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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

COOPERATIVE REGIONS OF
ORGANIC PRODUCER POOLS, a
Wisconsin Stock Cooperative,

Plaintiff,

v.

STUEVE'S CERTIFIED ORGANIC
DAIRY, a California business
entity of unknown form; LLOYD
L. STUEVE, individually and
doing business as Stueve's
Certified Organic Dairy;
GAGE STUEVE, individually and
doing business as Stueve's
Certified Organic Dairy; and
DOES 1 through 50, inclusive,

Defendants.

No. 1:14-cv-01123 GEB SKO

**ORDER DENYING MOTION FOR AN EX
PARTE TEMPORARY RESTRAINING
ORDER**

Plaintiff moves ex parte for a temporary restraining order ("TRO") under "California Food and Agriculture Code section[] . . . 54265, and alternatively, pursuant to Federal Rule of Civil Procedure [('Rule')] 65" "enjoining Defendants . . . from selling organic milk to any third parties and requiring Defendants to deliver all the organic milk they produce to [Plaintiff]" as prescribed in an agricultural marketing contract. (TRO i:16-17, 6-9, ECF No. 7.)

1 A threshold issue is whether section 54265 or Rule
2 65 governs Plaintiff's TRO motion. "When a state law directly
3 conflicts with a federal rule of civil procedure, courts apply
4 the test set forth in Hanna v. Plumer, 380 U.S. 460, 460 (1965)."
5 Kane v. Chobani, Inc., No. 12-cv-02425-LHK, 2013 WL 3776172, at
6 *2 (N.D. Cal. July 15, 2013). "[Under Hanna] courts apply 'the
7 Federal Rule, and can refuse to do so only if the Advisory
8 Committee, [the Supreme Court], and Congress erred in their prima
9 facie judgment that the Rule is within the scope of the Rules
10 Enabling Act and the Constitution." Id. (quoting Hanna, 380 U.S.
11 at 471). California Food and Agriculture Code section 54265
12 prescribes: "Pending the adjudication of [a breach of agriculture
13 marketing contract] action and upon filing a verified complaint
14 which shows the breach or threatened breach, and upon filing a
15 sufficient bond, [a movant] shall be entitled to a [TRO]"
16 This statute conflicts with Rule 65(b), which prescribes: "The
17 court may issue a [TRO] . . . only if specific facts in an
18 affidavit or verified complaint clearly show that immediate and
19 irreparable injury will result to the movant before the adverse
20 party can be heard in opposition." (emphasis added). Since
21 "[c]ourts have held that [] Rule 65 is both constitutional and
22 within the scope of the Rules Enabling Act," Rule 65 applies.
23 Chobani, 2013 WL 3776172 at *3.

24 The following facts averred in Plaintiff's Verified
25 Complaint are germane to the TRO motion. "[O]n July 3, 2014,
26 Defendant Gage Stueve sent an e-mail to [Plaintiff] which stated,
27 in pertinent part: 'Our last day shipping milk to [Plaintiff]
28 will be Monday, July 7, 2014.'" (Ver. Compl. ¶ 42, ECF No. 1.)

1 "On July 8 and 9, 2014, [Plaintiff] dispatched the same milk
2 hauler who regularly handles acceptance of [Defendants'] organic
3 milk to the farm; however, Defendants turned the milk hauler away
4 on both dates, refusing to transfer any of [Defendants'] milk to
5 [Plaintiff]." (Id. ¶ 43.)

6 Plaintiff's Chief Financial Officer declares the
7 following concerning immediate and irreparable injury:

8 The impact from the loss of organic milk from
9 [Defendants] is significant[, and, as a
10 result,] . . . [Plaintiff] has been unable to
11 build its supply due to the loss of milk from
12 [Defendants]. The supply of inventory is
13 critical because milk sales are lower in the
14 summer and this is the time period during
15 which [Plaintiff] is able to ensure that it
16 has sufficient stock for the upcoming fall to
17 meet its commitments. . . . [O]nce dairy
18 sales start increasing in September,
19 [Plaintiff] will lack sufficient daily supply
20 to meet its commitments and will have to
21 short its customers.

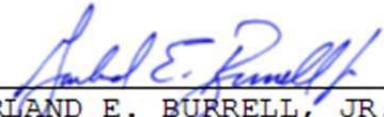
22 (Decl. of Mike Bedessem ¶ 6, ECF No. 7-2.) This "will lead to
23 harm to [Plaintiff]'s business and reputational harm." (Id. ¶ 5.)

24 Plaintiff filed its TRO motion on July 24, 2014,
25 twenty-one days (or three weeks) after Plaintiff avers Defendants
26 notified Plaintiff on July 3, 2014 of their intention to breach.
27 Local Rule 231(b) prescribes: "In considering a motion for a
28 [TRO], the Court will consider whether the applicant could have
sought relief by [a] motion for [a] preliminary injunction at an
earlier date without the necessity for seeking last-minute relief
by [a] motion for [a] [TRO]." Here, Plaintiff has not explained
why it did not seek injunctive relief earlier. This failure of
explanation for Plaintiff's three-week delay in seeking a TRO
implies that, under the circumstances, its delay has contributed

1 to part of the irreparable injury it avers it is enduring, and
2 that it should proceed by an expedited preliminary injunction
3 proceeding, rather than an ex parte TRO proceeding. This would
4 provide Defendants an opportunity to respond to Plaintiff's
5 request for injunctive relief, as contemplated by the equitable
6 principles embodied in the above referenced rules under these
7 circumstances.

8 Therefore, Plaintiff's motion for an ex parte TRO is
9 DENIED.

10 Dated: July 25, 2014

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15 GARIAND E. BURRELL, JR.
16 Senior United States District Judge
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