 Act trademark claim.

15 "Trademark law aims to protect trademark owners from a false
16 perception that they are associated with or endorse a product."
17 Mattel Inc. v. Walking Mt. Prods., 353 F.3d 792, 806 (9th Cir.
18 2003). The traditional elements of a claim for trademark
19 infringement are ownership of a protectable mark and likelihood of
20 confusion arising from defendant's use of the mark.² Applied Info.
21 Scis. Corp. v. eBay, Inc., 511 F.3d 966, 969 (9th Cir. 2007). In
22 this case, the mark is protectable in that it is suggestive and
23

24 ² Plaintiff's claim is "traditional" in this regard, in that
25 the alleged harm is likelihood of confusion. Trademark law also
26 protects against other types of harm, such as dilution even when
there is no likelihood of confusion. Plaintiff has not alleged
such harm in the instant motion.

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