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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

NUTRITION DISTRIBUTION, LLC,
Plaintiff,

v.

ENHANCED ATHLETE, INC., a
Wyoming Corporation; GILMORE
ENGINEERING, INC., an
unincorporated association;
SCOTT E. CAVELL, an
individual; CHARLES ANTHONY
HUGHES, an individual; and
DOES 1 through 10, inclusive,
Defendants.

No. 2:17-cv-2069-JAM-CKD

**ORDER DENYING MOTION FOR
PRELIMINARY INJUNCTION**

Plaintiff Nutrition Distribution, LLC, doing business as Athletic Xtreme ("Plaintiff") is suing Enhanced Athlete, Inc., Gilmore Engineering, Inc., Scott E. Cavell, and Charles Anthony Hughes (collectively "Defendants") for false advertising and violation of the Civil Racketeer Influenced and Corrupt Organization Act ("RICO"). Plaintiff now seeks a preliminary injunction enjoining Defendants from producing, licensing, marketing, and selling DNP products and from establishing any

1 other entity for the purpose of doing so. For the reasons set
2 forth below, Plaintiff's motion for preliminary injunction is
3 DENIED.

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5 I. FACTUAL ALLEGATIONS AND PROCEDURAL BACKGROUND

6 Plaintiff has accused Defendants of false and misleading
7 advertising with respect to products containing 2,4-Dinitrophenol
8 ("DNP"), which Defendants market and sell to body builders, gym
9 users, and the like. Compl. ¶¶ 1, 3. Plaintiff contends that
10 this product is dangerous for human consumption but Defendants
11 promote it as an ingestible fitness supplement that increases fat
12 loss. See id. at ¶ 28. Plaintiff manufactures and markets its
13 own supplement—Slim FX—which competes for similar customers. Id.
14 at ¶¶ 18-21. Plaintiff now sues Defendants for false advertising
15 under § 43(a)(1)(B) of the Lanham Act and for engaging in a long-
16 term scheme to defraud customers in violation of RICO. Id. at
17 ¶¶ 38-54.

18 Shortly after filing this suit, Plaintiff filed an ex parte
19 application for a temporary restraining order. ECF No. 4. The
20 Court denied the request, finding Plaintiff failed to file the
21 requisite affidavits in support of its motion, and set a briefing
22 schedule for the preliminary injunction request. ECF No. 8.
23 Hughes and Cavell attest that they have not yet been served with
24 the summons and complaint in this lawsuit. Cavell Decl. ¶¶ 9-10;
25 Hughes Decl. ¶ 2. Rutan & Tucker, LLP, filed an opposition on
26 behalf of Enhanced Athlete and Cavell, appearing solely for the
27 purposes of opposing the pending motion. Opp'n at 5.

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2 II. OPINION

3 A. Legal Standard

4 "A plaintiff seeking a preliminary injunction must establish
5 the he is likely to succeed on the merits, that he is likely to
6 suffer irreparable harm in the absence of preliminary relief,
7 that the balance of equities tips in his favor, and that an
8 injunction is in the public interest." Alliance for the Wild
9 Rockies v. Cottrell, 632 F.3d 1127, 1131 (9th Cir. 2011) (quoting
10 Winter v. Natural Resources Defense Council, 555 U.S. 7 (2008)).
11 A plaintiff must establish that the irreparable harm is likely,
12 not just possible. Id.

13 B. Analysis

14 The Court finds Plaintiff is not entitled to a preliminary
15 injunction because it has failed to demonstrate irreparable harm.
16 Because this conclusion is dispositive, the Court does not need
17 to address the remaining three factors set out in Winter. See
18 Nutrition Distribution LLC v. Lecheek Nutrition, Inc., No. CV 15-
19 1322-MWF (MRWx), 2015 WL 12659907 (C.D. Cal. June 5, 2015)
20 ("Indeed, suffering irreparable harm prior to a determination of
21 the merits is perhaps the single most important prerequisite for
22 the issuance of a preliminary injunction.") (citation and
23 quotation marks omitted).

24 Plaintiff argues the irreparable harm prong of the Winter
25 test is met because of the serious risk of harm DNP poses to the
26 life of those who ingest it. Mot. at 17-18. However, Plaintiff
27 provides no authority under which the Court may consider
28 irreparable harm to third parties in lieu of or in addition to

1 irreparable harm to Plaintiff. See Winter, 555 U.S. at 20 (“A
2 plaintiff seeking a preliminary injunction must establish . . .
3 that he is likely to suffer irreparable harm[.]”) (emphasis
4 added); Wooten v. BNSF Railway Co., No. CV 16-139-M-DLC-JCL, 2017
5 WL 1089546, at *1 (D. Mont. Mar. 21, 2017) (“The Court agrees
6 with Judge Lynch that harms alleged against third parties are not
7 relevant to the irreparable harm prong of the Winter analysis.”).
8 Plaintiff is a competitor, not a consumer. While it may be
9 appropriate to consider this risk in weighing public interest
10 concerns, the Court may not consider it in the irreparable harm
11 analysis.

12 Plaintiff also argues that it “has lost sales after the
13 introduction of DNP into the marketplace.” Mot. at 18.
14 Plaintiff cites a paragraph in Michael Keplinger’s declaration in
15 support: “Slim FX sales decreased significantly since the fall of
16 2016 after the reintroduction of DNP into the marketplace by
17 Defendants. Since Defendants began selling DNP during the Fall
18 of 2016, our sales of DNP have decreased 38%.” Keplinger Decl.
19 ¶ 5. Plaintiff also contends that any deficiency in this
20 evidence is irrelevant because “in Lanham Act cases . . .
21 injunctive relief may be granted upon proof that a false
22 statement of fact in a commercial advertisement is material and
23 has a tendency to deceive the relevant purchasing public[,]”
24 which is sufficient to establish irreparable injury. Rep. at 3-4
25 (citing National Products, Inc. v. Gamber-Johnson LLC, 734 F.
26 Supp. 2d 1160, 1171 (W.D. Wash. 2010)).

27 The Court will not presume irreparable harm in evaluating
28 the propriety of granting a preliminary injunction in a false

1 advertising case. See Leatherman Tool Grp., Inc. v. Coast
2 Cutlery Co., 823 F. Supp. 2d 1150, 1157-58 (D. Ore. 2011) ("Given
3 the direction that the Supreme Court and Ninth Circuit have taken
4 in the context of copyright and patent cases, I decline to find
5 that a presumption of irreparable harm exists in a false
6 advertising claim."); Nutrition Distribution LLC, 2015 WL
7 12659907, at *7 ("Plaintiff has not demonstrated that any injury
8 it might suffer would be irreparable absent an injunction.").
9 Plaintiff's cited cases applying such presumption either predate
10 decisions strictly requiring a showing that irreparable harm is
11 likely or rely on that earlier authority. See National Products,
12 734 F. Supp. 2d at 1171 (relying on Southland Sod Farms v. Stover
13 Seed Co., 108 F.3d 1134 (9th Cir. 1997)); cf. Leatherman Tool
14 Grp., 823 F. Supp. 2d at 1156-57 ("Leatherman argues that it is
15 entitled to a presumption of irreparable harm if a tendency to
16 deceive has been established. . . . The eBay Court disapproved
17 of the use of 'categorical' rules with respect to irreparable
18 harm. . . . It is now clear that eBay signifies a return to
19 traditional equitable principles, under which presumptions of
20 harm are not allowed.") (citing eBay, Inc. v. MercExchange, LLC,
21 547 U.S. 388 (2006)). Further, the cases Plaintiff relies upon
22 involved a permanent injunction or damages following
23 adjudication, not a determination of irreparable harm during the
24 pendency of a case.

25 Without a presumption, Plaintiff's evidence is insufficient
26 to establish irreparable harm. The proffered declaration does
27 not establish a causal connection—or even more than a merely
28 speculative connection—between Defendants' product and marketing

1 and Plaintiff's decrease in sales. Furthermore, Plaintiff only
2 provides evidence supporting its loss in sales, which may be
3 remedied by monetary damages. See Nutrition Distribution, 2015
4 WL 12659907 at *7 ("An irreparable harm is one that cannot be
5 redressed by a legal or equitable remedy following trial.").
6 Because Plaintiff has not demonstrated it is likely to suffer
7 irreparable harm its motion for a preliminary injunction must be
8 denied.

9 III. ORDER

10 For the reasons set forth above, the Court DENIES
11 Plaintiff's Motion for Preliminary Injunction.

12 IT IS SO ORDERED.

13 Dated: November 13, 2017

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16 JOHN A. MENDEZ,
17 UNITED STATES DISTRICT JUDGE
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