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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JOHN P. BAIRD; BRET KURIHARA; OS
NEW MEXICO, LLC; BNS RD, LLC;
SEAN SIMPSON; CHARLA SIMPSON;
MARY JO MCHENRY; and K&L
WELLNESS, LLC,

Plaintiffs,

v.

OSTEOSTRONG FRANCHISING, LLC;
KYLE ZAGRODZKY; and JOHN
JAQUISH,

Defendants.

No. 2:20-cv-02010-TLN-DMC

ORDER

This matter is before the Court on Plaintiffs John P. Baird, Bret Kurihara, OS New Mexico, LLC, BNS RD, LLC, Sean Simpson, Charla Simpson, Mary Jo McHenry, and K&L Wellness, LLC's (collectively, "Plaintiffs") Motion for Preliminary Injunction.¹ (ECF No. 4.) Defendants OsteoStrong Franchising, LLC ("OsteoStrong") and Kyle Zagrodzky ("Zagrodzky") (collectively, "Defendants") have filed an opposition.² (ECF No. 9.) Plaintiffs have filed a reply.

¹ Plaintiffs originally filed their motion as a Motion for a Temporary Restraining Order but the Court, in its November 6, 2020 Order, denied the Motion for a Temporary Restraining Order and instead construes it as a Motion for Preliminary Injunction. (ECF No. 5.)

² This action involves three named Defendants. Defendant John Jaquish ("Jacquish") did not join in this opposition.

1 (ECF No. 12.) For the reasons set forth herein, Plaintiffs’ motion is DENIED.

2 **I. FACTUAL AND PROCEDURAL BACKGROUND**

3 OsteoStrong is a company that sells franchises for bone density improvement centers that
4 utilize osteogenic loading equipment.³ (ECF No. 1 at ¶ 22.) The equipment is branded as
5 “Spectrum equipment” pursuant to a non-exclusive license from Performance Health Systems.
6 (*Id.* at ¶¶ 19, 20.) OsteoStrong claims Spectrum equipment increases bone density, prevents
7 osteoporosis, and “diagnose[s], cure[s], mitigate[s], treat[s], or prevent[s] medical diseases.” (*Id.*
8 at ¶¶ 16, 89.)

9 Plaintiffs are small business owners and franchisees of OsteoStrong centers throughout the
10 United States. (ECF No. 4 at ¶¶ 1, 2.) Plaintiffs allege that OsteoStrong “intentionally omit[s]
11 certain information, mak[es] affirmative misrepresentations, and intentionally convey[s] false
12 information prior to executing the [franchise agreement] in an effort to induce potential
13 franchisees into signing the agreement.” (*Id.* at ¶ 35.) Specifically, Plaintiffs were harmed by
14 Defendants’ intentional omission of information regarding known bankruptcies and lawsuits in
15 Defendants’ Franchise Disclosure Document (“FDD”),⁴ their affirmative misrepresentation of the
16 patent rights and proprietary nature of OsteoStrong’s equipment, and their intentional
17 misrepresentation of their organizational relationship with motivational speaker Tony Robbins.
18 (*Id.* at ¶¶ 36, 42–47, 48–58, 59–65.)

19 Plaintiffs further allege that OsteoStrong also “create[s] an impossibility of performance
20 under the [franchise agreement] and negligently expos[es] franchisees to criminal and civil
21 liability.” (*Id.* at ¶ 35.) Specifically, OsteoStrong “violates [f]ederal law by marketing its system
22

23 ³ “Osteogenic loading” exercises are defined in the Complaint as equipment “intended to
24 measure forces on bone and muscle, and through the application of force, or loads, foster
strengthening of both bone and muscle tissue.” (ECF No. 1 at ¶ 17.)

25 ⁴ As Plaintiffs note, in accordance with the Federal Trade Commission’s Franchise Rule, 16
26 C.F.R. Parts 436 and 437, a franchisor is required to serve a complete and accurate FDD on each
27 potential franchisee at least 14 days before entering into a Franchise Agreement (“FA”) with the
28 potential franchisee. (*Id.* at ¶ 23.) Plaintiffs also note that they received and relied upon FDDs
issued by OsteoStrong. (*Id.* at ¶¶ 37–41.)

1 as a medical treatment,” and further fails to comply with the Federal Food, Drug, and Cosmetic
2 Act (“FDCA”) and the U.S. Food and Drug Administration (“FDA”) regulations for medical
3 devices. (*Id.* at ¶¶ 67, 68–88.) Additionally, OsteoStrong “requires franchisees to use these same
4 marketing materials and practices” and “may unilaterally terminate the FA with the [f]ranchisee
5 for failure to do so.” (*Id.* at ¶¶ 67, 110.) Plaintiffs also allege that the FAs require them to
6 comply with “all applicable laws, regulations, codes, and ordinances including, without
7 limitation, all governmental regulations relating to sales and marketing, which includes the FDA.”
8 (*Id.* at ¶ 113.) However, Plaintiffs believe that performance under the FA is impossible because
9 OsteoStrong mandates the usage of marketing materials and practices that “[do] not comply with
10 all applicable laws, regulations, codes and ordinances.” (*Id.* at ¶ 114.) Plaintiffs assert that had
11 they been aware the marketing materials and practices provided to them were not in compliance
12 with local and federal laws, they would not have signed the FAs. (*Id.* at ¶ 120.)

13 On October 7, 2020, Plaintiffs filed a Complaint in this Court, alleging claims for: (1)
14 common law fraud; (2) common law fraudulent inducement; (3) common law negligent
15 misrepresentation by OsteoStrong; (4) common law negligent misrepresentation by Zagrodzky
16 and Jaquish in their individual capacity; (5) unjust enrichment; (6) violations of the California
17 Unfair Competition Law (“UCL”) (Cal. Bus. & Prof. Code §§ 17200–17210); (7) violations of
18 the California Corporations Code; (8) violations of 15 U.S.C. § 52; (9) violations of 35 U.S.C. §
19 292; (10) declaratory judgment that the franchise agreements are void as contracts for an illegal
20 purpose or otherwise contrary to public policy; and (11) preliminary and permanent injunctive
21 relief. (*See* ECF No. 1 at 36–50.)

22 On November 4, 2020, Plaintiffs filed the instant Motion for a Temporary Restraining
23 Order. (*See* ECF Nos. 4.) In its November 5, 2020 Order, the Court denied Plaintiffs’ Motion,
24 construing it instead as a Motion for Preliminary Injunction. (*See* ECF No. 5.) The Court found
25 the length of time between the first instance of alleged harm and Plaintiffs’ motion contradicts
26 Plaintiffs’ allegation of immediate, irreparable injury. (ECF No. 5 at 5 (citing ECF No. 1 at 12
27 (noting the years when Plaintiffs “received and relied upon an FDD” as 2013, 2014, 2015, and
28 2017)).) The Court also noted Plaintiffs failed to make a showing of immediate, irreparable

1 injury because they have not pleaded in their Complaint or demonstrated in their motion any
2 specific dates or times to signify that relief is urgently needed. (*Id.* at 6.) On December 3, 2020,
3 Defendants filed an opposition. (ECF No. 9.) On December 10, 2020, Plaintiffs filed a reply.
4 (ECF No. 12.)

5 II. STANDARD OF LAW

6 Injunctive relief is “an extraordinary remedy that may only be awarded upon a clear
7 showing that the plaintiff is entitled to such relief.” *Winter v. Nat. Res. Def. Council, Inc.*, 555
8 U.S. 7, 22 (2008) (citing *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam)). “The
9 purpose of a preliminary injunction is merely to preserve the relative positions of the parties until
10 a trial on the merits can be held.” *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981); *see also*
11 *Costa Mesa City Emps. Ass’n v. City of Costa Mesa*, 209 Cal. App. 4th 298, 305 (2012) (“The
12 purpose of such an order is to preserve the status quo until a final determination following a
13 trial.”); *GoTo.com, Inc. v. Walt Disney, Co.*, 202 F.3d 1199, 1210 (9th Cir. 2000) (“The status quo
14 ante litem refers not simply to any situation before the filing of a lawsuit, but instead to the last
15 uncontested status which preceded the pending controversy.”).

16 “A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed
17 on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief,
18 [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest.”
19 *Winter*, 555 U.S. at 20. A plaintiff must “make a showing on all four prongs” of the *Winter* test
20 to obtain a preliminary injunction. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135
21 (9th Cir. 2011). In evaluating a plaintiff’s motion for preliminary injunction, a district court may
22 weigh the plaintiff’s showings on the *Winter* elements using a sliding-scale approach. *Id.* A
23 stronger showing on the balance of the hardships may support issuing a preliminary injunction
24 even where the plaintiff shows that there are “serious questions on the merits . . . so long as the
25 plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the
26 public interest.” *Id.* Simply put, plaintiffs must demonstrate, “that [if] serious questions going to
27 the merits were raised [then] the balance of hardships [must] tip[] sharply” in [p]laintiffs’ favor
28 in order to succeed in a request for preliminary injunction. *Id.* at 1134–35.

1 **III. ANALYSIS**

2 Plaintiffs specifically request Defendants be enjoined from the following:

- 3 • Representing that their Spectrum equipment or the OsteoStrong system is able
4 to diagnose, treat, or cure any medical condition or using claims like “reversing
5 Osteoporosis” or “reversing type 2 Diabetes;”
6 • Representing that OsteoStrong owns any patented technology;
7 • Representing that the equipment is safe;
8 • Representing that Tony Robbins is a Partner in OsteoStrong;
9 • Ceasing to provide access to services and support as required under the
10 Franchise Agreement and as established by regular practice for the operation of
11 the franchises.

12 (ECF No. 4.)

13 In opposition to the instant motion, Defendants argue Plaintiffs cannot show immediate,
14 irreparable harm for three reasons: (1) Plaintiffs’ motion is now moot because they have
15 permanently ceased operating their businesses, meaning Plaintiffs seek an injunction “based on
16 alleged past wrongs only because they cannot now be wronged again”; (2) Plaintiffs do not allege
17 any evidence to show actual harm has been threatened against them or is imminent, nor do they
18 explain why injunctive relief is necessary after years of operating under the FAs; and (3)
19 Defendants do not engage in the conduct Plaintiffs seek to enjoin. (ECF No. 9 at 10–15
20 (emphasis removed).)

21 In reply, Plaintiffs assert their businesses are not permanently closed, as Plaintiffs still “(1)
22 have active agreements with OsteoStrong, (2) have active leases with landlords regarding
23 franchise space, (3) have clientele, (4) own the equipment, and (5) have continuing liability for
24 past and future conduct.” (ECF No. 12 at 3–4.) Plaintiffs maintain there has been no rescission
25 of the agreements, as they seek an injunction “based on continuing, present adverse harms.” (*Id.*
26 at 4–5.) Plaintiffs note the FDD and FA require them “to use marketing and advertising materials
27 which contain misrepresentations and falsities regarding the patented nature of the OsteoStrong
28 equipment, the degree of physical benefit consumers can receive from the equipment, the injury-
free nature of the equipment, and the diagnostic, treatment, and curative effects of the
equipment.” (*Id.* at 6.) Plaintiffs maintain these are misrepresentations because OsteoStrong’s

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