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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Spectrum Products LLC,

10 Plaintiff,

11 v.

12 Jie Gao, et al.,

13 Defendants.
14

No. CV-21-01407-PHX-DLR

ORDER

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16 Plaintiff Spectrum Products LLC (“Spectrum”) owns United States Patent Number
17 D925721, a vent extender which Spectrum sells on Amazon.com. (Doc. 18-2 ¶¶ 1-3; Doc.
18 1-2.) Spectrum alleges that Defendants—Jie Gao (allegedly an alias; Spectrum believes
19 his real name might be Ji Hue) and Gao’s sole proprietorship, Ventilaiders—sell an
20 infringing product on Amazon.com. (Doc. 1 ¶ 34.) After being notified by Spectrum of
21 the infringing nature of their product, Defendants have continued to sell the same infringing
22 product but have attempted to conceal that infringement by changing the online description
23 of their product’s design. (Doc. 18-2 ¶¶ 5-6.) Spectrum has sent cease and desist letters to
24 six addresses associated with the infringing product but does not presently know which
25 address (if any) is Defendants’ true address. (*Id.* ¶¶ 7-8.) Spectrum attempted to obtain
26 this information from Defendants’ attorney, but Defendants’ attorney refused to divulge
27 his clients’ address or to confirm Gao’s name and has since discontinued communication
28 with Spectrum. (*Id.* ¶¶ 8-10.) In this action, Spectrum accuses Defendants of patent

1 infringement. (Doc. 1.) At issue is Spectrum’s application for an *ex parte* temporary
2 restraining order (“TRO”) enjoining Defendants from closing or removing money from
3 their Amazon.com accounts. (Doc. 18.)

4 The purpose of a TRO is to preserve the status quo pending a hearing on a
5 preliminary injunction motion if irreparable harm will occur in the interim. *See Ariz.*
6 *Recovery Housing Ass’n v. Ariz. Dep’t of Health Servs.*, No. CV-20-00893-PHX-JAT,
7 2020 WL 8996590, at *1 (D. Ariz. May 14, 2020). The standards for issuing a TRO are
8 identical to those for issuing a preliminary injunction. *Whitman v. Hawaiian Tug & Barge*
9 *Corp./Young Bros., Ltd. Salaried Pension Plan*, 27 F. Supp. 2d 1225, 1228 (D. Haw. 1998).
10 A plaintiff seeking a TRO must establish that he is likely to succeed on the merits, that he
11 is likely to suffer irreparable harm in the absence of immediate relief, that the balance of
12 equities tips in his favor, and that a TRO is in the public interest. *See Winter v. Natural*
13 *Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *Am. Trucking Ass’n, Inc. v. City of L.A.*, 559
14 F.3d 1046, 1052 (9th Cir. 2009). These elements are balanced on a sliding scale, whereby
15 a stronger showing of one element may offset a weaker showing of another. *See Alliance*
16 *for the Wild Rockies v. Cottrell*, 632 F. 3d 1127, 1131, 1134-35 (9th Cir. 2011). The
17 sliding-scale approach, however, does not relieve the movant of the burden to satisfy all
18 four prongs for the issuance of a TRO. *Id.* at 1135. Instead, “‘serious questions going to
19 the merits’ and a balance of hardships that tips sharply towards the plaintiff can support
20 issuance of a [TRO], so long as the plaintiff also shows that there is a likelihood of
21 irreparable injury and that the [TRO] is in the public interest.” *Id.* at 1135. The movant
22 bears the burden of proof on each element of the test. *Env’tl. Council of Sacramento v.*
23 *Slater*, 184 F. Supp. 2d 1016, 1027 (E.D. Cal. 2000).

24 Spectrum has at least raised serious questions going to the merits of its patent
25 infringement claim. Spectrum has demonstrated that it owns the D925721 vent extender
26 patent. Spectrum also has demonstrated that Defendants likely are knowingly selling an
27 infringing product. Spectrum alleges in its unverified complaint that Defendants
28 challenged the validity and enforceability of the patent by sending the Patent Examiner

1 prior art, and that the United States Patent Office was unpersuaded and allowed the patent
2 to issue. (Doc. 1 ¶ 38.) But Spectrum fails to provide evidence to substantiate this
3 allegation with its TRO application. For this reason, the Court finds under the sliding-scale
4 approach that serious questions going to the merits of Spectrum’s patent infringement
5 claim exist, but that Spectrum has stopped short of establishing a likelihood of success on
6 the merits. *See Visto Corp. v. Sproqit Technologies, Inc.*, 413 F.Supp.2d 1073, 1077 (N.D.
7 Cal. 2006) (“In order to demonstrate likelihood of success on the merits, [the plaintiff]
8 must show that in light of the presumptions and burdens that will inhere at trial on the
9 merits, (1) it will likely prove that [the defendant] infringes the patent, and (2) [the
10 plaintiff’s] infringement claim will likely withstand [the defendant’s] challenges to the
11 validity and enforceability of the patent. On a motion for preliminary injunction, the
12 presumption of validity under 35 U.S.C. § 2822 does not shift the burden of proof; the
13 movant carries the burden of establishing it will likely succeed on all disputed liability
14 issues at trial.” (citations omitted)).

15 Where Spectrum’s application fails, however, is in establishing a likelihood of
16 irreparable harm. On this point, it is important to keep in mind the type of relief Spectrum
17 seeks. Spectrum does not seek a TRO enjoining Defendants from continuing to sell an
18 infringing product. For this reason, Spectrum’s concerns about a “wacka-mole problem,”
19 with Defendants, after receiving notice of this lawsuit, “open[ing] new accounts and
20 sell[ing] the infringing products in another corner of the internet,” (Doc. 18 at 2) cannot
21 support its application for a TRO because the order Spectrum seeks would not enjoin
22 Defendants from opening a new account or selling the infringing product somewhere else
23 online.¹ No, Spectrum seeks an asset freeze, and “[a] party seeking an asset freeze must
24 show a likelihood of dissipation of the claimed assets, or other inability to recover monetary

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26 ¹ Spectrum indicates that it has been in contact with Defendants’ attorney and has
27 asked Defendants’ attorney to accept service on behalf of his clients. (Doc. 18 at 1.) If
28 true, it seems likely that Defendants have already heard about this lawsuit from their
attorney. Indeed, Spectrum also indicates that “Defendants are fully aware that [Spectrum]
is seeking to shut down their selling and offering of the infringing products.” (*Id.* at 2.) To
the extent Spectrum is concerned that irreparable harm will follow if Defendants learn
about this lawsuit before a TRO issues, that cat seems already to be out of the bag.

1 damages, if relief is not granted.” *Johnson v. Couturier*, 572 F.3d 1067, 1085 (9th Cir.
2 2009). This can be shown, for example, by evidence that Defendants will become insolvent
3 or that they have “engaged in a pattern of secreting or dissipating assets to avoid
4 judgment.” *In re Estate of Ferdinand Marcos, Human Rights Litig.*, 25 F.3d 1467, 1480
5 (9th Cir. 1994). Spectrum has not made such a showing.

6 Spectrum argues that “the shifty and disingenuous continual actions of the
7 Defendant(s) and their shifty attorney” make it unlikely that Spectrum will be able to
8 recover monetary damages in this action. (Doc. 18 at 6.) This “shifty behavior,” according
9 to Spectrum, consists of the following: “1) using a third-party attorney to obfuscate
10 Defendant’s identity, 2) refusing to accept service 3) Defendant appears to be a foreigner
11 with little to no ties to the United States 4) mislabeling the infringing product on
12 Amazon.com and 5) misrepresenting the infringing product to the consumer.” (*Id.* at 1.)
13 These arguments do not withstand scrutiny.

14 First, there is nothing suspicious about Defendants being represented by an attorney.
15 And although Spectrum alleges that Defendants are obfuscating their identifies, Spectrum
16 fails to substantiate this allegation. Spectrum submits an affidavit from its owner, Michael
17 Mosiman, in which Mosiman claims that he has “a reasonable belief” that Defendants are
18 using aliases, but he does not explain the factual basis for that belief. (Doc. 18-2 ¶ 10.)
19 This first allegation of “shifty behavior” therefore does not establish a likelihood that
20 Defendants’ assets will be secreted away or dissipated, or that Spectrum will be unable to
21 recover damages in this case.

22 Second, the fact that Defendants’ attorney has refused to accept service on behalf of
23 his clients is not suspicious. Indeed, “[t]he attorney-client relationship by itself is
24 insufficient to convey authority to accept service.” *Kruska v. Perverted Justice Foundation*
25 *Inc.*, No. CV-08-0054-PHX-SMM, 2009 WL 4041941, at *2 (D. Ariz. Nov. 16, 2009).
26 Service of process on an agent is sufficient only if the agent is “authorized by appointment
27 or by law to receive service of process.” Fed. R. Civ. P. 4(e)(2). Nothing in the present
28 record indicates that Defendants have authorized their attorney to accept service of process,

1 and the mere fact that their attorney refuses to do so does not suggest that Defendants’
2 assets will be secreted away or dissipated, or that Spectrum will be unable to recover
3 damages in this case.

4 Third, the mere fact that Gao is a foreign national (the complaint alleges that Gao is
5 a citizen of South Korea) does not show that Gao likely will dissipate or hide assets once
6 he receives notice of this lawsuit. The Court will not presume that foreign nationals are
7 untrustworthy. And although Spectrum argues that Gao has few ties to the United States,
8 it does not substantiate this argument with any evidence. Notably, the complaint alleges
9 that Gao has a temporary residence in Maryland, that Ventilaiders is based in Maryland,
10 and that Defendants are represented by an attorney who works at Quantum Patent Law
11 Firm, which is located in Washington, D.C. (Doc. 1 ¶¶ 3, 8, 9); *see*
12 <https://www.quantumpat.com/contact>, last visited September 3, 2021. Assuming these
13 allegations are true, it appears that Gao has some meaningful ties to the United States.
14 More importantly, however, the fact that Gao is a South Korean citizen with only a handful
15 of known ties to the United States does not, by itself, show that Defendants would dissipate
16 or hide their asserts upon notice of this lawsuit.

17 Lastly, although Spectrum has shown that Defendants likely are mislabeling the
18 infringing product on Amazon.com and misrepresenting the infringing product to
19 consumers, nothing about the TRO Spectrum seeks would prevent Defendants from
20 continuing to infringe, mislabel, or misrepresent. Moreover, although these facts suggest
21 that Defendants might have engaged in some dishonest activity, they fall short of
22 establishing a likelihood that Defendants’ assets will be secreted away or dissipated, or that
23 Spectrum will be unable to recover damages in this case.

24 Perhaps the true goal of Spectrum’s TRO application comes into focus on page nine
25 of the application. There, Spectrum argues that “[p]utting an immediate hold on
26 Defendants’ accounts is the only way to get the Defendants to stop hiding behind a lawyer
27 and face their day in Court.” (Doc. 18 at 9.) But the purpose of a TRO is to prevent an
28 immediate and irreparable injury from occurring before the Court has time to consider and

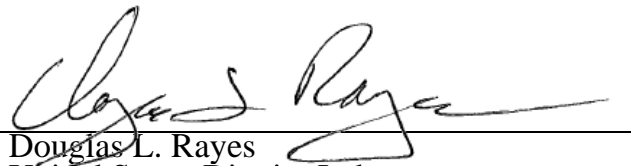
1 rule on a preliminary injunction motion. A TRO is not meant to operate like bail, assuring
2 a defendant's appearance in court by holding assets as security. Throughout its complaint
3 and TRO application, Spectrum voices frustration with its unsuccessful efforts to serve
4 Defendants with process in this matter, but there are other mechanisms available to
5 discover the facts necessary to effectuate service of process. *See Columbia Ins. Co. v.*
6 *Seescandy.com*, 185 F.R.D. 573, 577 (N.D. Cal. 1999) ("As a general rule, discovery
7 proceedings take place only after the defendant has been served; however, in rare cases,
8 courts have made exceptions, permitting limited discovery to ensue after filing of the
9 complaint to permit the plaintiff to learn the identifying facts necessary to permit service
10 on the defendant."). Courts do not, however, issue TROs for the sole purpose of
11 strongarming potentially unwilling defendants into appearing and participating in
12 litigation.

13 For these reasons,

14 **IT IS ORDERED** that Spectrum's application for an asset-freezing TRO (Doc. 18)
15 is **DENIED**.

16 Dated this 3rd day of September, 2021.

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Douglas L. Rayes
United States District Judge