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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GIOCONDA LAW GROUP PLLC,
Plaintiff,

-against-

ARTHUR WESLEY KENZIE,
Defendant.

12 Civ. 4919 (JPO)

ORDER

J. PAUL OETKEN, District Judge:

Plaintiff filed the Complaint in this case on June 22, 2012. On July 25, 2012, the Court issued an order requiring Defendant to show cause why a preliminary injunction ("PI") should not be entered. The Court held a hearing on that order and ultimately entered a PI on August 21, 2012. On April 23, 2012, the Court denied Plaintiff's motion for judgment on the pleadings with respect to Plaintiff's claims under the Anti-Cybersquatting Consumer Protection Act ("ACPA"). *See generally Gioconda Law Grp. PLLC v. Kenzie*, No. 12 Civ. 4919, 2013 WL 1747111 (S.D.N.Y. Apr. 23, 2013) ("the Opinion"). The Court then ordered Plaintiff to show cause why the PI should not be lifted in light of the Opinion and, after Plaintiff filed papers in response to that order, held a hearing regarding the status of the PI on June 10, 2013.

It is settled law that "[a] preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). "To prevail on its motion for a preliminary injunction, [a movant is] required to demonstrate (a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly

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toward the party requesting the preliminary relief." *UBS Fin. Servs., Inc. v. W. Virginia Univ. Hospitals, Inc.*, 660 F.3d 643, 648 (2d Cir. 2011) (quotation marks and citations omitted).

Although Plaintiff has shown irreparable harm, it cannot demonstrate a likelihood of success on the merits or sufficiently serious questions going to the merits to make them a fair ground for litigation. With respect to the ACPA claim, Plaintiff's arguments on the pleadings cannot meet these standards for the reasons set forth in the Opinion; Plaintiff's reliance on a few extra documents produced to the Court since the Opinion does not alter this outcome.[1] Turning to Plaintiff's alleged cause of action for violation of the Electronic Communications Privacy Act ("ECPA"), 18 U.S.C. §§ 2510-2511, this claim cannot support the PI for the reasons set forth in court at the June 10, 2013 hearing. Specifically, Plaintiff has failed to demonstrate interception of an electronic communication within the meaning of the ECPA because, *inter alia*, the e-mails at issue would not otherwise have reached Plaintiff.

The Court maintains an ongoing duty to ascertain whether preliminary injunctive relief is warranted. Given that Plaintiff cannot demonstrate a substantial likelihood of success on the merits or substantial questions going to the merits, the PI entered in this case on August 21, 2012 is hereby VACATED without prejudice to a renewal by Plaintiff of its request for a PI.

SO ORDERED.

Dated: New York, New York
June 11, 2013

J. PAUL OETKEN
United States District Judge

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[1] Specifically, none of these documents or materials alters the Court's conclusion that, at this stage in the litigation, there is neither enough evidence in the record nor enough basis in the pleadings to conclude that Plaintiff has satisfied the requirements of a PI with respect to the "bad faith intent to profit" element of its ACPA claim.