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3 **UNITED STATES DISTRICT COURT**  
4 **EASTERN DISTRICT OF CALIFORNIA**  
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7 DP ENTERPRISES, LP, a California limited  
partnership, Plaintiff,

8 v.

9 JAMES CORRADO INC., a New Jersey  
10 corporation; PETER CORRADO, an  
individual; GERALD CORRADO, an  
11 individual; and JOSEPH CORRADO, an  
individual,

12 Defendants.  
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CASE: 1:21-cv-01655-AWI-SKO

**ORDER:**

1. **DENYING PLAINTIFF'S *EX PARTE* APPLICATION FOR TEMPORARY RESTRAINING ORDER; AND**
2. **DENYING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION**

(Doc. No. 7)

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20 Plaintiff DP Enterprises, LP (“DP Enterprises” or “Plaintiff”) filed this action on  
21 November 16, 2021 alleging that Defendant James Corrado, Inc. (“Corrado”)—which is allegedly  
22 controlled by James Corrado (“Mr. Corrado”)—has failed to make payment for more than \$29,000  
23 in produce. See Doc. No. 1. On November 18, 2021, DP Enterprises made an ex parte application  
24 for a temporary restraining order (“TRO”) pursuant to Rule 65(b) of the Federal Rules of Civil  
25 Procedure and brought a motion for a preliminary injunction requiring Corrado to segregate and  
26 preserve all assets of a trust arising under the Perishable Agricultural Commodities Act  
27 (“PACA”). Doc. Nos. 7-1 & 7-2.  
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1 **LEGAL FRAMEWORK**

2 The analysis for issuing a TRO and the analysis for issuing a preliminary injunction are  
3 “substantially identical” to one another. Stuhlbarg Int’l Sales Co. v. John D. Brush & Co., 240  
4 F.3d 832, 839 n.7 (9th Cir. 2001). To obtain such relief, a plaintiff must establish four factors set  
5 forth in *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008): (1) “he is likely to  
6 succeed on the merits”; (2) “he is likely to suffer irreparable harm in the absence of preliminary  
7 relief”; (3) “the balance of equities tips in his favor”; and (4) “an injunction is in the public  
8 interest.” Am. Trucking Ass’ns, Inc. v. City of Los Angeles, 559 F.3d 1046, 1052 (9th Cir. 2009)  
9 (quoting Winter, 555 U.S. at 20). In the Ninth Circuit, these factors—sometimes referred to as the  
10 “*Winter* factors”—may be evaluated on a sliding scale: “serious questions going to the merits, and  
11 a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary  
12 injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and  
13 that the injunction is in the public interest.” Alliance for the Wild Rockies v. Cottrell, 632 F.3d  
14 1127, 1135 (9th Cir. 2011) (internal quotation marks omitted).

15 Under Rule 65(b), a court may issue a TRO without notice to the adverse party or its  
16 attorney only if: (1) “specific facts in an affidavit or a verified complaint clearly show that  
17 immediate and irreparable injury, loss, or damage will result to the movant before the adverse  
18 party can be heard in opposition” and (2) “the movant’s attorney certifies in writing any efforts  
19 made to give notice and the reasons why it should not be required.” Fed. R. Civ. Pro. 65(b); Reno  
20 Air Racing Ass’n v. McCord, 452 F.3d 1126, 1130 (9th Cir.2006).

21 Rule 65(b)’s requirements are “stringent,” and temporary restraining orders that are issued  
22 ex parte are to be “restricted to serving their underlying purpose of preserving the status quo and  
23 preventing irreparable harm just so long as is necessary to hold a hearing, and no longer.” Granny  
24 Goose Foods, Inc. v. Brotherhood of Teamsters, 415 U.S. 423, 438–39 (1974); McCord, 452 F.3d  
25 at 1131. A temporary restraining order is an “extraordinary remedy that may only be awarded  
26 upon a clear showing that the plaintiff is entitled to such relief.” Winter, 555 U.S. at 22; see Earth  
27 Island Inst. v. Carlton, 626 F.3d 462, 469 (9th Cir. 2010) (emphasizing plaintiffs “face a difficult  
28 task in proving that they are entitled to this ‘extraordinary remedy’ ”).

1 **DISCUSSION**

2 Plaintiff’s TRO application and preliminary injunction motion are based entirely on a  
3 declaration by a limited partner of DP Enterprises, Demetrio Papagni (“Papagni Declaration”).  
4 Doc. No. 7-4. As set forth in the Papagni Declaration, DP Enterprises sold “perishable agricultural  
5 commodities” (apparently grapes) to Corrado for a total of \$29,092.00 (including \$50 in  
6 packaging materials), “[i]n or around September 2020 through October 2020.” Id. at 2:6-10, 2:16-  
7 19. The produce, which was shipped interstate, was “received and accepted” by Corrado, but  
8 Corrado still has not paid for it. Id. at 2:14-19. DP Enterprises issued an invoice for the produce on  
9 October 1, 2020. Id. at 5. The invoice states, *inter alia*, that the produce was “sold subject to the  
10 statutory trust authorized by section 5(c) of the Perishable Agricultural Commodities Act” and that  
11 DP Enterprises retained a “trust claim” over the produce, as well as related “inventories,”  
12 “receivables or proceeds,” until receipt of final payment. Id.

13 Mr. Papagni states that he has spoken to James Corrado “several times over the last few  
14 months regarding status of payment” and that “[o]n a number of occasions, Mr. Corrado told [him]  
15 that it ha[d] been a rough year for Corrado and hopefully they could issue payment to Plaintiff.”  
16 Doc. No. 7-4 at 2:20-25. Further, Mr. Papagni states that Mr. Corrado “ignored a large amount of  
17 [] requests regarding status of payment”; that “it appears that [Corrado] ha[s] been delaying and/or  
18 avoiding any payment” to DP Enterprises; and that in Mr. Papagni’s “opinion,” “Corrado does not  
19 have sufficient funds to fully satisfy Plaintiff’s PACA trust claim in full as required by law [] and  
20 is dissipating PACA trusts.” Id. at 2:20-3:2. Finally, Mr. Papagni attaches approximately 20 pages  
21 of text messages that he apparently exchanged with Mr. Corrado to substantiate his assertions that  
22 Corrado has ignored requests for payment and may be unable to make payment due to lack of  
23 financial resources. Doc. No. 7-4 at 7-28.

24 The text messages, however, appear to involve the negotiation of a 2021 transaction and  
25 not payment with respect to the October 1, 2020 invoice at issue here. For example, no year is  
26 indicated on any of the text messages, but the text messages have stamps showing dates and days  
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1 of the week that map to the 2021—not the 2020—calendar.<sup>1</sup> See, e.g., id. at 9 (“Tue, Aug 31”); 10  
2 (“Thu, Sep 2”); 15 (“Sat, Sep 11”). The Court accepts, for the limited purpose of this analysis, that  
3 the transaction in question was subject to PACA, that a PACA trust arose and that Corrado has  
4 failed to make payment required under the October 1, 2020 invoice. The text messages, however,  
5 are problematic for two reasons. First, even assuming it was error, the apparent  
6 mischaracterization of the text messages makes it difficult for the Court to give full weight to other  
7 aspects of the Papagni Declaration. And second, it is difficult for the Court to credit Plaintiff’s  
8 blanket assertion that Corrado is dissipating trust assets when it appears that DP Enterprises was  
9 negotiating a new transaction with Corrado very similar to the one at issue here as recently as last  
10 month. Moreover, the Court generally finds the Papagni Declaration, which is largely predicated  
11 on speculation and subjective impressions, to be lacking in “specific facts” that “clearly show” a  
12 risk of dissipation (let alone risk of dissipation in the short interval before Corrado could be heard  
13 in opposition to a properly noticed motion). See Fed.R.Civ.P. 65(b)(1)(A); S. Mill Mushroom,  
14 LLC v. V.I.P. Mktg., Inc., 2021 WL 4134052, at \*3 (C.D. Cal. Sept. 10, 2021) (denying ex parte  
15 application for a TRO on finding that an email evidencing financial difficulties on the part of the  
16 defendant buyer did not constitute “a substantial showing that the trust assets [were] at risk of  
17 dissipation” and that plaintiff “failed to take the foundational step of specifying exactly what kind  
18 of dissipation it fear[ed]”).

19 In addition, given the foregoing considerations, the Court finds counsel’s bare assertion  
20 that notice to Corrado and its counsel should not be required because it would “afford Defendants  
21 with an opportunity to dissipate trust assets” to be conclusory, unconvincing and insufficient. Cf.  
22 McCord, 452 F.3d at 1131 (stating that “courts have recognized very few circumstances justifying  
23 the issuance of an ex parte TRO” and allowing for TROs without notice on showings that notice is  
24 “impossible” or that “notice to the defendant would render fruitless the further prosecution of the  
25 action”); see also S. Mill Mushroom, 2021 WL 4134052, at \*2 (stating that inadequacy of required  
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27 <sup>1</sup> The Court takes judicial notice of the 2020 calendar and the 2021 calendar. See Fed.R.Civ.Pro. Rule 201(b)-(d); Lee  
28 v. Delta Air Lines Inc., 2021 WL 4497209, at \*3 (C.D. Cal. Aug. 23, 2021) (taking judicial notice of the 2020  
calendar).

1 showing under Fed.R.Civ.P. 65(b)(1)(B) is “sufficient independent grounds” for denying an ex  
2 parte TRO application).

3 For the foregoing reasons, the Court finds that DP Enterprises fails to satisfy the standard  
4 for an ex parte TRO set forth in Rule 65(b) and the application will be denied. See Granny Goose  
5 Foods, 415 U.S. at 438-39 (“The stringent restrictions imposed ... by Rule 65 on the availability of  
6 ex parte temporary restraining orders reflect the fact that our entire jurisprudence runs counter to  
7 the notion of court action taken before reasonable notice and an opportunity to be heard has been  
8 granted both sides of a dispute.”).

9 Further, the Court finds that the defects discussed above with respect to the Papagni  
10 Declaration preclude DP Enterprises from showing the likelihood of irreparable harm required for  
11 a preliminary injunction, as the record in this case currently stands. See Am. Trucking Ass’ns,  
12 Inc., 559 F.3d at 1052. Also, it appears that the motion for preliminary injunction has effectively  
13 been brought on an ex parte basis in violation of Rule 65(a)(1) (“The court may issue a  
14 preliminary injunction only on notice to the adverse party.”). The Court will therefore deny the  
15 motion for preliminary injunction without prejudice to refiling with notice and evidence  
16 supporting a good faith claim for injunctive relief.

17 **ORDER**

18 Accordingly, IT IS HEREBY ORDERED that:

- 19 1. Plaintiff’s ex parte application for a temporary restraining order (Doc. Nos. 7 & 7-1) is  
20 DENIED; and  
21 2. Plaintiff’s motion for preliminary injunction is DENIED (Doc. No. 7-2), without  
22 prejudice to renewing the motion with proper notice.  
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25 IT IS SO ORDERED.

26 Dated: November 19, 2021

  
27 SENIOR DISTRICT JUDGE  
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