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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

INSPECTION MANAGEMENT
SYSTEMS, INC.,

No. 2:09-cv-00023-MCE-GGH

Plaintiff,

v.

MEMORANDUM AND ORDER

OPEN DOOR INSPECTIONS, INC.,
MICHAEL R. SCHEIDERICH; KEVIN
SCHEIDERICH; BOB FISHER; RUN
TANGENT, LLC,

Defendants.

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Through the present lawsuit, Plaintiff Inspection Management Systems, Inc. ("Plaintiff" or "IMS") seeks to prevent Defendants from marketing their software program for managing home inspections, on grounds that said program is unlawfully derived from software previously developed by IMS. IMS claims that Defendant Scheiderich subscribed to the IMS software and violated the contractual conditions of its use by making the software available to engineers in India for purposes of developing a competing product. IMS' initial request for a TRO was granted by the Court on January 16, 2009.

1 Because the initial date set for the hearing on Plaintiff's
2 subsequent request for a preliminary injunction fell outside the
3 time parameters for permitting injunctive relief to remain in
4 place, the TRO expired. As set forth below, Plaintiff's Motion
5 for a Preliminary Injunction will now be denied.

6
7 **BACKGROUND**
8

9 According to Plaintiff's First Amended Complaint, IMS has
10 developed unique scheduling, management, and business automation
11 software that allows home inspectors to automate key business
12 processes. First Amended Complaint ("FAC"), ¶ 5. In February of
13 2007, Defendant Michael Scheiderich registered as a user of the
14 IMS software, and according to the FAC, he simultaneously
15 executed an electronic End User Licensing Agreement ("EULA") as
16 part of his user registration process.¹ Under the terms of the
17 EULA (a copy of which is attached to the FAC as Exhibit "A") a
18 non-transferable license to use the IMS software was granted.
19 The user also acknowledged IMS' exclusive proprietary rights in
20 the system and agreed not to disclose any information, for a
21 period of three years after accepting the EULA, to any person who
22 has not also accepted the EULA. See EULA, Ex. "A" to Pl.'s FAC,
23 ¶¶ 13, 18, 21. Paragraph 21(b) of the EULA contains the
24 following stipulation:

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27 ¹ Michael Scheiderich, for his part, does not recall ever
28 having accepted the terms of the EULA as a precondition to using
the IMS software, or signing a hard copy of the agreement.
Michael Scheiderich Decl., ¶ 6.

1 "You agree that the information being provided by IMS,
2 Inc. is confidential and derives its value, in part,
3 from its confidential nonpublic nature. You further
agree that in the event you breach this agreement, IMS,
Inc., will suffer irreparable harm."

4 Id. at ¶ 21(b).

5 The FAC goes on to allege that on October 1, 2008,
6 individuals both using Michael Scheiderich's IMS logon
7 simultaneously accessed the IMS software from Georgia (where
8 Scheiderich allegedly resided) and from India. Both users
9 thereafter remained online utilizing the IMS program for
10 approximately one hour. FAC, ¶¶ 14-15.

11 IMS contends that the simultaneous logon was orchestrated so
12 that software engineers in India could emulate its software. IMS
13 bases its contention in this regard on the fact that in November
14 of 2008, IMS' President, Russell Colliau, attended a sales
15 demonstration made by Michael Scheiderich to market new home
16 inspection software called "Inspector Accelerator". That
17 software was developed under the auspices of a new company
18 established for that purpose, Defendant Run Tangent, LLC. During
19 Scheiderich's sales demonstration, Colliau allegedly observed
20 visual elements similar to those contained within the IMS
21 software. This caused him to conclude that Defendants had both
22 illegally copied portions of the IMS code and incorporated those
23 copied portions into their own server code. See January 13, 2009
24 Colliau Decl., ¶¶ 31-32.

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1 In support of that inference, Colliau cited both the
2 similarities he observed in the software and the close
3 relationship in time between the simultaneous logons to the IMS
4 program, as delineated above, and the demonstration of
5 Defendants' software thereafter. Id. In a subsequent
6 February 12, 2009 Declaration, Colliau elaborated further on just
7 what similarities he observed:

8 Many elements of the Inspector Accelerator program,
9 including visual elements, specialized business
10 processes and the handling of the relationships between
11 the realtors, clients and home inspector were extremely
12 similar to unique elements of the IMS system.

13 February 12, 2009 Colliau Decl., ¶ 11.

14 Based on the initial evidence provided by IMS, along with
15 its claim that Defendants intended a launch of their new,
16 allegedly infringing software, at a national home inspectors
17 trade show to be held in Florida between January 21, 2009 and
18 January 25, 2009, the Court granted IMS' initial request for a
19 temporary restraining order on January 16, 2009 in order to
20 protect against the threat of irreparable harm pending a more
21 thorough review of the claims made by IMS.

22 In opposition to Plaintiff's request for preliminary
23 injunctive relief, Defendants claim that IMS has submitted little
24 more than innuendo and speculation to support its claims of
25 Defendants' alleged wrongdoing. Scheiderich claims that the
26 November 2008 sales presentation apparently attended by Colliau
27 in fact showed only a very limited view of the Inspector
28 Accelerator system, with only a few screen shots and without
filling in any of the fields or showing any of the actual
processes in the system. Michael Scheiderich Supp. Decl., ¶ 8.

1 Factually, Defendants deny that they copied the IMS software
2 in any way in developing their own home inspection software.²
3 Although Defendants admit that the software was developed by
4 software engineers based in India, they claim that its design was
5 not copied based on any access to the code, screens or elements
6 of the IMS system.³ Michael Scheiderich Decl., ¶ 12; Kevin
7 Scheiderich Decl, ¶¶ 5-7; Chetan Kelkar Decl., ¶ 2(a).
8 Defendants point to the fact that because the IMS software is web
9 based, a user like Scheiderich lacked access to either the source
10 or object codes underlying the IMS system. Michael Scheiderich
11 Decl., ¶ 5. According to Defendants, one of its Indian software
12 developers, CSSA Global, viewed the IMS system only in order to
13 understand the need for agents to be linked to multiple
14 inspections on behalf of their clients. Scheiderich Decl. at
15 ¶ 12; Kelkar Decl. at ¶ 4.

16 Functionally, Defendants also claim that Inspector
17 Accelerator system is structured as a client-based system, where
18 clients, agents and others each have their own database profile.
19 Michael Scheiderich Decl., ¶ 20a. In contrast, they describe the
20 IMS system as parameter based, meaning that all records are tied
21 to the inspection or service event. Id.

22
23 ² Defendants assert that Open Door Inspections is Michael
24 Scheiderich's home inspections business company and was not
25 involved in any way in the development or marketing of Inspector
26 Accelerator software. Instead, Scheiderich claims he formed Run
27 Tangent, LLC for that purpose. Michael Scheiderich Decl., ¶¶ 9,
28 10.

29 ³ According to the Declaration of Kevin Scheiderich, two
30 Indian software developers spent in excess of 1500 hours in
31 creating the basic database and overall architecture for the
32 Inspector Accelerator software, which included both a "lite" and
33 a professional version. Kevin Scheiderich Decl., ¶¶ 3-7.

1 While IMS disputes that description, and claims that the IMS
2 system is in fact client based, its own copyright application
3 appears to belie that contention in describing that IMS system as
4 a "parameter based appointment scheduling system and method".
5 See Ex. E to Scheiderich Decl.

6 Given the fact that Plaintiff's copyright application is
7 still pending, Plaintiff's First Amended Complaint deletes the
8 copyright and trademark infringement claims included within the
9 original complaint. IMS continues to assert a claim for breach
10 of contract, given IMS' claim that Schederich breached the terms
11 of his EULA in emulating the IMS software. Moreover, the FAC
12 also asserts counts alleging misappropriation of trade secrets
13 and claims for unfair business practices and false advertising
14 under California law.

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16 **STANDARD**
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18 A preliminary injunction is an extraordinary remedy, and
19 Plaintiffs have the burden of proving the propriety of such a
20 remedy by clear and convincing evidence. See Granny Goose Foods,
21 Inc. v. Teamsters, 415 U.S. 423, 442 (1974). In order to warrant
22 issuance of such relief, Plaintiffs must demonstrate either: 1) a
23 combination of probable success on the merits and a likelihood of
24 irreparable injury; or 2) that serious questions are raised and
25 the balance of hardships tips sharply in favor of granting the
26 requested injunction.

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1 Stuhlbarg Int'l Sales Co., Inc. v. John D. Brush & Co., Inc.,
2 240 F.3d 832, 839-40 (9th Cir. 2001); Winter v. Natural Resources
3 Defense Council, 129 S. Ct. 365, 375 (2008) (likelihood rather
4 than possibility of irreparable harm required for issuance of
5 preliminary injunctive relief). These two alternatives represent
6 two points on a sliding scale, pursuant to which the required
7 degree of irreparable harm increases or decreases in inverse
8 correlation to the probability of success on the merits. Roe v.
9 Anderson, 134 F.3d 1400, 1402 (9th Cir. 1998); United States v.
10 Nutri-cology, Inc., 982 F.2d 394, 396 (9th Cir. 1992). Under
11 either formulation of the test for granting injunctive relief,
12 however, Plaintiffs must demonstrate a significant threat of
13 irreparable injury. Oakland Tribune, Inc. v. Chronicle Publ.
14 Co., 762 F.2d 1374, 1376 (9th Cir. 1985).

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16 **ANALYSIS**
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18 Courts have consistently identified a showing of likely
19 irreparable harm as the single most important prerequisite for
20 the issuance of a preliminary injunction; Plaintiff must make
21 that showing before the other requirement for the issuance of a
22 preliminary injunction need even be considered. Dominion Video
23 Satellite, Inc. v. Echostar Satellite Corp., 356 F.3d 1256, 1260-
24 61 (10th Cir. 2004) (and cases cited therein).

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1 Just what constitutes irreparable harm does not readily lend
2 itself to precise definition. Prairie Bank of Potawatomi Indians
3 v. Pierce, 253 F.3d 1234, 1246 (10th Cir. 2001). Irreparable
4 injury has been equated with circumstances where compensatory
5 damages are unsuitable (Wildmon v. Berwick Universal Pictures,
6 983 F.2d 21, 24 (5th Cir. 1992)), and has also been defined in
7 terms of harm that cannot be remedied by the court following a
8 final determination on the merits. Am. Hosp. Ass'n v. Harris,
9 625 F.2d 1328, 1331 (7th Cir. 1998). Perhaps most generally,
10 irreparable harm is injury that cannot be adequately remedied by
11 the imposition of money damages. Prairie Band, 253 F.3d at 1250.

12 Here, Plaintiff has produced no evidence that monetary
13 damages are insufficient to remedy any actionable infringing
14 conduct on the part of Defendants in violation of the EULA or
15 otherwise. Plaintiff has cited authority for the proposition
16 that loss of prospective customers or goodwill under some
17 circumstances can support a finding of irreparable harm. See
18 Stuhlberg, 240 F.3d at 841. They also argue that loss of current
19 or future market share may also suffice to establish the
20 requisite harm. Grand River Enterprise Six Nations, Ltd. v.
21 Pryor, 48 F.3d. 60, 67 (2d Cir. 2007). IMS cites no specific
22 evidence, however, to support these claims. Plaintiff does not
23 contest Defendants' claim that it has some 300 customers, IMS
24 itself estimates its average revenue per customer at \$141.40 per
25 month. See Reply, p. 3; February 12, 2009 Colliau Decl., ¶ 3.
26 There is no indication that injuries to such a customer base
27 cannot be remedied by monetary damages.

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1 Significantly, Defendants, in opposition to IMS' request for
2 preliminary injunctive relief, indicate that there are over 25
3 home inspection software suites available on the market, and that
4 IMS' total market share is negligible. Michael Scheiderich
5 Decl., ¶ 17. Defendants also dispute the uniqueness of IMS' home
6 inspection software and tout the differences between that
7 software and Inspector Accelerator. The position of the
8 respective parties on those issues remains in stark contrast and
9 dispute.

10 Plaintiff's reply is telling because, when confronted with
11 the complete lack of evidence supporting irreparable harm in this
12 case, it falls back on the provisions of the EULA in arguing that
13 irreparable harm is present because the parties agreed it was
14 under the provisions of that agreement. See Reply, 2:7-11, 6:10-
15 15 (preliminary injunction should issue because the parties
16 contractually agreed in the EULA that its breach would constitute
17 irreparable harm). Plaintiff's counsel also underscored that
18 position in oral argument on this matter.

19 Plaintiff cannot rely on the contractual provisions of the
20 EULA to show irreparable harm. Instead, the court must make an
21 independent determination of whether such harm is present. As
22 the Second Circuit stated in Baker's Aid. v. Hussmann Foodservice
23 Co., 830 F.2d 13, 16 (2d Cir. 1987), "contractual language
24 declaring money damages inadequate in the event of a breach does
25 not control the question of whether preliminary injunctive relief
26 is appropriate." The Tenth Circuit expounded on this principle
27 in Dominion Video Satellite, Inc. v. Echostar Satellite Corp.,
28 supra.

1 In that case, like the case at bar, the terms of an agreement
2 between the parties provided that its breach would cause
3 irreparable harm. The district court's decision to grant
4 preliminary injunctive relief rested primarily on that
5 contractual language in determining that the requisite
6 irreparable harm was present. Dominion Video Satellite, 356 F.3d
7 at 1261. The Tenth Circuit reversed, explaining that irreparable
8 harm should not automatically be assumed from such an agreement.
9 The court instead explained that courts must "examine whether the
10 harms alleged by the party seeking the preliminary injunction are
11 in fact irreparable, and noted that even in the face of such
12 agreements courts "sometimes conclude in the negative." Id. at
13 "1263.

14 The Ninth Circuit has also adopted this reasoning, albeit in
15 an unpublished decision. In Int'l Ass'n of Plumbing and
16 Mechanical Officials v. Int'l Conf. of Building Officials, 1996
17 WL 117447 (9th Cir. 1995), the district court based its finding
18 of irreparable injury solely on a contractual provision in which
19 the parties conceded that irreparable injury would occur in the
20 event of a breach. Id. at *2. The Ninth Circuit reversed,
21 stating that it believed such conclusion was in error because it
22 knew of no "authority which allows a petitioner seeking
23 injunctive relief to meet its burden on the issue of irreparable
24 injury *solely* by referring to such a contractual provision." Id.
25 (emphasis in original).

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1 It follows that IMS' reliance on the contractual language
2 here for establishing irreparable injury is misplaced. Because the
3 Court does not believe that IMS has otherwise met its burden in
4 establishing irreparable injury, that prerequisite for injunctive
5 relief is lacking and a preliminary injunction cannot issue.

6 While the Court need not analyze the other requirements for
7 injunctive relief in the absence of irreparable harm, it does
8 note that Plaintiff also appears to have failed in meeting its
9 burden in showing probable success on the merits. The evidence
10 that Defendants have copied portions of the IMS software amounts
11 to little more than speculation at this point,⁴ particularly in
12 the face of evidence offered by Defendants that it revealed
13 relatively little of its system's attributes at the time of the
14 November 2008 sales demonstration attended by Russell Colliau.
15 Although the simultaneous logons from India and Georgia to access
16 the IMS program remain troubling, Defendants have provided an
17 explanation for that access that Plaintiff again cannot squarely
18 dismiss, especially since Defendants have also produced
19 un rebutted evidence that as a web based system, the design and
20 underlying code of the IMS program cannot be copied simply by
21 logging onto the system. See Michael Scheiderich Decl., ¶ 5.

23 ⁴ The Court recognizes that Defendants have filed extensive
24 evidentiary objections to the Declaration of Russell Colliau
25 filed along with Plaintiff's original papers requesting a
26 temporary restraining order and preliminary injunction. Because
27 the Court's decision in this matter rests on Plaintiff's failure
28 to establish the requisite irreparable harm for issuing a
preliminary injunction, even after taking the contents of the
Colliau declaration into account, the evidence fails irrespective
of whether or not it is properly admissible. As such, the Court
need not specifically rule on the proffered objections at this
time, and declines to do so.

1 **CONCLUSION**

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3 Based on the foregoing, Plaintiff's Motion for a Preliminary
4 Injunction is hereby DENIED. The Court, therefore, declines
5 Defendants' request to set a briefing schedule for purposes of
6 levying on the bond posted by Plaintiff prior to issuance of the
7 temporary restraining order.

8 IT IS SO ORDERED.

9 Dated: March 26, 2009

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12 MORRISON C. ENGLAND, JR.
13 UNITED STATES DISTRICT JUDGE
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