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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION**

STANDARD INNOVATION  
CORPORATION,

Plaintiff,

v.

LELO (SHANGHAI) TRADING CO.,  
LTD., et al.,

LELO.

Case No. [15-cv-04858-BLF](#)

**ORDER DENYING PLAINTIFF'S  
REQUEST FOR TEMPORARY  
RESTRAINING ORDER**

[Re: ECF 62]

Before the Court is Plaintiff Standard Innovation Corporation's emergency request for a temporary restraining order against Defendants LELOi AB, LELO, Inc., LELO (Shanghai) Trading Co., Ltd., Suzhou Armocon Technology Co., Ltd., SLS Specialty LLC, and 1960 Novelties, Inc. d/b/a/ Cindie's. ECF 62. On November 5, 2015, pursuant to Civil L.R. 7-1(b), the Court, finding this matter suitable for submission without oral argument, vacated the hearing scheduled for February 18, 2016. ECF 100. For the reasons discussed below, the Court DENIES Plaintiff Standard Innovation Corporation's request for a temporary restraining order.

**I. BACKGROUND**

Plaintiff Standard Innovation Corporation ("SI") commenced this action on December 2, 2011, in the Southern District of Texas, alleging that Defendants LELOi AB, LELO Inc., and LELO (collectively, "LELO") infringed U.S. Patent No. 7,931,605 ("the '605 patent").<sup>1</sup> ECF 1. On the same day, SI filed a complaint at the United States International Trade Commission ("ITC") alleging that LELO infringed the '605 patent and the ITC instituted an investigation on

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<sup>1</sup> On August 26, 2015, SI filed an amended complaint which added Defendants LELO (Shanghai) Trading Co., Ltd., Suzhou Armocon Technology Co., Ltd., SLS Specialty LLC, and 1960 Novelties, Inc. d/b/a/ Cindie's. ECF 48.

1 January 4, 2012. ECF 12. On January 23, 2012, this action was stayed pending a final  
2 determination by the ITC. On June 17, 2013, the ITC issued a final determination finding  
3 infringement and issuing a general exclusion order with respect to LELO's Tiani and Tiani 2  
4 products. Pl.'s Mot. for PI at 7, ECF 51. The ITC did not find infringement with respect to  
5 LELO's Mahana product. *Id.* On appeal, the Federal Circuit found that SI failed to meet the  
6 domestic industry requirement of Section 337 and reversed the ITC's decision. Def.'s Opp. to  
7 TRO at 2, ECF 72. The Federal Circuit issued its decision on May 11, 2015, *see LELO Inc. v.*  
8 *USITC*, 786 F.3d 879, 885 (Fed. Cir. 2015), and this action resumed on August 4, 2015, ECF 35,  
9 36.

10 On September 4, 2015, SI filed a motion for a preliminary injunction. ECF 51. On  
11 September 18, 2015, SI filed an emergency request for a temporary restraining order. ECF 62.  
12 On September 29, 2015, LELO filed an opposition to the emergency request for a temporary  
13 restraining order. ECF 72. While the parties were considering a briefing schedule for the motion  
14 for preliminary injunction, this action was transferred from the Southern District of Texas to the  
15 Northern District of California. ECF 86 (transferring case on October 23, 2015). On October 29,  
16 2015, this action was reassigned to the undersigned.

17 **II. LEGAL STANDARD**

18 The substantive standard for issuing a temporary restraining order is identical to the  
19 standard for issuing a preliminary injunction. *See Stuhlberg Int'l Sales Co., Inc. v. John D. Brush*  
20 *& Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001); *Lockheed Missile & Space Co. v. Hughes Aircraft*,  
21 887 F. Supp. 1320, 1323 (N.D. Cal. 1995). An injunction is a matter of equitable discretion and is  
22 "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is  
23 entitled to such relief." *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 22 (2008).

24 A plaintiff seeking preliminary injunctive relief must establish "[1] that he is likely to  
25 succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary  
26 relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public  
27 interest." *Id.* at 20. Alternatively, an injunction can issue where "the likelihood of success is such  
28 that serious questions going to the merits were raised and the balance of hardships tips sharply in

1 plaintiff's favor," provided that "plaintiff also shows that there is a likelihood of irreparable injury  
2 and that the injunction is in the public interest." *Alliance for the Wild Rockies v. Cottrell*, 632  
3 F.3d 1127, 1131, 1135 (9th Cir. 2011) (citation and internal quotation marks omitted). Showing  
4 "serious questions going to the merits" requires more than establishing that "success is more likely  
5 than not;" rather, it requires a plaintiff to demonstrate a "substantial case for relief on the merits."  
6 *Leiva-Perez v. Holder*, 640 F.3d 962, 967 (9th Cir. 2011). Under either standard, the plaintiff  
7 bears the burden of making a clear showing on these elements and on entitlement to this  
8 extraordinary remedy. *Earth Island Inst. v. Carlton*, 626 F.3d 462, 469 (9th Cir. 2010).

9 **III. DISCUSSION**

10 **A. Defendants LELOi AB and LELO, Inc.**

11 To prevail on its request for a temporary restraining order, SI must demonstrate a  
12 likelihood of irreparable harm. Because the Court finds this element dispositive under either  
13 formulation of the test for a preliminary injunction, the Court addresses only whether SI has  
14 shown a likelihood of irreparable harm.<sup>2</sup>

15 SI argues that it will be irreparably harmed absent a temporary restraining order against  
16 LELO.<sup>3</sup> According to SI, shortly after filing for a preliminary injunction, LELO drastically  
17 reduced the prices on its products. Pl.'s Mot. for TRO at 9, ECF 62. SI argues that this conduct  
18 has the potential to put it out of business and prohibit it from enforcing its patent rights. *Id.* SI  
19 asserts that LELO's stronger and well-funded marketing combined with the fact that LELO's  
20 products may become the only "couples' massagers on the U.S. market" threatens to eliminate  
21 SI's business. *Id.* at 9-10, ECF 62 (citing Finlayson Decl. to Pl.'s Mot for PI at ¶ 7, ECF 51-36).

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23 <sup>2</sup> The Court notes that SI's showing of its likelihood of success on the merits appears to be strong  
24 based on the ITC ruling. The Court is not, at this juncture, making a final determination on this  
25 issue. Should SI pursue a preliminary injunction, the Court will engage in a thorough analysis of  
26 the evidence.

27 <sup>3</sup> At various points in its request for a temporary restraining order, Plaintiff incorporates portions  
28 of its motion for a preliminary injunction. *See* Pl.'s Mot for TRO at 3 (incorporating background  
and history), 10 (appearing to incorporate discussion on issues of infringement and validity), ECF  
62. In considering this Plaintiff's request for a temporary restraining order, the Court has  
reviewed the relevant portions of Plaintiff's motion for a preliminary injunction. However, the  
parties are advised that future filings must comply with the page limit requirements set forth in the  
local rules and the Court's standing order and may not incorporate additional materials by  
reference.

1 SI also argues that it has no adequate remedy at law because “losses of sales, potential sales,  
2 customers, and potential customers, and the devaluation of [SI’s] intellectual property” are not  
3 easily measurable. *Id.* at 10. SI further contends that LELO may not have substantial assets in the  
4 United States, and thus, monetary damages are likely not recoverable and even if they were, SI is  
5 unlikely to survive to see a full trial because of “the escalation of [LELO’s price-cutting].”

6 LELO argues that SI has not shown irreparable harm. According to LELO, SI’s arguments  
7 are based on “conclusory attorney argument[s]” and are not supported by affidavits or evidence.  
8 Def.’s Opp. to TRO at 5, ECF 72. LELO also argues that SI has failed to show a casual nexus  
9 connecting the alleged harm to LELO’s alleged infringement. *Id.* at 6-7.

10 The Court finds that SI has failed to show irreparable harm. SI’s request for a temporary  
11 restraining order lacks evidence supporting its allegations regarding LELO’s conduct. SI argues  
12 that LELO reduced the prices on the Noa, Tiani 2, Tiani 3, and Kalia in an effort to quickly unload  
13 inventory. However, SI’s evidence only indicates that LELO has distributed a coupon code  
14 allowing customers to receive 20% off the purchase of a Tiani 2 or Tiani 3. *See* Exhs. 3 and 4 to  
15 Pl.’s Mot. for TRO, ECF 62-4, 62-5.<sup>4</sup> As LELO notes and SI does not dispute, although the Noa  
16 and Kalia products are offered at lower prices, these prices are the standard manufacturer’s  
17 suggested retail price because these products offer less features. *See* Def.’s Opp. to TRO at 4,  
18 ECF 72. This highlights the problem with SI’s argument – while LELO may be offering its  
19 products at a lower price than SI’s products, there could be several explanations for this, such as  
20 the products having different features, beyond an effort by LELO to unload inventory to escape  
21 liability. Although SI provided the declaration of Anne Finlayson as support for its arguments, the  
22 declaration provides no evidence to support the assertion that LELO’s discounts have had an  
23 actual impact on the market.

24 SI’s argument that it has no adequate remedy at law also falls short. While SI contends  
25 that it will suffer a loss in market share and sales, “it has not presented any evidence of actual or  
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27 <sup>4</sup> The Court also notes that it is not even clear how many people received this coupon and whether  
28 it was widely disseminated or sent to a few customers. Plaintiff’s exhibits only show that the  
coupon code was sent to one person. *Id.*

1 future losses to supports it conclusion.”<sup>5</sup> *See Generac Power Sys., Inc. v. Kohler Co.*, 807 F.  
2 Supp. 2d 791, 805 (E.D. Wis. 2011) (noting that status as a direct competitor without further  
3 evidence is not enough to show irreparable harm). While SI correctly notes that the Court should  
4 consider the ability to recover damages from LELO and whether they have assets in the United  
5 States, SI must provide some minimal evidence about LELO’s inability to pay. *See Robert Bosch*  
6 *LLC v. Pylon Mfg. Corp.*, 659 F.3d 1142, 1155 (Fed.Cir. 2011). SI has provided no evidence  
7 about LELO’s financial condition.<sup>6</sup> Finally, SI has failed to indicate any nexus between lost sales  
8 of its products and sales of LELO’s allegedly infringing products. *Asetek Danmark A/S v. CMI*  
9 *USA, Inc.*, No. 13-cv-00457-JST, 2015 WL 5568360, at \*13 (N.D. Cal. Sept. 22, 2015) (“To  
10 demonstrate irreparable harm in a patent infringement suit, a patentee must establish... a  
11 sufficiently strong causal nexus relates the alleged harm to the alleged infringement.”).  
12 Accordingly, SI has failed to demonstrate irreparable harm and because a temporary restraining  
13 order cannot be issued without demonstrating irreparable harm, the Court DENIES SI’s request  
14 for a temporary restraining order with respect to LELO.

15 **B. Defendants LELO (Shanghai) Trading Co., Ltd., Suzhou Armocon Technology**  
16 **Co., Ltd., SLS Specialty LLC, and 1960 Novelties, Inc. d/b/a/ Cindie’s**

17 SI’s request for a TRO was made *ex parte* to Defendants LELO (Shanghai) Trading Co.,  
18 Ltd., Suzhou Armocon Technology Co., Ltd., SLS Specialty LLC, and 1960 Novelties, Inc. d/b/a/  
19 Cindie’s pursuant to Fed. R. Civ. P. 65(b). Pl.’s Mot. for TRO at 9, ECF 62. Federal Rule of  
20 Civil Procedure 65(b)(1), requires SI to provide “specific facts in an affidavit or a verified  
21 complaint” that “clearly show that immediate and irreparable injury, loss, or damage will result to  
22 the movant before the adverse party can be heard in opposition,” and a certification describing the  
23 “efforts made to give notice [to the adverse party] and the reasons why it should not be required.”

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25 <sup>5</sup> Because of the motion to transfer venues, the Court notes that this request for a temporary  
26 restraining order has been pending for almost two months and SI has not provided any  
27 supplemental evidence regarding lost sales or irreparable harm.


28 <sup>6</sup> In fact, at one point in its brief, Plaintiff argues that LELO has a “well-funded marketing”  
operation which appears to contradict SI’s assertion that LELO does not have the financial  
resources to pay a judgment. Pl.’s Mot. for TRO at 9, ECF 62. This also contradicts the  
declaration of Anne Finlayson which indicates SI has been unable to determine “the most basic of  
financial information about LELO.” *See* Finlayson Decl. to Pl.’s Mot. for PI at ¶ 10, ECF 51-36.

1 Fed.R.Civ.P. 65(b)(1)(A)-(B). SI has failed to comply with these requirements and accordingly,  
2 the Court DENIES SI's request for a temporary restraining order with respect to Defendants  
3 LELO (Shanghai) Trading Co., Ltd., Suzhou Armocon Technology Co., Ltd., SLS Specialty LLC,  
4 and 1960 Novelties, Inc. d/b/a/ Cindie's.

5 **IV. ORDER**

6 For the foregoing reasons, IT IS HEREBY ORDERED that SI's request for a temporary  
7 restraining order is DENIED. SI shall file a Notice of Hearing for a Preliminary Injunction to be  
8 set for the Court's next available hearing date. SI may rest on its earlier filed brief and evidence or  
9 may file a new brief with supporting evidence. In the event that SI files a new brief with  
10 supporting evidence, incorporation by reference to previously filed documents is not allowed.

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12 Dated: November 6, 2015

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14 BETH LABSON FREEMAN  
15 United States District Judge  
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