IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ANTARES PHARMA, INC., Plaintiff, v. GORDON SILVER LIMITED and VERITY PHARMACEUTICALS INC., Defendants.	C.A. No. 24-00634

MEMORANDUM ORDER[1]

Pending before this Court is Plaintiff Antares Pharma, Inc.'s ("Plaintiff") Motion for Temporary Restraining Order ("TRO") (D.I. 2) and Motion for Expedited Discovery (D.I. 3). For the reasons set forth below, Plaintiff's Motion for TRO is DENIED. The Court already granted Plaintiff's Motion for Expedited Discovery with respect to Interrogatories Numbers 1, 2, 6, 7 and/or 8. *See* D.I. 31. Plaintiff's Motion for Expedited discovery is otherwise DENIED.

A temporary restraining order is "an extraordinary and drastic remedy . . . that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972, 117 S.Ct. 1865, 138 L.Ed.2d 162 (1997) (quotation marks and citation omitted). The purpose of a temporary restraining order "is to preserve the status quo so that a reasoned resolution of a dispute may be had." *Procter & Gamble Co. v. Bankers Tr. Co.*, 78 F.3d 219, 226 (6th Cir. 1996); *see also Hope v. Warden York Cty. Prison*, 956 F.3d 156, 160 (3d Cir. 2020) ("TROs are ordinarily aimed at temporarily preserving the status quo."). The Third

[1] The Court writes for the benefit of the parties who are already familiar with the pertinent background facts.

Circuit has defined the status quo as "the last, peaceable, noncontested status of the parties." *Arrowpoint Capital Corp. v. Arrowpoint Asset Mgmt., LLC*, 793 F.3d 313, 318 (3d Cir. 2015) (quotation marks and citation omitted). The first two factors—likelihood of success on the merits and irreparable harm—are "gateway factors" that the moving party must establish to obtain relief. *Reilly v. City of Harrisburg*, 858 F.3d 173, 179 (3d Cir. 2017); *Greater Phila. Chamber of Com.*, 949 F.3d at 133. Unless the movant meets its burden on these two factors, a preliminary injunction is not warranted, regardless of whether the Court proceeds to consider the balance of equities and the public interest. *Reilly*, 858 F.3d at 179.

Plaintiff contends that a TRO is necessary here to prevent Defendants from breaching the Transition Services Agreement (hereinafter, the "TSA") and from continuing to infringe Plaintiff's trademark by using, offering for sale, or selling TLANDO products purchased under Plaintiff's label which contain Plaintiff's "trademarks, tradenames, logos, trade dress and [NDC] number." D.I. 5 at 7. The TSA, which assigned Defendants a limited license to "use, offer for sale and sell" the TLANDO products with Plaintiff's trademark, contained a provision limiting Defendants' license to a Sell-Off Period. *Id.* at 3-4. Pursuant to the TSA, the Sell-off Period ended on "the earlier of (i) [Gordon Silver's] receipt of finished product labeling suitable for use in selling the Purchased Inventory or (ii) April 30, 2024." *Id.* Thus, at the very latest, Defendants' right to sell Antares-labeled TLANDO expired on April 30, 2024. *Id.*

Plaintiff contends that, despite the clear terms of the TSA requiring Defendants to cease selling Antares-labeled TLANDO products after the expiration of the Sell-Off Period, Defendants have continued to make such sales. *Id.* Initially, Plaintiff believed that Defendants were selling Antares-labeled TLANDO directly to customers. *Id.* However, after Defendants produced two agreements between Defendant Verity and Integrated Commercialization

Solutions, LLC ("ICS"),[2] Plaintiff now contends that Defendants are using ICS, its agent, to engage in conduct that Defendants are themselves prohibited from undertaking—selling Antares-labeled TLANDO. D.I. 34 at 1-2. According to Plaintiff, the Agreements "reveal that despite Defendants' last-minute efforts to off-load TLANDO onto its third party logistics provider, Defendants still have the ability to control sales of TLANDO made by ICS, and that ICS serves as an agent of Verity pursuant to these Agreements." *Id.* at 1.

Defendants, on the other hand, have consistently maintained that they are neither currently selling nor in possession of Antares-labeled TLANDO. D.I. 34-1 at 56. Defendants represent that, on April 26, 2024, they executed a sale which transferred 1407 units of Antares-labeled TLANDO to ICS. D.I. 34-1 at 56. Defendants represent that no other units of Antares-labeled TLANDO remained in their possession after the sale, and they do not currently possess or offer to sell Antares-labeled TLANDO. *Id.*

While Plaintiff alleges that Defendants likely contracted with ICS "to end-run the TSA,"[3] Plaintiff provides no evidence disputing Defendants' claim "*that a legal sale of the Antares-labeled TLANDO occurred* and that ICS took ownership of it." D.I. 39 at 2 (emphasis in original). Indeed, while the Service Agreement appointed ICS as Verity's "exclusive agent," the Outsourcing Agreement was entered with ICS several years before ICS purchased the remaining units of Antares-labeled TLANDO, and the Amendment confirms that ICS would take sole possession and ownership of the units following the sale. D.I. 34, Ex. A, ¶ 1. Thus, the

[2] The agreements submitted by Defendants include the Commercial Outsourcing Services Agreement (hereinafter, the "Outsourcing Agreement") and First Amendment to the Outsourcing Agreement (hereinafter, the "Amendment," collectively with the Outsourcing Agreement, the "Agreements").
[3] D.I. 34 at 2.

Amendment altered the agency relationship by transferring title of the Antares-labeled TLANDO from Defendants to ICS. D.I. 34, Ex. B, ¶ 3(ii). Because the alleged sale to ICS has already occurred, Defendants contend that nothing remains for the Court to enjoin.[4] D.I. 39 at 2. The Court agrees.

While the TSA prohibited Defendants from selling or offering to sell Antares-labeled TLANDO following the expiration of the Sell-Off Period, the weight of the evidence shows that the alleged sale to ICS occurred before the Sell-Off Period expired. Indeed, Defendants maintain, and Plaintiff does not dispute, that Defendants made their last sale of Antares-labeled TLANDO to ICS on April 26, 2024. D.I. 34-1 at 56. Despite Plaintiff's claims that the sale was a "last minute effort to off-load TLANDO," nothing in the TSA prevented Defendants from selling off any remaining units of Antares-labeled TLANDO days before the end of the Sell-Off Period. D.I. 34 at 1. Finally, even if Defendants lacked the authority to sell their remaining units to ICS on April 26, Plaintiff has presented no evidence that Defendants currently possess, sell, or offer to sell Antares-labeled TLANDO. Thus, there is nothing for the Court to enjoin. *See Nutzz.com v. Vertrue Inc.*, No. CIV.A. 1231-N, 2005 WL 1653974, at *10 (Del. Ch. July 6, 2005) ("Because a preliminary injunction is an extraordinary form of equitable relief, it 'should not be granted . . . if the act complained of has already occurred.").[5]

---

[4] While Plaintiff alleges that Defendants attempt to conceal the true expiration date of the Sell-Off Period by refusing to identify the date they received the finished product labeling for TLANDO, Plaintiff also does not—and cannot— dispute that the Sell-Off Period has already expired. D.I. 34 at 3. Without any evidence that Defendants continue to possess Antares-labeled TLANDO, the Court agrees that the true expiration date of the Sell-Off Period is irrelevant to Plaintiff's motion for TRO as it does not dispute Defendants' claims that it no longer possesses Antares-labeled TLANDO.

[5] Further, on the current record, the Court cannot enjoin ICS, a non-signatory to the TSA, from selling Antares-labeled TLANDO. Assuming that ICS purchased the TLANDO and currently retains title and control of the purchased units, the Court agrees that any attempt by Plaintiff to

In denying Plaintiff's TRO request, the Court is not determining the final validity of Plaintiff's breach of contract or trademark infringement claims. Rather, the Court finds that Plaintiff has failed to show that it will suffer imminent and irreparable injury unless an injunction is granted. *See Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797, 801 (3d Cir.1989) ("In order to demonstrate irreparable harm the plaintiff must demonstrate potential harm which cannot be redressed by a legal or an equitable remedy following a trial. The preliminary injunction must be the only way of protecting the plaintiff from harm."). Indeed, while the Court acknowledges that some questions remain as to the exact relationship between Defendants and ICS,[6] Plaintiff is not entitled to a TRO merely because it has shown "a risk of irreparable harm" stemming from Defendants' sale to ICS mere days before the end of the Sell-Off Period. *Campbell Soup Co. v. ConAgra, Inc.*, 977 F.2d 86, 92 (3d Cir. 1992) (internal citations omitted). To prove that it is entitled to injunctive relief, Plaintiff "has the burden of proving a 'clear showing of immediate irreparable injury.'" *Id.* (internal citations omitted). On the record before the Court, Plaintiff has failed to meet its burden.[7]

"force a recall of all Antares-labeled TLANDO from the marketplace if [ICS] is selling it after April 30, 2024" would grant Plaintiff a benefit far more expansive than its contractual right to prohibit ***Defendants'*** sale of Antares-labeled TLANDO after the Sell-Off Period. D.I. 39 at 2. Additionally, under such circumstances, the First Sale Doctrine could prohibit Plaintiff from exerting control over ICS's sale of Antares-marked products. *Cf. Bill Blass, Ltd. v. SAZ Corp.*, 751 F.2d 152, 155 (3d Cir. 1984).

[6] The Court notes, for instance, Plaintiff's claims that "Medi-Span, a commercially available data compendia of pharmaceuticals available for sale, Verity is currently offering TLANDO for sale under its own NDC number and own label." D.I. 34 at 3. While this evidence supports Plaintiff's claims that Defendants "failed to meaningfully respond to Interrogatory No. 6," *id.*, this evidence does little to satisfy Plaintiff's burden of proving future irreparable harm.

[7] For similar reasons, the Court denies Plaintiff's motion for expedited discovery. D.I. 3. Plaintiff concedes that its request for expedited discovery "relate[s] to Defendants' receipt and use of their own label for TLANDO and any sales made under Antares' label following that date." D.I. 34 at 3. However, this evidence would not support Plaintiff's motion for TRO as the evidence relates to a date that has already passed and could not be used to prove that Defendants are likely to engage in future sales of Antares-labeled TLANDO. *See Woodford Eurasia Assets*

***

At Wilmington this 27th day of June 2024, IT IS HEREBY ORDERED that:

1. Plaintiff's Motion for Temporary Restraining Order (D.I. 2) is **DENIED.**

2. Plaintiff's Motion for Expedited Discovery (D.I. 3) is **GRANTED-IN-PART** and **DENIED-IN-PART**. The Court already granted Plaintiff's motion by ordering Defendants to respond in an expedited time to Interrogatories Numbers 1, 2, 6, 7 and/or 8. See D.I. 31. Defendants responded to those interrogatories on June 19, 2024. Plaintiff's Motion for Expedited Discovery is otherwise denied.

GREGORY B. WILLIAMS
U.S. DISTRICT JUDGE

Ltd. v. Lottery.com, Inc., No. CV 23-1317, 2023 WL 8005621, at *5 (D. Del. Nov. 17, 2023) (noting that "the timing and context of the discovery requests," weighed against granting the request where the relevant deadlines "have already passed"). Accordingly, any dispute over the expiration of the Sell-Off Period can be resolved in the ordinary course of discovery.