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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

BRIAN LICHTENBERG, LLC, a California limited liability company; BRIAN LICHTENBERG, an individual,	)	Case No. CV 13-06837 DDP (PJWx)
	)	
	)	
Plaintiff,	)	
	)	
v.	)	<b>ORDER DENYING PLAINTIFFS' EX</b>
	)	<b>PARTE APPLICATION FOR A TEMPORARY</b>
	)	<b>RESTRAINING ORDER</b>
ALEX & CHLOE, INC., a California corporation; CHRISTOPHER WALTER LICHTENBERG, an individual; MARKED SHOWROOM, LLC, a California limited liability company; JACQUELINE YI, an individual; TU TRAN, an individual KYLE MOCKETT, an individual; KAYTEE ENRIGHT, an individual,	)	
	)	
	)	
Defendants.	)	
	)	
	)	

[Dkt. No. 19]

Presently before the court is Plaintiffs Brian Lichtenberg, LLC and Brian Lichtenberg's Ex Parte Application for a Temporary Restraining Order. Having considered the submissions of the parties, the court denies the Application.

**I. Background**

Plaintiff Brian Lichtenberg ("Brian") designs clothing and

1 accessories and distributes his products through Brian Lichtenberg,  
2 LLC. Brian's designs include a series of parodies of designer  
3 brands, such as "Homiès" as a play on "Hermès" and "Bucci," a  
4 parody of "Gucci." Brian's spoof or parody logos mimic the style,  
5 font, and other elements of the luxury brand designs. Brian sells  
6 shirts, sweatshirts, beanies, and hats bearing the various spoof  
7 designs. Brian alleges that his designs are frequently worn by  
8 celebrities and recognized by the public as Brian's work.

9 Brian's younger brother, Defendant Christopher Walter  
10 Lichtenberg ("Chris") is the CEO of Defendant Alex and Chloe, Inc.  
11 ("A&C"), which operates a website of its own (the "AC website").  
12 In 2011, Brian allowed Chris to take orders for Brian's apparel on  
13 the AC website. Brian would fill orders taken by Chris, who would  
14 collect from the consumer and distribute fifty percent of the  
15 proceeds to Brian. In mid-2011, Brian allowed Chris to post  
16 promotional pictures of Brian's products directly on the AC website  
17 in an effort to increase traffic to the site.

18 Brian alleges that in early 2012, he came up with the idea to  
19 parody the luxury brand "Balmain," and created a drawing for a  
20 design in the style of the Balmain logo but reading "Ballin Paris"  
21 (the "Ballin Design," "Design," or "Ballin"). Brian claims that he  
22 showed the Design to Chris in confidence in March 2012.

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1 In late 2012 or early 2013, Brian hired Chris as an employee.<sup>1</sup>  
2 Chris performed graphic design duties and provided assistance with  
3 marketing and promotional activities. As part of these duties,  
4 Chris helped Brian craft and send an e-mail reading, "Ballin' With  
5 My Homies" to Brian's fashion industry contacts to promote Brian's  
6 forthcoming line of Ballin apparel.<sup>2</sup>

7 Between January 21 and January 31 2013, Chris called in sick  
8 to work several times. During that time, Chris contacted Brian's  
9 manufacturer in China. (Declaration of Flair Xu.) Chris placed  
10 large orders for labels and garments with the same measurements and  
11 specifications as Brian's products, purportedly for use in a new  
12 clothing line that would be sold "with [Brian]" but on the A&C  
13 label. (Xu Decl. ¶¶ 19-21.) During that same ten day span, Chris  
14 allegedly sent samples of A&C-labeled Ballin apparel to Brian's  
15 industry contacts.<sup>3</sup>

16 On February 1, 2013, Chris and/or A&C posted images of apparel  
17 featuring the Ballin design on social media. A&C-labeled Ballin  
18 apparel was listed for sale on the AC website soon after. At some  
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20 <sup>1</sup> The record is unclear on when Chris became an employee.  
21 Brian's declaration states both that Chris began work on January  
22 21, 2013 and that Brian was able to afford Chris' services in  
23 December 2012. Brian's declaration further states that Chris  
24 "helped" with a "Ballin" marketing campaign in November. The  
Application for a TRO claims that Chris was an employee in November  
2012, but also that Chris became a full-time employee in January  
2013.

25 <sup>2</sup> While the Application asserts that Chris was assigned to  
26 convert Brian's hand-drawn Ballin Design into electronic format,  
the portion of Brian's declaration cited does not support that  
contention.

27 <sup>3</sup> At least one of these contacts, Ben Taylor, later forwarded  
28 his correspondence with Chris to Brian. (B. Lichtenberg Decl., Ex.  
25.)

1 later point in time, Brian brought his own Ballin apparel to market  
2 on his BLTEE label. Both Brian and Chris currently sell virtually  
3 identical apparel bearing the Ballin Design.

4 As early as March 14, 2013, Chris and/or A&C sent cease and  
5 desist letters to Brian's distributors, claiming that Chris  
6 invented the Ballin Design and demanding that distributors cease  
7 selling Brian's Ballin products. Chris also maintained an active  
8 social media presence, with which he frequently claimed to be the  
9 author of the design and stated that Brian stole the Ballin design  
10 from him. (See, e.g. id. ¶ 131 ("no confusion necessary. The  
11 Ballin Paris design was made by us here at [A&C], not#LyinBrian lol  
12 . . . .".))

13 Brian frequently posted images of celebrities and models  
14 wearing Brian's Ballin merchandise on social media pages. At least  
15 some of these personalities expressly granted Brian permission to  
16 post the photographs. (B. Lichtenberg Decl. ¶¶ 126, 133.) In  
17 several cases, identical images soon appeared on A&C's pages,  
18 usually identifying the garments depicted as "an original Alex &  
19 Chloe Ballin Paris design," "by Alex & Chloe," or other words to  
20 that effect. (Id. ¶¶ 133-144.) The subjects of the photos did not  
21 authorize Chris to use the images. In one instance, a model  
22 depicted in an image posted to an A&C website went so far as to  
23 comment that she was wearing one of Brian's sweatshirts, not an A&C  
24 product. (Id. ¶ 131.) A&C responded, "[a]ctually the BALLIN PARIS  
25 design including this sweatshirt you are wearing is an Original and  
26 Official design by [A&C] NOT [Brian] . . . ." (Id.)

27 In March 2013, Plaintiffs filed a suit against Chris and A&C  
28 in Los Angeles County Superior Court. Plaintiffs obtained a

1 temporary restraining order, but were not successful in their  
2 motion for a preliminary injunction. Plaintiffs then dismissed  
3 their state court action and, on September 17, 2013, filed the  
4 instant suit in this court. Plaintiffs' complaint alleges seven  
5 causes of action against Defendants, including causes of action  
6 under state law and the Lanham Act, 15 U.S.C. §1125. Plaintiffs  
7 now seek a Temporary Restraining Order ("TRO").

8 **II. Legal Standard**

9 A temporary restraining order is meant to be used only in  
10 extraordinary circumstances. To establish entitlement to a TRO,  
11 the requesting party must show (1) that she is likely to succeed  
12 on the merits, (2) that she is likely to suffer irreparable harm  
13 in the absence of preliminary relief, (3) that the balance of  
14 equities tips in her favor, and (4) that an injunction is in the  
15 public interest. Winter v. Natural Res. Defense Counsel, 555 U.S.  
16 7, 20 (2008). A TRO may be warranted where a party (1) shows a  
17 combination of probable success on the merits and the possibility  
18 of irreparable harm, or (2) raises serious questions and the  
19 balance of hardships tips in favor of a TRO. See Arcamuzi v.  
20 Continental Air Lines, Inc., 819 F.2d 935, 937 (9th Cir. 1987).  
21 "These two formulations represent two points on a sliding scale in  
22 which the required degree of irreparable harm increases as the  
23 probability of success decreases." Id. Under both formulations,  
24 however, the party must demonstrate a "fair chance of success on  
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1 the merits" and a "significant threat of irreparable injury."<sup>4</sup>

2 Id. **III. Discussion**

3 Plaintiffs have provided extensive evidentiary support for  
4 their Application in the form of declarations, e-mails,  
5 photographs, and screen shots spanning approximately one thousand  
6 pages. Plaintiffs' legal theories, however, are developed less  
7 thoroughly. Much of Plaintiffs' memorandum in support of their  
8 Application focuses on unfair competition under the Lanham Act.  
9 Plaintiffs' Complaint, however, lumps together Lanham Act claims  
10 for trademark infringement, trade dress infringement, false  
11 designation of origin, and trademark dilution into one single  
12 cause of action. Plaintiff's Application for a TRO appears to  
13 focus on the trademark claim. (App. at 16 ("Plaintiffs are  
14 entitled to protection of its unregistered trademark names . . .  
15 .").)

16 The analysis for an unregistered trademark is similar to that  
17 for trade dress. Int'l Jensen, Inc. v. Metrosound U.S.A., Inc., 4  
18 F.3d 819, 824 (9th Cir. 1993). Plaintiffs must show that an  
19 unregistered trademark or trade dress is nonfunctional, is  
20 distinctive or has acquired secondary meaning, and that a  
21 defendant's use of a similar mark or trade dress is likely to  
22 confuse consumers. Id. at 824-25.

23 Plaintiffs' Application and Complaint, however, do not  
24 clearly identify the particular mark or trade dress that forms the

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26 <sup>4</sup> Even under the "serious interests" sliding scale test, a  
27 plaintiff must satisfy the four Winter factors and demonstrate  
28 "that there is a likelihood of irreparable injury and that the  
injunction is in the public interest." Alliance for the Wild  
Rockies v. Cottrell, 632 F.3d 1127, 1135 (9th Cir. 2011).

1 basis of Plaintiffs' unfair competition claim. Plaintiffs'  
2 Application, for example, refers to unregistered marks "Ballin  
3 Paris," "Homies," "Feline," "Caninè," and "Bucci," but also the  
4 "cut, color, style, fabric, stitching, label sizes, text, logo  
5 placement, font, and packaging" of Brian's products. (App. at 14,  
6 16.) The complaint refers in one place to "the name 'Ballin' and  
7 'Ballin Paris'" (Compl. ¶ 102,), but immediately thereafter refers  
8 to wrongful appropriation of "fabrics, stitching, and label  
9 location" (Compl. ¶ 103), and yet elsewhere defines the "BRIAN  
10 LICHTENBERG Trademark" as comprised of "fashion apparel,  
11 merchandise and accessories." (Compl. ¶ 22.) Without a better  
12 sense of which marks or trade dress Plaintiffs seek to protect, it  
13 is impossible for this court to analyze functionality,  
14 distinctiveness, or likelihood of confusion, and thus to determine  
15 the likelihood that Plaintiffs will succeed on the merits of any  
16 of their infringement claims.<sup>5</sup>

17 Plaintiffs also seek a TRO on the basis of their Lanham Act  
18 false advertising claim, California Uniform Trade Secrets Act  
19 claim, and intentional interference with contract and prospective  
20 economic relations claims. Beyond generally and conclusorily  
21 contesting authorship of the Ballin Design, Defendants' opposition  
22 does not address these claims. While Plaintiffs themselves devote  
23 far less attention to these claims than the infringement claims,  
24 the record presented could support a finding of likely success on

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26 <sup>5</sup> Plaintiffs cannot possibly hope, for example, to succeed on  
27 a claim that they have a claim to a trademark in "fashion apparel,  
28 merchandise and accessories." Some combination of the various  
elements identified above, however, might conceivably warrant  
trademark or trade dress protection.

1 the merits. There is ample evidence that Chris appropriated  
2 Brian's promotional photos and made statements claiming or  
3 suggesting that the apparel depicted therein was his, not Brian's.  
4 See Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134, 1139  
5 (9th Cir. 1997) (listing elements of Lanham Act false advertising  
6 claim). It also appears beyond dispute that Chris contacted  
7 Brian's customers, encouraged them to stop doing business with  
8 Brian, and claimed Brian is a thief. See Korea Supply Co. v.  
9 Lockheed Martin Corp., 29 Cal. 4th 1134, 1153 (2003) (listing  
10 elements of intentional interference with prospective economic  
11 advantage claim); Quelimane Co. v. Stewart Title Guaranty Co., 19  
12 Cal. 4th 26, 55 (1998) (listing elements of interference with  
13 contract claim).

14 Nevertheless, the court does not address Plaintiffs'  
15 likelihood of success in further depth because Plaintiffs have  
16 failed to adequately show irreparable harm. In analyzing  
17 irreparable harm, courts should take into account whether a movant  
18 "proceeded as quickly as it could have" in seeking a TRO. Apple,  
19 Inc. v. Samsung Electronics Co., Ltd., 678 F.3d 1314, 1325 (Fed.  
20 Cir. 2012) (analyzing a preliminary injunction). At the TRO  
21 stage, courts consider whether the movant would have been able to  
22 file a noticed preliminary injunction motion had it acted  
23 diligently. See, e.g., Occupy Sacramento v. City of Sacramento,  
24 2:11-CV-02873-MCE, 2011 WL 5374748, at \*4 (E.D. Cal. Nov.4, 2011)  
25 (denying application for TRO for twenty-five day delay); Mammoth  
26 Specialty Lodging, LLC v. We-Ka-Jassa Inv. Fund, LLC, CIVS10-0864  
27 LKK/JFM, 2010 WL 1539811, at \*2 (E.D. Cal. Apr. 16, 2010); Rosal

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1 v. First Fed. Bank of California, No. C 09-1276 PJH, 2009 WL  
2 837570, at \*2 (N.D. Cal. Mar. 26, 2009).

3 Here, the vast majority of Chris' alleged misappropriation of  
4 photographs and wrongful contact with Brian's distributors and  
5 customers appears to have taken place in between February and  
6 April 2013, approximately six to eight months ago. The most  
7 recent such instance appears to have occurred on May 18, 2013,  
8 over five months ago. (Declaration of Reda Bouaissa ¶ 66.)<sup>6</sup> While  
9 Plaintiffs attribute the roughly thirty-day delay between the  
10 filing of their complaint and the instant Application to the  
11 necessity of preparing voluminous documentary support, Plaintiffs  
12 make no attempt to explain why they did not seek preliminary  
13 relief here until six to eight months after the alleged wrongful  
14 acts occurred.<sup>7</sup> Plaintiffs do not contend, nor has the court found  
15 any evidence, that Chris' alleged wrongful acts persisted beyond  
16 May 2013 or are continuing. Accordingly, the court cannot  
17 conclude that Plaintiffs will suffer irreparable harm in the  
18 absence of a TRO.

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22 <sup>6</sup> The court notes that Plaintiffs' citations to the record in  
23 support of their showing of irreparable harm are extremely  
24 unfocused. Plaintiffs cite, for example, over a dozen exhibits and  
25 approximately one hundred paragraphs of witness declarations for  
26 the proposition that Chris' actions are currently doing injury to  
27 Brian's reputation. Several of Plaintiffs' citations, however, are  
28 completely unrelated to that claim. (See, e.g., B. Lichtenberg  
Decl. ¶ 72 ("On or about January 25, 2013, I learned that Chris was  
still sick from the day before and was 'bed ridden' and feeling  
horrible."))

27 <sup>7</sup> The state court denied Plaintiffs preliminary injunctive  
28 relief on April 19, 2013. (Defendants' Request for Judicial  
Notice, Ex. J.)

1 **IV. Conclusion**

2 For the reasons stated above, Plaintiffs' Application for a  
3 Temporary Restraining Order is DENIED, without prejudice.

4 IT IS SO ORDERED.

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7 Dated: October 25, 2013



DEAN D. PREGERSON  
United States District Judge

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