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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

ALBERT SANCHEZ, SR.,

Plaintiff,

vs.

ALBERT SANCHEZ, JR.; GARNETT
MCKEEN LABORATORY, INC.; EL-GEN
LLC; AMARC ENTERPRISES, INC.; ALO
INVESTMENTS, LLC.; et al.,

Defendants.

CASE NO. 10-CV-1628 JLS (RBB)

**ORDER: DENYING PLAINTIFF'S
EX PARTE APPLICATION FOR A
TEMPORARY RESTRAINING
ORDER AND/OR AN ORDER TO
SHOW CAUSE WHY A
PRELIMINARY INJUNCTION
SHOULD NOT BE ENTERED**

(Doc. No. 6)

Presently before the Court is Plaintiff's ex parte application for a temporary restraining order (TRO) and order to show cause why a preliminary injunction should not be entered. (Doc. No. 6 (Appl.)) Also before the Court is Defendant's opposition. (Doc. No. 7 (Opp'n)) Having fully considered the parties' arguments and the law, the Court **DENIES** Plaintiff's application.

FACTUAL BACKGROUND

The parties dispute virtually all of the relevant facts. Accordingly, the following factual background outlines the undisputed facts. Where a dispute of fact exists, the Court so indicates.

In 1995, Defendant Garnett McKeen Laboratory, Inc. (GML) introduced Plaintiff to a then-

1 new dietary supplement product, which came to be known as POLY-MVA.¹ (Doc. No. 6-2 (Albert
2 Sanchez, Sr. Decl.) ¶ 3.) POLY-MVA consists of “[a] proprietary blend of palladium, alpha lipoic
3 acid, vitamins B1, B2 and B12, and specific trace minerals and amino acids” (Doc. No. 8-1
4 (Albert Lee Sanchez Decl.) Ex. C.) “[POLY-MVA] is marketed as a dietary supplement that has the
5 ability to restore the nutrients lost and heal the damage that is common during treatments, diets[,] and
6 therapies.” (*Id.*)

7 After GML introduced Plaintiff to POLY-MVA, Plaintiff agreed to “assume the Sole
8 Worldwide Distribution rights” for the product (Albert Sanchez, Sr. Decl. ¶ 4 & Ex. 1) and
9 immediately began to market and sell it under the POLY-MVA mark (*id.* ¶ 6).² Plaintiff claims to
10 have marketed POLY-MVA through Advanced Medicine and Research Center (AMARC), a sole
11 proprietorship (*id.* ¶ 14); according to Defendants, Plaintiff marketed POLY-MVA through Defendant
12 AMARC Enterprises, Inc., a corporation formed with Plaintiff’s consent in 2002, and Advanced
13 Medicine Information Center (AMIC), the successor to the sole proprietorship AMARC (Albert Lee
14 Sanchez Decl. ¶¶ 12–17, 19 & Ex. C; Doc. No. 8-2 (McKeen Decl.) ¶ 3). Regardless of which entity
15 held the distribution rights, the parties agree that in 2008, Defendant El-Gen LLC, GML’s
16 manufacturing subsidiary (Albert Sanchez, Sr. Decl. ¶ 9), terminated the distribution agreement (*id.*
17 ¶ 10; McKeen Decl. ¶ 9 & Ex. D). In 2009, El-Gen and GML entered into a new distribution
18 agreement regarding POLY-MVA with AMARC Enterprises. (McKeen Decl. ¶ 12; Albert Lee
19 Sanchez Decl. ¶ 22 & Ex. E; Albert Sanchez, Sr. Decl. ¶ 10.)

20 According to Plaintiff, Defendant Albert Lee Sanchez secretly formed AMARC Enterprises
21 and ALO Investments, LLC in 2002. (Albert Sanchez, Sr. Decl. ¶¶ 14, 20.) Through ALO, Albert
22 Lee Sanchez allegedly fraudulently obtained trademark protection for the POLY-MVA mark. (*Id.*

24 ¹ The parties’ memoranda and declarations in support of and in opposition to the application
25 variously refer to the product as “POLY-MVA,” “Poly-MVA,” and “POLYMVA.” (*Compare* Doc.
26 No. 6-1 (Mem. ISO Appl.), at 1–12 (POLY-MVA), *and* Albert Sanchez, Sr. Decl. *passim* (same), *with*
27 Opp’n 3–7 (Poly-MVA and POLYMVA), *and* Albert Lee Sanchez Decl. *passim* (POLYMVA).) The
operative complaint refers to the product as “POLY-MVA” (*see* Doc. No. 5 (FAC) *passim*), and the
Court adopts that usage unless directly quoting another source.

28 ² According to Defendants, sometime thereafter, the Food and Drug Administration began
investigating certain statements Plaintiff made regarding POLY-MVA. (Albert Lee Sanchez Decl.
¶¶ 8, 20.)

1 ¶¶ 21, 23–24.) The United States Patent and Trademark Office subsequently canceled the registration
2 for the POLY-MVA mark. (*Id.* ¶¶ 24–27.) On April 27, 2010, ALO—again allegedly
3 fraudulently—began anew the registration process for the POLY-MVA mark. (*Id.* ¶¶ 28–29, 31.)
4 According to Plaintiff, Albert Lee Sanchez has used ALO’s status as registrant of the POLY-MVA
5 mark to force Plaintiff to purchase POLY-MVA only from Albert Lee Sanchez’s company,
6 presumably AMARC Enterprises. (*See id.* ¶ 35.) Plaintiff claims that Albert Lee Sanchez and ALO
7 never owned and were never entitled to register the POLY-MVA mark. (*Id.*)

8 Defendants vigorously dispute Plaintiff’s allegations. Defendants contend that AMARC
9 Enterprises and ALO were formed with Plaintiff’s knowledge and consent³ for the purpose of
10 insulating the POLY-MVA business from Plaintiff’s creditors. (Albert Lee Sanchez Decl. ¶¶ 9–12.)
11 “As part of this asset protection plan, the decision was made with the participation of Plaintiff and his
12 family that ALO Investments . . . would hold the trademark for the ‘POLYMVA’ name.” (*Id.* ¶ 23.)
13 According to Defendants, AMARC Enterprises employed Plaintiff⁴ as a consultant between 2002 and
14 2008, during which time Plaintiff sold POLY-MVA that he purchased from AMARC Enterprises. (*Id.*
15 ¶ 17.) However, when El-Gen and GML expressed their desire to enter into a new distribution
16 agreement precluding Plaintiff from making certain claims regarding POLY-MVA, Plaintiff “walked
17 away from the offer” and, apparently, AMARC Enterprises. (*Id.* ¶¶ 20–21.)

18 PROCEDURAL BACKGROUND

19 On August 4, 2010, Plaintiff filed his original complaint (Doc. No. 1), and on August 12, 2010,
20 the case was reassigned to this Court (Doc. No. 4).⁵ On August 14, 2010, Plaintiff filed his first
21 amended complaint, the operative complaint in this action. (Doc. No. 5.) On August 30, 2010,
22 Plaintiff filed the instant application.

23 On September 1, 2010, the Court denied Plaintiff’s application without prejudice because

25 ³ The contention that Plaintiff knew of and participated in the formation of AMARC
26 Enterprises is supported by a report Plaintiff authored in which he described himself as the “founder
of AMARC Enterprises.” (Albert Lee Sanchez Decl. Ex. A.)

27 ⁴ Defendants allegedly employed Plaintiff through AMIC, which succeeded to the sole
28 proprietorship AMARC. (*See* Albert Lee Sanchez Decl. ¶¶ 15, 17, 19.)

⁵ This case was originally assigned to the Honorable Thomas J. Whelan. (*See* Doc. No. 4.)

1 Plaintiff had served neither the complaint nor the application on Defendants, and the application did
2 not meet the requirements for the issuance of a TRO without notice. (Doc. No. 7.) The Court directed
3 Plaintiff to serve Defendants by September 7, 2010 and set a hearing on Plaintiff’s application for
4 September 16, 2010. (Doc. No. 7.) On September 13, 2010, Defendants filed their opposition to
5 Plaintiff’s application. (Doc. No. 8.) On September 15, 2010, the parties jointly moved for a thirty-
6 day continuance of the hearing on Plaintiff’s application to allow the parties to attempt to mediate the
7 dispute. (Doc. No. 12 (Joint Mot. to Continue).) On the same day, the Court granted the parties’ joint
8 motion and continued the hearing on Plaintiff’s application to October 28, 2010. (Doc. No. 13 (Order
9 Granting Joint Mot. to Continue).)

10 LEGAL STANDARD

11 Temporary restraining orders are governed by the same standard applicable to preliminary
12 injunctions. *See New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1347 n.2 (1977)
13 (Rehnquist, J.). “A plaintiff seeking a preliminary injunction must establish that he is likely to
14 succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief,
15 that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter*
16 *v. Natural Res. Def. Council, Inc. (NRDC)*, — U.S. —, 129 S. Ct. 365, 374 (2008) (citing *Munaf v.*
17 *Geran*, 553 U.S. 674, 128 S. Ct. 2207, 2218–19 (2008)); *see also Am. Trucking Ass’ns, Inc. v. City of*
18 *Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009). This is an “extraordinary remedy that may only
19 be awarded upon a clear showing that the plaintiff is entitled to such relief.” *NRDC*, 129 S.Ct. at 376.
20 This “clear showing” requires Plaintiff to show more than a mere “possibility” of irreparable harm,
21 but instead he must “demonstrate that irreparable injury is *likely* in the absence of an injunction.” *Id.*
22 at 375 (emphasis in original); *Am. Trucking Ass’ns*, 559 F.3d at 1052.

23 DISCUSSION

24 Plaintiff’s first amended complaint asserts eight state and federal causes of action arising from
25 Defendants’ use of the POLY-MVA marks. (*See* Doc. No. 5.) However, Plaintiff’s application only
26 addresses the merits of its first and third causes of action for trademark infringement and false
27 designation of origin, respectively. (*See* Mem. ISO Appl. 12–24.) Accordingly, the Court addresses
28

1 the propriety of a TRO⁶ only as it would pertain to those causes of action.

2 **I. Plaintiff Has Not Demonstrated a Likelihood of Success on His Claim for Infringement**
3 **of a Registered Mark**

4 Section 32 of the Lanham Act protects owners of registered trademarks against infringement.
5 See 15 U.S.C. § 1114 (“Any person who shall, without the consent of the *registrant*-- (a) use in
6 commerce any reproduction, counterfeit, copy, or colorable imitation of a *registered mark* in
7 connection with the sale, offering for sale, distribution, or advertising of any goods or services . . .
8 shall be liable in a civil action by the *registrant* . . .”) (emphasis added); see also *Reno Air Racing*
9 *Ass’n v., Inc. v. McCord*, 452 F.3d 1126, 1129 (9th Cir. 2006) (claim for infringement of registered
10 mark under § 1114; claim for infringement of unregistered mark under § 1125); *Toho Co. v. Sears,*
11 *Roebuck & Co.*, 645 F.2d 788, 792 (9th Cir. 1981) (distinguishing between claims for infringement
12 of registered trademarks and false designation of origin); *Coach, Inc. v. Asia Pacific Trading Co.*, 676
13 F. Supp. 2d 914, 924–25 (C.D. Cal. 2009) (same). Thus, registration is a prerequisite to maintaining
14 a trademark infringement action under section 32.

15 Plaintiff offers no evidence that he ever registered the POLY-MVA mark. To the contrary,
16 much of Plaintiff’s application centers around his allegations that Defendant Albert Lee Sanchez
17 “fraudulently submitted an application . . . for federal trademark registration [of the POLY-MVA
18 mark].” (Albert Sanchez, Sr. Decl. ¶ 7.) And the evidence Plaintiff submitted in support of his
19 application tends to indicate that, to the extent that the POLY-MVA mark is or was registered,
20 Plaintiff is or was not the registrant. (See Albert Sanchez, Sr. Decl. Ex. 4 (listing “Alo Investments”
21 as the owner of the word mark “POLYMVA”); *id.* Ex. 5 (listing “ALO Investments” as the applicant
22 for the word mark “POLYMVA”); *id.* Exs. 6, 7 (same).) Accordingly, the Court finds that Plaintiff
23 has not demonstrated a likelihood of success on his trademark infringement claim under section 32
24 of the Lanham Act.

25
26 ⁶ Through his application, Plaintiff requests both a TRO and an order to show cause why a
27 preliminary injunction should not be entered. (See Appl. 1–3.) For brevity’s sake and because TROs
28 are governed by the same standard applicable to preliminary injunctions, see *New Motor Vehicle Bd.*,
434 U.S. at 1347 n.2, this Order refers only to Plaintiff’s request for a TRO. However, its reasoning
applies with equal force to Plaintiff’s request for an order to show cause why a preliminary injunction
should not be entered.

1 **II. Plaintiff Has Not Demonstrated a Likelihood of Success on His Claim for Infringement**
2 **of an Unregistered Mark**

3 To prevail on a claim for infringement of an unregistered mark under section 43 of the Lanham
4 Act, 15 U.S.C. § 1125(a), a plaintiff must prove “(1) that it has a protectable ownership interest in the
5 mark; and (2) that the defendant’s use of the mark is likely to cause consumer confusion”⁷ *Dep’t*
6 *of Parks and Recreation v. Bazaar Del Mundo, Inc.*, 448 F. 3d 1118, 1124 (9th Cir. 2006).

7 A. Likelihood of Confusion

8 Defendants do not dispute that, if Plaintiff has a protectable ownership interest in the POLY-
9 MVA mark, Defendants’ use of the mark is likely to cause confusion. (Opp’n 8.) Rather, Defendants
10 contend that Plaintiff has no protectable ownership interest in the mark. (*Id.*) Accordingly, for the
11 purposes of this motion, the Court assumes without deciding that the likelihood of confusion
12 requirement is satisfied, *see generally AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348–49 (listing
13 factors courts weigh in considering the likelihood of confusion requirement), and limits its inquiry to
14 whether Plaintiff has a protectable ownership interest in the mark.

15 B. Protectable Ownership Interest

16 “It is axiomatic in trademark law that the standard test of ownership is priority of use. To
17 acquire ownership of a trademark it is not enough to have invented the mark first or even to have
18 registered it first; the party claiming ownership must have been the first to actually use the mark in
19 the sale of goods or services.” *Sengoku Works Ltd. v. RMC Int’l Ltd.*, 96 F.3d 1217, 1219 (9th Cir.
20 1996). In addition to prior use, the party claiming ownership must show “that its use of the marks was
21 continuous and uninterrupted.” *Dep’t of Parks & Recreation*, 448 F.3d at 1126 (citing *Chance v. Pac-*
22 *Tel Teletrac*, 242 F.3d 1151, 1157 (9th Cir. 2001)).

23 Plaintiff alleges—and Defendants do not dispute—that Plaintiff was the first to use the POLY-
24 MVA mark in the sale of goods. (*See* Albert Sanchez, Sr. Decl. ¶¶ 4–6 (stating that Plaintiff began
25 marketing and selling goods under the POLY-MVA mark in 1995); Albert Lee Sanchez Decl. ¶ 1

26
27 ⁷ In their opposition to Plaintiff’s application, Defendants cite the Sixth Circuit’s four-factor
28 trademark infringement inquiry. (*See* Opp’n 8 (citing *Borescopes R U.S. v. 1800Endoscope.com, LLC*,
2010 WL 2991042, at *7 (M.D. Tenn. July 26, 2010)).) However, the Court applies the Ninth
Circuit’s two-factor inquiry here and reminds Defendants of the perils of relying on out-of-circuit
authority.

1 (“Plaintiff . . . began the business of distributing the nutritional supplement distributed by him as
2 POLYMVA in 1995.”.) This finding, however, does not end the Court’s inquiry. Plaintiff alleges
3 that Defendant Albert Lee Sanchez formed ALO Investments without Plaintiff’s knowledge and “for
4 the purpose of using the LLC as the applicant/owner for fraudulently filing a POLYMVA trademark
5 application.” (Albert Sanchez, Sr. Decl. ¶ 20.) However, Defendants allege that ALO Investments
6 was formed with Plaintiff’s consent, and that Plaintiff agreed that ALO Investments would hold the
7 POLY-MVA mark. (Albert Lee Sanchez Decl. ¶¶ 14, 23.) Moreover, Defendants allege that Plaintiff
8 assisted Defendant Albert Lee Sanchez in applying for and obtaining registration for the mark
9 “POLYMVA” in ALO Investments’ name (*id.* ¶ 27), and that Plaintiff provided the date of first use
10 listed on the original application for the POLYMVA mark (*id.* ¶ 28; *see also* Albert Sanchez, Sr. Decl.
11 Exs. 4, 6). Thus, if the Court credits Defendants’ declarations and supporting evidence, it might find
12 that Plaintiff assigned to Defendants his right to use the POLY-MVA mark. *See Tillamook Cnty.*
13 *Creamery Ass’n v. Tillamook Cheese and Dairy Ass’n*, 345 F.2d 158, 161–62 (9th Cir. 1965) (holding
14 that trademark assignee enjoyed the rights of its predecessor-in-interest); *see also* 7 J. Thomas
15 McCarthy, *McCarthy on Trademarks and Unfair Competition* § 18:15 (2010) (“[A]n assignment is
16 binding so as to prevent the assignor from asserting an infringement claim against the assignee’s use
17 of the mark . . .”).

18 In light of the parties contradictory declarations and the evidence that accompanies them, the
19 Court cannot resolve the issue of whether Plaintiff has a protectable ownership interest in the POLY-
20 MVA mark without credibility determinations. Accordingly, the Court concludes that Plaintiff has
21 not demonstrated a likelihood of success on the merits of his claim under section 43(a) of the Lanham
22 Act. *See Yountville Investors, LLC v. Bank of America, NA*, 2009 WL 538667, at *2 (W.D. Wash.
23 Mar. 4, 2009) (finding likelihood of success on the merits not established in light of witnesses’
24 contradictory declarations).

25 **III. Plaintiff Has Not Established That He Is Likely to Suffer Immediate Irreparable Harm**
26 **in the Absence of Preliminary Relief**

27 Even assuming, *arguendo*, that Plaintiff had demonstrated a likelihood of success on the merits
28 of his claims, the Court would find that Plaintiff’s twenty-six-day delay in filing his TRO application

1 and his agreement to a continuance of the TRO hearing counsel against issuing a TRO. (See Joint
2 Mot. to Continue; Order Granting Joint Mot. to Continue.)

3 A plaintiff seeking a TRO “must demonstrate *immediate* threatened injury as a prerequisite
4 to preliminary injunctive relief.” *Caribbean Marine Servs. Co., Inc. v. Baldrige*, 844 F.2d 668, 674
5 (9th Cir. 1988) (emphasis added); accord *Oakland Tribune, Inc. v. Chronicle Publ’g Co.*, 762 F.2d
6 1374, 1377 (9th Cir. 1985); cf. *Miller ex rel. NLRB v. Cal. Pac. Med. Ctr.*, 991 F.2d 536, 544 (9th Cir.
7 1993) (“Plaintiff’s long delay before seeking a preliminary injunction implies a lack of urgency and
8 irreparable harm.” (quoting *Oakland Tribune*, 762 F.2d at 1377) (internal quotation marks omitted)).
9 Although a delay in seeking a TRO is not dispositive, it may tip the scales against the issuance of a
10 TRO. See *Miller*, 991 F.2d at 544; *Lydo Enters. v. City of Las Vegas*, 745 F.2d 1211, 1213 (9th Cir.
11 1984) (“A delay in seeking a preliminary injunction is a factor to be considered in weighing the
12 propriety of relief.”); *Dahl v. Swift Distrib., Inc.*, 2010 WL 1458957, at *4 (C.D. Cal. Apr. 1, 2010)
13 (finding that eighteen-day delay in filing TRO application “implic[d] a lack of urgency and irreparable
14 harm).

15 Two delays in this case weigh against issuing a TRO. First, although Plaintiff filed his original
16 complaint on August 4, 2010, he waited until August 30, 2010 to file the instant application. This
17 twenty-six-day delay, on its own, counsels against issuing a TRO. See *Dahl*, 2010 WL 1458957, at
18 *4. Second, after Plaintiff filed his application and the Court set a hearing on Plaintiff’s application,
19 Plaintiff agreed to a thirty-day continuance of the hearing so the parties could “attempt to mediate this
20 dispute” and resolve the matters alleged in the complaint and application. (Joint Mot. to Continue 2.)
21 Plaintiff’s agreement to a continuance of the TRO hearing suggests that any harm he might suffer in
22 the absence of preliminary relief is not “immediate[ly] threatened,” *Caribbean Marine*, 844 F.2d at
23 674, and seemingly contradicts his sworn statement in support of his application that his “funds will
24 be completely exhausted within two weeks without a Temporary Restraining Order.” (Albert
25 Sanchez, Sr. Decl. ¶ 45.) Accordingly, the Court finds that Plaintiff has not demonstrated that any
26 threatened injury that is sufficiently immediate to warrant the extraordinary relief of a TRO.⁸

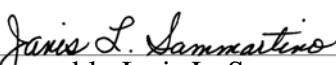
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28 ⁸ Having found that Plaintiff has failed to demonstrate a likelihood of success on the merits
of his claims or a likelihood of irreparable harm, the Court declines to address the remaining
requirements for a preliminary injunction. See *NRDC*, 129 S. Ct. at 374.

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CONCLUSION

For the reasons stated, the Court **DENIES** Plaintiff's application for a TRO and order to show cause why a preliminary injunction should not be entered.⁹

DATED: November 17, 2010



Honorable Janis L. Sammartino
United States District Judge

⁹ Further, the parties should bear in mind that this Court is perhaps not the proper forum for resolution of this familial dispute. The Court views this dispute as ripe for settlement and suggests that the parties avail themselves of the services of the able Magistrate Judge Ruben Brooks.