

1 **WO**

2  
3  
4  
5  
6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
8

9 Invoke LLC, et al.,

10 Plaintiffs,

11 v.

12 Combine Performance Golf LLC, et al.,

13 Defendants.  
14

No. CV-20-00906-PHX-DJH

**ORDER**

15 Pending before the Court is Defendants’ Partial Motion to Dismiss (Doc. 13), in  
16 which they seek to dismiss two counts from Plaintiffs’ Complaint (Doc. 1) for failure to  
17 state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure. The Motion  
18 also seeks to dismiss Defendant John Brenkus (“Brenkus”) from this action for lack of  
19 personal jurisdiction under Rule 12(b)(2). Plaintiffs have filed their Response (Doc. 20),  
20 and Defendants have filed their Reply (Doc. 23). The matter is fully briefed.

21 **I. Background**

22 Plaintiffs allege trouble with a business venture. It began when Plaintiffs John  
23 Abbey (“Abbey”) and Catalina Jimenez (“Jimenez”) decided to help Defendant Michael  
24 Pinkey’s (“Pinkey”) company, Combine Performance Golf LLC (“Combine”), develop a  
25 line of nutrient supplements. (Doc. 1 at ¶ 17). Through their dealings, one of Abbey’s  
26 companies, Invoke LLC (“Invoke”), acquired a 20% ownership interest in Combine. (*Id.*  
27 at ¶ 18). Another of Abbey’s companies, Virtue Vape LLC (“Virtue Vape”), made a loan  
28 to Combine to help build a new facility to produce the supplements. (*Id.* at ¶¶ 19–20).

1           The Complaint alleges that on October 23, 2019, Invoke registered the trademark  
2 for the supplement line, “CP Nutrition” (“Trademark”). (*Id.* at ¶ 56). It also alleges that,  
3 at some time in early October 2019, Pinkey told Abbey that he wanted to remove Invoke  
4 as a member of Combine. (*Id.* at ¶ 29). In addition, without specifying when, the  
5 Complaint alleges that Pinkey told Abbey he wanted the rights to the Trademark. (*Id.* at ¶  
6 32). Abbey told Pinkey he would remove Invoke on the condition that Combine’s other  
7 members pay Invoke for its share according to the terms of Combine’s Operating  
8 Agreement and that Combine pay its outstanding debt of \$41,822.41 to Virtue Vape. (*Id.*  
9 at ¶¶ 26, 31, 100–04). Abbey also said that he would transfer the Trademark once  
10 Combine compensated Invoke for its membership interest and repaid Virtue Vape’s loan.  
11 (*Id.* at ¶ 33).

12           Also on October 23, 2019, the Complaint alleges that, “Defendants improperly  
13 removed Invoke as a member of Combine.” (*Id.* at ¶ 35). Finally, the Complaint alleges  
14 that Combine has not paid Invoke for its membership interest, that it has not repaid Virtue  
15 Vape’s loan, and that it continues to use the Trademark despite having no right to it. (*Id.*  
16 at ¶¶ 62, 64, 93, 102).

17           The named Defendants in this action include Combine and three of its members,  
18 Defendants Pinkey, Travis Weza (“Weza”), and Brenkus. (*Id.* at ¶ 5–8); (Doc. 1-3 at 3).  
19 Plaintiffs also include these three members’ wives as Defendants, each as a “Jane Doe.”  
20 (Doc. 1 at 2). Among Plaintiffs’ ten claims against Defendants, Count I and Count II  
21 allege unfair competition and trademark infringement in violation of the Lanham Act, 15  
22 U.S.C. § 1051 *et seq.*, and Delaware law. (*Id.* at ¶¶ 53–74). Plaintiffs’ other eight claims  
23 are all either Delaware or Arizona state-law claims. (*Id.* ¶¶ 75–143).

24           Defendants’ Partial Motion to Dismiss seeks to dismiss Counts I and II for failing  
25 to state a claim for trademark infringement. (Doc. 13 at 1). The Motion also seeks to  
26 dismiss Brenkus from this action for lack of personal jurisdiction. (*Id.*) The Court will  
27 first assess whether Plaintiffs state claims for trademark infringement.

28       ///

1 **II. Failure to State a Claim**

2 A motion to dismiss pursuant to Rule 12(b)(6) tests the legal sufficiency of a  
3 claim. *Cook v. Brewer*, 637 F.3d 1002, 1004 (9th Cir. 2011). Complaints must make a  
4 short and plain statement showing that the pleader is entitled to relief for its claims. Fed.  
5 R. Civ. P. 8(a)(2). This standard does not require “‘detailed factual allegations,’ but it  
6 demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.”  
7 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S.  
8 544, 555 (2007)). There must be “more than a sheer possibility that a defendant has acted  
9 unlawfully.” *Id.* In other words, while courts do not require “heightened fact pleading of  
10 specifics,” a plaintiff must allege facts sufficient to “raise a right to relief above the  
11 speculative level.” *See Twombly*, 550 U.S. at 555.

12 Dismissal of a complaint for failure to state a claim can be based on either the  
13 “lack of a cognizable legal theory or the absence of sufficient facts alleged under a  
14 cognizable legal theory.” *Balistren v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir.  
15 1990). In reviewing a motion to dismiss, “all factual allegations set forth in the complaint  
16 ‘are taken as true and construed in the light most favorable to the plaintiffs.’” *Lee v. City*  
17 *of L.A.*, 250 F.3d 668, 679 (9th Cir. 2001) (quoting *Epstein v. Wash. Energy Co.*, 83 F.3d  
18 1136, 1140 (9th Cir. 1996)). But courts are not required “to accept as true a legal  
19 conclusion couched as a factual allegation.” *Twombly*, 550 U.S. at 555 (quoting *Papasan*  
20 *v. Allain*, 478 U.S. 265, 286 (1986)).

21 **A. Trademark Infringement Under the Lanham Act**

22 Count I of the Complaint brings a trademark infringement claim under the Lanham  
23 Act. (Doc. 1 at ¶¶ 53–67). Plaintiffs specifically bring Count I under 15 U.S.C. § 1125(a),  
24 which states that, “[a]ny person who, on or in connection with any goods or services . . .  
25 uses in commerce any word, term, name, symbol, or device or any combination thereof . . .  
26 . which . . . is likely to cause confusion . . . shall be liable in a civil action.” A plaintiff  
27 bringing this claim must prove two elements: “(1) that it has a protectable ownership  
28 interest in the mark, and (2) that the defendant’s use of the mark is likely to cause

1 consumer confusion.” *Rearden LLC v. Rearden Com., Inc.*, 683 F.3d 1190, 1202 (9th Cir.  
2 2012) (quoting *Network Automation, Inc. v. Advanced Sys. Concepts, Inc.*, 638 F.3d  
3 1137, 1144 (9th Cir. 2011)); *see also S. Cal. Darts Ass’n v. Zaffina*, 762 F.3d 921, 929  
4 (9th Cir. 2014); *Applied Info. Scis. Corp. v. eBay, Inc.*, 511 F.3d 966, 969 (9th Cir.  
5 2007).

6 “It is axiomatic in trademark law that the standard test of ownership is priority of  
7 use. To acquire ownership of a trademark it is not enough to have invented the mark first  
8 or even to have registered it first; the party claiming ownership must have been the first  
9 to actually use the mark in the sale of goods or services.” *Rearden*, 683 F.3d at 1203  
10 (quoting *Sengoku Works Ltd. v. RMC Int’l, Ltd.*, 96 F.3d 1217, 1219 (9th Cir. 1996)).  
11 Under the Lanham Act, the term “‘use in commerce’ means the bona fide use of a mark  
12 in the ordinary course of trade, and not made merely to reserve a right in a mark.” 15  
13 U.S.C. § 1127; *see Rearden*, 683 F.3d at 1203.

#### 14 **B. Analysis**

15 Defendants’ argument focuses on the first element of a Lanham Act claim,  
16 demonstrating a protectable ownership interest. (Doc. 13 at 6–7). They argue that  
17 Plaintiffs have not shown an ownership interest, and, to the contrary, the Complaint  
18 shows Combine was the first to use the Trademark. (*Id.*) Defendants point to Exhibit C of  
19 the Complaint, which contains social media posts documenting Combine’s use of the  
20 Trademark in August 2019 at the earliest. (Doc. 1-4 at 5). Furthermore, Defendants argue  
21 “Invoke registered the CP Nutrition trademark only *after* Pinkey told Abbey he no longer  
22 wanted to work with Abbey or Invoke, and on the *same day* Combine Performance  
23 removed Invoke as a member.” (Doc. 13 at 4).<sup>1</sup> Ultimately, Defendants argue the  
24 Complaint shows Plaintiffs’ attempt to “hijack their former company’s intellectual

---

25 <sup>1</sup> Defendants request the Court take judicial notice of a Trademark Electronic Search  
26 System record for the purpose of establishing that Invoke registered the Trademark on  
27 October 23, 2019. (Doc. 14 at 3 n.4). But Plaintiffs’ Complaint already alleges that  
28 Invoke registered the Trademark on October 23. (Doc. 1 at ¶ 56). Because the main focus  
of the Court’s inquiry here is on the Complaint, it is not necessary to take notice of  
redundant information. *Cf. Lee*, 250 F.3d at 679 (stating that factual allegations in a  
complaint are presumed true on a motion to dismiss). Therefore, the Court will deny  
Defendants’ request.

1 property,” an attempt that does not give rise to a Lanham Act claim. (*Id.* at 5).

2 In their Response, Plaintiffs do not contest that Combine used the Trademark first.  
3 However, they argue the parties had agreed that Invoke and Abbey were the rightful  
4 owners of the Trademark. (Doc. 20 at 8). To evidence this agreement, Plaintiffs cite the  
5 allegations that Abbey helped develop the nutrient supplements, that Pinkey asked Abbey  
6 to let him have the Trademark, and that Abbey said he was not willing to transfer the  
7 trademark until his companies were repaid. (Doc. 1 at ¶¶ 16–17, 32–34). Although  
8 nothing in the Complaint explicitly states that there was an agreement, Plaintiffs argue  
9 one can be inferred by viewing the allegations in Plaintiffs’ favor. (Doc. 20 at 8).

10 Trademark ownership may be demonstrated by priority of use. *Rearden*, 683 F.3d  
11 at 1203. Trademark owners may also agree to assign their rights to others. *Russell Road*  
12 *Food and Beverage, LLC v. Spencer*, 829 F.3d 1152, 1156 (9th Cir. 2016). If an  
13 agreement existed by which Combine gave the Trademark to Invoke, the question then is  
14 whether the Complaint’s allegations show this above a speculative level. *See Twombly*,  
15 550 U.S. at 555. They do not.

16 To begin, the Complaint does not list its allegations chronologically, and so the  
17 exact order of events is unclear.<sup>2</sup> Because the chronology is unclear, determining whether  
18 an agreement existed calls for speculation. Based on the facts as they are alleged, Pinkey  
19 may have asked for the Trademark rights after October 23, 2019, when Invoke had  
20 registered the Trademark for itself. But Pinkey may have also asked Invoke for the  
21 Trademark before October 23, pursuant to an agreement that the Complaint never  
22 explicitly mentions. While it still is possible that an agreement existed, the Complaint  
23 does not allege sufficient facts to demonstrate its existence beyond a speculative level.  
24 *See id.* Therefore, the Complaint does not adequately plead the existence of an agreement

---

25  
26 <sup>2</sup> For example, Paragraph 28, without stating when, alleges that Invoke obtained a federal  
27 trademark for “CP Nutrition.” Next, Paragraph 29 alleges that, “[a]round the beginning of  
28 October, [sic] 2019, the relationship between Pinkey and Abbey began to deteriorate and  
Pinkey informed Abbey that he was overwhelmed and wanted to remove Invoke as a  
member of Combine Performance Golf.” Later, at Paragraph 56, the Complaint clarifies  
that Inovoke registered the Trademark on October 23, presumably after the relationship  
began to deteriorate.

1 between Combine and Invoke whereby Combine gave the Trademark it had been using to  
2 Invoke.

3 Without this agreement, Plaintiffs fail to adequately allege a protectable ownership  
4 interest in the Trademark, either by use or agreement. The Complaint instead shows that  
5 Combine was the first to use the Trademark, which gives Combine the protectible  
6 ownership interest despite Invoke's subsequent registration. *See Rearden*, 683 F.3d at  
7 1203. Because Plaintiffs fail to allege a protectable ownership interest, they fail to  
8 properly bring a Lanham Act claim under 15 U.S.C. § 1125(a). *See id.* And so, the Court  
9 must dismiss Count I of the Complaint for failure to state a claim.

### 10 **III. Supplemental Jurisdiction**

11 Count I's Lanham Act claim is the Complaint's only claim that falls under the  
12 Court's original jurisdiction. *See* 28 U.S.C. § 1338(a). By dismissing Count I, all that  
13 remain are state-law claims under the Court's supplemental jurisdiction. *See id.* §  
14 1367(a). When all federal claims are dismissed before trial, a court should also dismiss  
15 the state law claims. *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966);  
16 *Acri v. Varian Assocs., Inc.*, 114 F.3d 999, 1000 (9th Cir. 1997); *see also* 28 U.S.C. §  
17 1367(c)(3). Therefore, the Court will decline to exercise supplemental jurisdiction over  
18 the Complaint's remaining claims. As a result, it is not necessary to determine whether  
19 the Complaint states a claim for trademark infringement under Delaware law or whether  
20 the Court has personal jurisdiction over Brenkus. The Court will deny as moot these  
21 aspects of Defendant's Partial Motion to Dismiss.

22 Accordingly,

23 **IT IS HEREBY ORDERED** that Defendants' Partial Motion to Dismiss  
24 (Doc. 13) is **GRANTED** in part, with respect to Count I, and **DENIED** in part as moot,  
25 with respect to Count II and personal jurisdiction over Defendant John Brenkus.

26 **IT IS FURTHER ORDERED** that Plaintiffs' Complaint (Doc. 1) is **dismissed**  
27 with leave to file a First Amended Complaint within thirty (30) days of the date this  
28 Order is entered;

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**IT IS FINALLY ORDERED** that if Plaintiff does not file a First Amended Complaint within thirty (30) days of the date this Order is entered, the Clerk of Court shall dismiss this action without further order of this Court.

Dated this 14th day of October, 2020.

  
Honorable Diane J. Humetewa  
United States District Judge