UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

BISHOY NESSIM,

Plaintiff,

v.

FLIFF, INC.,

Defendants.

Case No. 5:23-cv-01048-SSS-SHKx

ORDER DENYING PLAINTIFF'S TEMPORARY RESTRAINING ORDER [DKT. 42]

Before the Court is Plaintiff Bishoy Nessim's Application for Temporary Restraining Order as to Enjoining Defendant Enforcing its Newly Established Arbitration Terms (the "TRO"). [Dkt. 43]. Defendant Fliff filed its Opposition to the TRO ("Opposition"). [Dkt. 43]. The matter is now fully briefed and ripe for consideration. The Court deems this TRO appropriate for decision without oral argument. Fed. R. Civ. P. 78; L.R. 7-15. For the following reasons, the Court finds Nessim's TRO is **DENIED**.

I. BACKGROUND

On June 6, 2023, Nessim filed his putative class action Complaint against Fliff for violations of California's Unfair Competition Law ("UCL") and unjust enrichment. [Dkt. 1 at 15–16]. Nessim argues that, under California law, Fliff operates an illegal "unregulated online sports book," and that Fliff's conduct in running its service constitutes unlawful and unfair business acts under the UCL. [*Id*. at 5–15]. On August 11, 2023, Fliff filed a Motion to Compel Arbitration based on the arbitration agreement found within Fliff's "Sweepstakes Rules." [Dkt. 36-1 at 10].

Nessim now maintains that, in response to Nessim's suit and arguments against Fliff's Motion to Compel Arbitration, Fliff intends to revise its "Terms of Use" ("TOU") and its "Sweepstakes Rules" such that new and past users would be subject to a "new arbitration scheme" unless they opt out of the new arbitration terms before October 7, 2023. [Dkt. 42 at 6]. Nessim claims the new arbitration agreement would cause those class members who chose not to opt out of the new agreement to "retroactively lose their ability to participate" in the present case. [*Id*. at 10]. Nessim now asks this Court to issue an order enjoining Fliff from enforcing its "new arbitration agreement" in full. [*Id*. at 12].

II. LEGAL STANDARD

For the Court to grant an application for a TRO, plaintiff must show: (1) that he is "likely to succeed on the merits" of his underlying claim, (2) that he is "likely to suffer irreparable harm in the absence of preliminary relief," (3) that "the balance of equities tips in his favor," and (4) that the requested injunction "is in the public interest." *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008).

III. DISCUSSION

Nessim argues the TRO is necessary because, without the TRO, class members "retroactively" will lose their ability to participate in the present case due to Fliff's new arbitration agreement. [Dkt. 42 at 10]. Fliff argues the TRO should be denied because (1) case law establishes retroactive application of new arbitration terms to existing claims is acceptable [Dkt. 44 at 2], (2) any harm that may occur to a class member is "self-inflicted" such that it does not constitute irreparable injury, and (3) no harm is occurring to Plaintiff or existing users because Fliff intends to only impose the new TOU on new users until the Court rules on the TRO. [Dkt. 44 at 4]. The Court addresses these arguments as necessary below.

A. Likelihood of Success on the Merits

The Court denies Nessim's TRO request because Nessim fails to show there is any likelihood of success on the merits of his claims. For the Court to grant Nessim's proposed TRO, Nessim must show he is "likely to succeed on the merits." *Winter*, 555 U.S. at 20. The Ninth Circuit has noted that likely success on the merits is the "most important factor" of a court's TRO analysis such that, in the absence of such a showing, a Court need not even consider the other three *Winter* elements. *Garcia v. Google, Inc.*, 286 F.3d 733, 740 (9th Cir. 2015).

Here, the Court denies Nessim's TRO because Nessim fails to provide this Court with any evidence that he would succeed on his underlying claims. [Dkt. 42 at 9–10]. Instead of explaining to the Court that he is likely to succeed on his UCL or unjust enrichment claims, Nessim argues the TRO should be granted because he is likely to "succeed on [his] request for a preliminary injunction." [*Id*. at 9]. While parties seeking preliminary injunctions and temporary restraining orders certainly do not have to prove their case in full for a Court to grant their requests, they must show, at least, there is some likelihood they will succeed on the merits of their claims. *See Univ. of Texas v. Camenisch*, 452 U.S. 390, 395 (1981); *see also Mohammed v. Reno*, 309 F.3d 95, 102 (2d Cir. 2002); *Leiva-Perez v. Holder*, 640 F.3d 962, 966 (9th Cir. 2011).[1]

Because Nessim failed to address if he is likely to succeed on the merits of his claims, and that element is a required element of this Court's TRO analysis under *Winter*, the Court **DENIES** Nessim's TRO request. *See Garcia*, 786 F.3d at 737 (affirming lower court's denial of a TRO where plaintiff failed to show likely success on the merits as to their underlying copyright claim); *see also Winter*, 555 U.S. at 20–23 (discussing plaintiffs' showing of a likelihood of success as to the merits of their "NEPA claim").

B. Irreparable Injury

While the Court finds the lack of evidence of success on the merits to be determinative, the Court also has grave doubts as to whether Nessim has shown irreparable injury. Various courts have held that "self-inflicted" harms do not

[1] Moreover, Nessim's arguments as to the success of his future preliminary injunction hearing is erroneous because the test for a preliminary injunction and TRO are the same such that success under the latter application of the test does not mean the first was proper. *See Lockheed Missile & Space Co., Inc. v. Hughes Aircraft Co*., 887 F. Supp. 1320, 1323 (N.D. Cal. 1995).

constitute irreparable injury. *See e.g. Caplan v Fellheimer Eichen Braverman & Kasket*, 68 F.3d 828, 839 (3rd Cir. 1995); *Salt Lake Tribune Pub. Co., LLC v. AT & T Corp.*, 320 F.3d 1081, 1106 (10th Cir. 2003); *Al Otro Lado v. Wolf*, 952 F.3d 999, 1008 (9th Cir. 2020); *NWS Corp. v. Dish Network, LLC.*, No. 13-cv-2247-GPC-BGS, 2013 WL 12114489, at *7 (S.D. Cal. Sept. 30, 2013). Here, the Court finds that any harm that could befall the class members as a result of the new arbitration terms likely would be considered self-inflicted injury because Fliff is providing their users the opportunity to opt out of the new agreement, and users may simply elect not to do so. *See Salt Lake Tribune Pub. Co.*, 320 F.3d at 1106 (noting harm that befalls a plaintiff as a result of a contract they negotiated is self-inflicted and not considered irreparable injury).

Because the alleged harm to the class members would result out of the class members decision to not opt out of Fliff's new TOU, the Court finds that any harm that would occur would likely constitute self-inflicted harm such that Nessim cannot establish irreparable injury based on these facts.

IV. CONCLUSION

Accordingly, Nessim's TRO is **DENIED** for failure to show he is likely to succeed on the merits. The Court is also in receipt of Nessim's Motion for a Preliminary Injunction. [Dkt. 43]. Because Nessim and his attorneys failed to select a date for a hearing of the Motion for a Preliminary Injunction, the Court **sets that matter for hearing on December 8, 2023, at 2:00 PM over Zoom.**

IT IS SO ORDERED.

Dated: October 5, 2023

SUNSHINE S. SYKES
United States District Judge