

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**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. 10CV1628 JLS (RBB)

**ORDER: (1) GRANTING
DEFENDANTS’ MOTION TO
DISMISS; (2) DENYING
PLAINTIFF’S EX PARTE
APPLICATION FOR A
TEMPORARY RESTRAINING
ORDER AND/OR ORDER TO
SHOW CAUSE WHY A
PRELIMINARY INJUNCTION
SHOULD NOT BE ENTERED**

(Doc. Nos. 15, 34)

Presently before the Court are Defendants’ motion to dismiss Plaintiff’s first amended complaint (Doc. No. 15 (MTD)) and 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. 34 (Appl.)). Also before the Court are the parties’ respective oppositions (Doc. Nos. 23 (Opp’n to MTD), 36 (Opp’n to Appl.)) and replies (Doc. Nos. 24 (Reply to MTD), 37 (Reply to Appl.)). Having considered the parties’ arguments and the law, the Court **GRANTS** Defendants’ motion to dismiss and **DENIES** Plaintiff’s application for a TRO.

BACKGROUND

The parties are well aware of the facts of this case. (See Doc. No. 22 (Order), at 1–3.) In summary, in 1995 Defendant Garnett McKeen Laboratory, Inc. (GML) introduced Plaintiff to a

1 dietary supplement product, which came to be known as POLY-MVA.¹ (Doc. No. 6-2 (Albert
2 Sanchez, Sr. Decl.) ¶ 3.) Plaintiff agreed to “assume the Sole Worldwide Distribution rights” for the
3 product (*id.* ¶ 4) and immediately began to market and sell it under the POLY-MVA mark (*id.* ¶ 6).
4 In 2008, however, Defendant El-Gen LLC, GML’s manufacturing subsidiary, terminated the
5 distribution agreement in favor of a new agreement with AMARC Enterprises, Inc. (AMARC). (*Id.*
6 ¶ 10; Doc. No. 34-5 (McKeen Decl.) ¶ 9.)

7 According to Plaintiff, Defendant Albert Lee Sanchez secretly formed AMARC and ALO
8 Investments, LLC in 2002. (FAC ¶ 21.) Through ALO, Albert Lee Sanchez allegedly fraudulently
9 obtained trademark protection for the POLY-MVA mark. (*Id.* ¶ 28.) The United States Patent and
10 Trademark Office subsequently canceled the registration for the POLY-MVA mark. (*Id.* ¶ 30.) On
11 April 27, 2010, ALO—again allegedly fraudulently—began anew the registration process for the
12 POLY-MVA mark. (*Id.* ¶ 33.) Plaintiff alleges that Albert Lee Sanchez and ALO never owned and
13 were never entitled to register the POLY-MVA mark. (*Id.* ¶ 35).

14 Against this background, Plaintiff asserts several trademark infringement claims (*see* FAC),
15 two of which Defendants ask the Court to dismiss (*see* Doc. No. 15-1 (Mem. ISO MTD), at 3–5). This
16 background also serves as the factual basis for Plaintiff’s application for a TRO enjoining Defendants
17 from refusing to sell POLY-MVA to him. (Mem. ISO Appl. 1, 13.)

18 LEGAL STANDARD

19 1. Motion to Dismiss

20 Federal Rule of Civil Procedure 12(b)(6) permits a party to raise by motion the defense that
21 the complaint “fail[s] to state a claim upon which relief can be granted,” generally referred to as a
22 motion to dismiss. The Court evaluates whether a complaint states a cognizable legal theory and
23 sufficient facts in light of Federal Rule of Civil Procedure 8(a), which requires a “short and plain
24 statement of the claim showing that the pleader is entitled to relief.” Although Rule 8 “does not

25
26 ¹ The parties’ memoranda and declarations in support of and in opposition to the motion to
27 dismiss and the application variously refer to the product as “POLY-MVA,” “Poly-MVA,” and
28 “POLYMVA.” (*Compare* Doc. No. 34-2 (Mem. ISO Appl.) *passim* (POLY-MVA), and *Opp’n* to
MTD *passim* (same), *with* *Opp’n* to Appl. *passim* (Poly-MVA), and Doc. No. 34-4 (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.

1 require ‘detailed factual allegations,’ . . . it [does] demand[] more than an unadorned, the-defendant-
2 unlawfully-harmed-me accusation.” *Ashcroft v. Iqbal*, — U.S. —, 129 S. Ct. 1937, 1949 (2009)
3 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). In other words, “a plaintiff’s
4 obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and
5 conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Twombly*,
6 550 U.S. at 555 (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). “Nor does a complaint suffice
7 if it tenders ‘naked assertion[s]’ devoid of ‘further factual enhancement.’” *Iqbal*, 129 S. Ct. at 1949
8 (citing *Twombly*, 550 U.S. at 557).

9 “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted
10 as true, to ‘state a claim to relief that is plausible on its face.’” *Id.* (quoting *Twombly*, 550 U.S. at
11 570); *see also* Fed. R. Civ. P. 12(b)(6). A claim is facially plausible if the facts pleaded “allow[] the
12 court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*,
13 129 S. Ct. at 1949 (citing *Twombly*, 550 U.S. at 556). That is not to say that the claim must be
14 probable, but there must be “more than a sheer possibility that a defendant has acted unlawfully.” *Id.*
15 Facts “‘merely consistent with’ a defendant’s liability” fall short of a plausible entitlement to relief.
16 *Id.* (quoting *Twombly*, 550 U.S. at 557). Further, the Court need not accept as true “legal conclusions”
17 contained in the complaint. *Id.* This review requires context-specific analysis involving the Court’s
18 “judicial experience and common sense.” *Id.* at 1950 (citation omitted). “[W]here the well-pleaded
19 facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has
20 alleged—but it has not ‘show[n]’—‘that the pleader is entitled to relief.’” *Id.*

21 **2. Ex Parte Application for TRO**

22 Temporary restraining orders are governed by the same standard applicable to preliminary
23 injunctions. *See New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1347 n.2 (1977).
24 “A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits,
25 that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of
26 equities tips in his favor, and that an injunction is in the public interest.” *Winter v. Natural Res. Def.*
27 *Council, Inc. (NRDC)*, 555 U.S. 7, 129 S. Ct. 365, 374 (2008) (citing *Munaf v. Geren*, 553 U.S. 674,
28 128 S. Ct. 2207, 2218–19 (2008)); *see also Am. Trucking Ass’ns, Inc. v. City of Los Angeles*, 559 F.3d

1 1046, 1052 (9th Cir. 2009). This is an “extraordinary remedy that may only be awarded upon a clear
2 showing that the plaintiff is entitled to such relief.” *NRDC*, 129 S. Ct. at 376. This clear showing
3 requires Plaintiff to show more than a mere “possibility” of irreparable harm, but instead he must
4 “demonstrate that irreparable injury is *likely* in the absence of an injunction.” *Id.* at 375; *accord Am.*
5 *Trucking Ass’ns*, 559 F.3d at 1052.

6 ANALYSIS

7 1. Motion to Dismiss

8 Defendants move to dismiss only two of Plaintiff’s trademark infringement claims: (1) the first
9 cause of action for violation of 15 U.S.C. § 1114 of the Lanham Act, and (2) the fifth cause of action
10 for violation of California Business and Professions Code section 14245. (*See* Mem. ISO MTD 3–5.)
11 Because Plaintiff concedes that the state claim is not viable (*see* Opp’n to MTD 8), the Court only
12 discusses the federal claim.

13 Under federal law, a person who uses “any reproduction, counterfeit, copy, or colorable
14 imitation of a registered mark” “without the consent of the registrant” is liable for trademark
15 infringement. 15 U.S.C. § 1114. Defendants read the “consent of the registrant” and “registered
16 mark” clauses to mean that a plaintiff can sue under § 1114 only if the plaintiff has a federally
17 registered trademark. (Mem. ISO MTD 2–3.) Because the FAC does not allege that Plaintiff has a
18 federally registered trademark, Defendants argue that Plaintiff has failed to state a claim under § 1114.
19 (*Id.* at 3.)

20 Defendants’ contention is well-taken. Under the Lanham Act, a plaintiff’s path to relief from
21 infringement depends on the nature of the trademark that the plaintiff holds. If the plaintiff holds a
22 federally registered mark, § 1114, which expressly contemplates a “registrant,” is appropriate. If,
23 however, the mark is not registered, § 1125(a), which does not contain a registration requirement, is
24 appropriate. The plain statutory language compels this conclusion, as does substantial case law. *See*,
25 *e.g.*, *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111, 117 (2004); *Toho Co.*
26 *v. Sears, Roebuck & Co.*, 645 F.2d 788, 792 (9th Cir. 1981); *Int’l Order of Job’s Daughters v.*
27 *Lindeburg & Co.*, 633 F.2d 912, 915 (9th Cir. 1980).

28 Plaintiff nevertheless argues that he has pleaded “all the essential elements [of a claim] under

1 the Lanham Act and/or common law trademark infringement.” (Opp’n to MTD 6.) Whether or not
2 that is true does not change the fact that Plaintiff’s first cause of action, which seeks relief under
3 § 1114 only, fails to state a claim. Accordingly, Plaintiff’s first cause of action is **DISMISSED**
4 **WITH PREJUDICE**. The fifth cause of action, which both parties agree fails, is also **DISMISSED**
5 **WITH PREJUDICE**.

6 **2. Ex Parte Application for a TRO**

7 Although the FAC contains eight causes of action, Plaintiff’s application only discusses the
8 merits of the seventh cause of action, which is for violation of California’s unfair competition statute,
9 California Business and Professions Code section 17200. (Mem. ISO Appl. 1.) Specifically, though,
10 the unfair competition that Plaintiff identifies in the application is a monopoly violation of the
11 Sherman Antitrust Act. (*Id.* at 5–6.) Accordingly, the Court addresses the propriety of a TRO² only
12 as it pertains to the monopoly claim.

13 At the outset, the Court assumes without deciding that Plaintiff likely would succeed on the
14 merits of the monopoly claim. That assumption can be made because, whatever the merits of the
15 monopoly claim, Plaintiff has not demonstrated, as he must, an “*immediate* threatened injury.”
16 *Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988) (emphasis added); *accord*
17 *Oakland Tribune, Inc. v. Chronicle Publ’g Co.*, 762 F.2d 1374, 1377–78 (9th Cir. 1985).

18 What prevents Plaintiff from establishing such immediacy is his five-month delay in applying
19 for this TRO. Although a delay in applying for a TRO is not necessarily dispositive, Plaintiff’s utter
20 “lack of urgency” tips the scales against issuing a TRO in this case. *See Miller ex rel. NLRB v. Cal.*
21 *Pac. Med. Ctr.*, 991 F.2d 536, 544 (9th Cir. 1993) (quoting *Oakland Tribune, Inc.*, 762 F.2d at 1377);
22 *Lydo Enters., Inc. v. City of Las Vegas*, 745 F.2d 1211, 1213 (9th Cir. 1984). Taken in context, the
23 belated nature of Plaintiff’s application is even more egregious— in his previous application for a
24 TRO, which the Court denied (*see* Order 1), Plaintiff advanced a completely different theory and

26 ² 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.*
of Cal., 434 U.S. at 1347 n.2, this Order only refers 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 excluded any mention of unfair competition. If Plaintiff was unconcerned with Defendants' allegedly
2 unfair practices then, there is no reason why he has cause to fear those same practices today.
3 Accordingly, the Court finds that Plaintiff has not demonstrated any threatened injury that is
4 sufficiently immediate to warrant the extraordinary relief of a TRO.

5 Having found that Plaintiff has failed to demonstrate a likelihood of irreparable harm, the
6 Court declines to address the remaining requirements of a preliminary injunction. *See NRDC*, 129 S.
7 Ct. at 374.

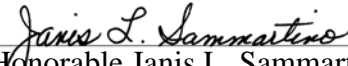
8 **CONCLUSION**

9 The Court **GRANTS** Defendants' motion to dismiss. Plaintiff's first and fifth causes of
10 action are **DISMISSED WITH PREJUDICE**. However, Plaintiff may file an amended
11 complaint for the limited purpose incorporating the factual allegations of the fifth cause of action
12 into the sixth cause of action within seven days of this Order being electronically docketed.

13 The Court **DENIES** Plaintiff's ex parte application for a temporary restraining order and
14 order to show cause why a preliminary injunction should not be entered.

15 **IT IS SO ORDERED.**

16
17 DATED: May 12, 2011

18 
19 _____
20 Honorable Janis L. Sammartino
21 United States District Judge
22
23
24
25
26
27
28