

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA

3
4 Gold Water Trading Corporation,
5 Plaintiff
6 v.
7 Jinro America, Inc.,
8 Defendant

Case No.: 2:18-cv-00257-JAD-VCF

**Order Denying Emergency Motion for
Temporary Restraining Order and
Preliminary Injunction**

[ECF No. 7]

9 Liquor wholesaler Gold Water Trading Corporation contends that it has an oral
10 exclusive-franchise agreement with supplier Jinro America, Inc. (JAI) to offer, sell, and
11 distribute HiteJinro Co., Ltd.-branded beer and soju alcoholic beverages in Nevada, and it sues
12 JAI under various contract and tort theories for allegedly terminating that franchise agreement in
13 violation of Nevada law.¹ Before this case was removed, Gold Water sought and obtained an
14 order from a Nevada state court temporarily restraining JAI from terminating the alleged
15 agreement or soliciting or doing business with any other wholesaler, and requiring JAI to fulfill
16 all purchase orders from Gold Water and to retract its purported notice terminating the franchise
17 agreement.² The state court's injunction automatically expired on February 23, 2018.³

18 Gold Water now moves on an emergency basis for a temporary restraining order identical
19 to the one that it obtained from the state court and, if granted, to convert that restraining order
20 into a preliminary injunction.⁴ I find that Gold Water has not met the standard for obtaining that
21 relief because it has not demonstrated that it is likely to succeed on, or that there are serious
22 questions going to, the merits of its claims. So, I deny Gold Water's motion in its entirety.

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25 ¹ ECF No. 1-2 at 4–16 (verified complaint).

26 ² *Id.* at 55–58 (state court's order granting emergency motion for TRO on OST).

27 ³ *See* ECF No. 7-1 at 4, ¶ 11.

28 ⁴ ECF No. 7.

1 **Discussion**

2 **A. Standard to obtain temporary restraining order**

3 The legal standard for obtaining a temporary restraining order and the legal standard for
 4 preliminary injunctive relief are “substantially identical.”⁵ In *Winter v. Natural Resources*
 5 *Defense Council, Inc.*, the Supreme Court clarified that the standards “require[] a party to
 6 demonstrate ‘that [it] is likely to succeed on the merits, than [it] is likely to suffer irreparable
 7 harm in the absence of preliminary relief, that the balance of equities tips in [its] favor, and that
 8 [a temporary restraining order] is in the public interest.’”⁶ But “if a plaintiff can show that there
 9 are ‘serious questions going to the merits’—a lesser showing that likelihood of success on the
 10 merits— then a [temporary restraining order] may still issue if the ‘balance of hardships tips
 11 sharply in the plaintiff’s favor,’ and the other two *Winter* factors are satisfied.”⁷

12 For this motion, my analysis begins and ends with the first *Winter* factor—whether Gold
 13 Water has demonstrated that it is likely to succeed on the merits of its claims. Gold Water sues
 14 JAI for: (1) breach of statutory rights under NRS Chapter 597; (2) breach of the franchise
 15 agreement; (3) contractual breach of the implied covenant of good faith and fair dealing; (4)
 16 tortious breach of the implied covenant of good faith and fair dealing; (5) intentional interference
 17 with prospective economic advantage; and (6) intentional interference with contractual
 18 relations.⁸ The common thread that runs through all of these claims is Gold Water’s allegation
 19 that, on or about October 22, 2015, it entered into an oral agreement with JAI to act as its
 20 exclusive wholesaler in Nevada for all HiteJinro-branded beer and soju alcoholic beverages.⁹ To

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 22 ⁵ See *Stuhlberg Intern. Sales Co. v. John D. Brush and Co.*, 240 F.3d 832, 839 n.7 (9th Cir.
 2001) (stating that the “analysis is substantially identical for the injunction and the TRO”).

23 ⁶ *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1127 (9th Cir. 2009) (quoting *Winter v. Nat. Res. Def.*
 24 *Council, Inc.*, 555 U.S. 7, 20 (2008)).

25 ⁷ *Shell Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d 1281, 1291 (9th Cir. 2013) (quoting with
 emphasis *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011)).

26 ⁸ ECF No. 1-2 at 9–13. Gold Water also asserts “claims” for declaratory and injunctive relief.
 27 *Id.* at 13–14.

28 ⁹ *Id.* at 6, ¶ 14.

1 show that this oral agreement exists, Gold Water relies on: (1) its verified complaint¹⁰; (2) the
2 affidavit of Kyoung H. Ur, who serves as Gold Water’s president, secretary, and director¹¹; (3)
3 the affidavit of Ben Chon, who serves as Gold Water’s operations manager¹²; and (3) the Nevada
4 Department of Taxation form wherein JAI purports to appoint Gold Water as a wholesaler under
5 NRS 369.386, which was signed by both entities in October 2015.¹³

6 In reviewing this evidence, I note that it is devoid of any facts showing how the oral
7 agreement was reached or who negotiated it on behalf of each entity. The evidence is also vague
8 about the oral agreement’s terms. Ur testifies that the ordinary course of the parties’ business
9 was for JAI to allow Gold Water to carry balances in excess of \$200,000.¹⁴ But he does not
10 testify that this is a term of the oral agreement, and no other evidence tends to show that it is a
11 term. Chon testifies that, since the state court’s restraining order, JAI has deviated from its usual
12 course of delivery by “requiring pre-payment of product and forcing Gold Water . . . to incur
13 freight charges and delays.”¹⁵ But neither Chon nor Ur testifies that these are terms of the oral
14 agreement, and no other evidence tends to show that they are. The most that I can discern from
15 Gold Water’s evidence is that the alleged oral agreement calls for Gold Water to serve as JAI’s
16 exclusive wholesaler in Nevada for HiteJinro-branded beer and soju alcoholic beverages.

17 JAI responds that there is no oral agreement. To make this point, it relies on: (1) the
18 declaration of Kyung Tae Kang, who is currently JAI’s vice president and was its general
19 manager from March 2004 to January 2017¹⁶; and (2) the declaration of Kyu Hun Lim, who was
20 JAI’s president, secretary, and treasurer from July 2014 to January 2017 and is currently the

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22 ¹⁰ *Id.* at 4–15.

23 ¹¹ ECF No. 7-1 at 7–11.

24 ¹² *Id.* at 13–14.

25 ¹³ *Id.* at 16.

26 ¹⁴ *Id.* at 9, ¶ 23–24.

27 ¹⁵ *Id.* at 14, ¶ 18.

28 ¹⁶ ECF No. 10.

1 president of HiteJinro Industry Co., Ltd., an affiliate of JAI's parent company HITEJINRO Co.,
2 Ltd., which is the brewer and distiller of the products at issue in this case.¹⁷ Both declarants state
3 without reservation that there is no oral agreement between JAI and Gold Water.¹⁸

4 JAI also provides a letter that Lim declares was sent by JAI to Gold Water on October 1,
5 2015.¹⁹ The letter informs Gold Water that the distributorship agreements between JAI and Hite
6 USA, Inc. have been terminated for cause and are no longer in effect.²⁰ Lim declares that this
7 letter was sent to approximately 20 wholesalers that were customers of Hite USA.²¹ The letter
8 explains that "Hite USA is no longer the distributor for HiteJinro beer or soju products in the
9 United States, and is no longer authorized to accept or fulfill purchase orders for HiteJinro beer
10 or soju products."²² "If you have a contract with Hite USA," the letter continues, "JAI will be in
11 touch shortly regarding replacing this contract with a contract with JAI. JAI will also follow-up
12 with each distributor regarding any regulatory actions required in your state for this transition,
13 such as brand registration and licenses."²³ The letter instructs that, from there forward, "all
14 purchase orders for HiteJinro beer and soju products should be placed directly with JAI and will
15 be fulfilled directly by JAI."²⁴ It explains that any purchase orders that Gold Water "placed with
16 either Hite USA or JAI will be fulfilled as usual[,] and "[b]ecause Hite USA is no longer the
17 seller for these products, JAI will be sending you invoices for these deliveries shortly. Please

18 ¹⁷ ECF No. 12.

19 ¹⁸ See ECF No. 10 at 4, ¶ 9; ECF No. 12 at 2–3, ¶ 4.

20 ¹⁹ ECF No. 12-1.

21 ²⁰ *Id.* at 3. Hite USA is the company that Gold Water had contracted with to serve as the
22 exclusive wholesaler of HiteJinro beer and soju alcoholic beverages in Nevada. See ECF No. 7-
1 at 7, ¶ 7. Kang declares that JAI contracted with Hite USA in 2007 for Hite USA to serve as
23 JAI's distributor for these products in the United States. ECF No. 10 at 3, ¶ 6. Hite USA
24 appears to be wholly separate from the HITEJINRO Co., Ltd. group of entities, of which JAI is a
part.

25 ²¹ ECF No. 12 at 2, ¶ 2.

26 ²² ECF No. 12-1 at 3.

27 ²³ *Id.*

28 ²⁴ *Id.*

1 make timely payment.”²⁵ I note that this letter makes no mention of exclusivity or even the State
2 of Nevada.²⁶

3 Gold Water jumps on this letter in its reply, and uses it as the basis to morph its theory
4 about the agreement’s form and terms. Gold Water asserts in its complaint and emergency
5 motion that the agreement is entirely oral. Indeed, Ur expressly testifies that “the Exclusive
6 Franchise Agreement between Gold Water Trading and JAI **was an oral agreement.**”²⁷ Yet, in
7 its reply, Gold Water hedges that the agreement is partially oral and partially written and, further,
8 that the written parts are contained in the 10/1/15 letter from JAI and the Hite USA-Gold Water
9 agreement.²⁸ Gold Water’s reply is also the first time that it asserts that JAI assumed Hite
10 USA’s rights and duties under the Hite USA-Gold Water agreement. I recognize that JAI
11 provided the 10/1/15 letter in response to the emergency motion, and that this letter might have
12 refreshed the Gold Water declarants’ memories or altered Gold Water’s counsel’s perception of
13 the available legal theories. But the fact remains that what Gold Water alleges and seeks with its
14 complaint and emergency motion—specific performance of an agreement that is entirely oral and
15 appears to have limited terms (i.e., exclusive-in-Nevada right to wholesale HiteJino-branded beer
16 and soju alcoholic beverages)—is entirely different from what it now contends about the
17 agreement in its reply. The Ninth Circuit has repeatedly stated that district courts “need not
18 consider arguments raised for the first time in a reply brief.”²⁹ To prevent any prejudice to JAI,

19 ²⁵ ECF No. 12-1 at 4.

20 ²⁶ *Id.* at 3–4.

21 ²⁷ ECF No. 7-1 at 9, ¶ 25 (emphasis added).

22 ²⁸ Compare ECF No. 1-2 at 7, ¶ 24 (alleging and defining the agreement as Gold Water’s “oral
23 agreement with JAI wherein JAI would directly act as the supplier . . . and Gold Water . . . would
24 be the exclusive wholesaler . . . in the State of Nevada (‘Exclusive Franchise Agreement’)”) and
25 ECF No. 7-1 at 9, ¶ 21 (declaring and defining the agreement as Gold Water’s “oral agreement
26 with JAI wherein JAI would directly act as the supplier . . . and Gold Water . . . would be the
27 exclusive wholesaler . . . in the State of Nevada (‘Exclusive Franchise Agreement’)”) with ECF
28 No. 17 at 4 (relying on the Hite USA-Gold Water agreement and 10/1/15 letter to argue that the
agreement “is permanent and contains all necessary terms”) and *id.* at 5 (arguing that “it is
already proved that JAI assumed the franchise agreement between Gold Water and Hite USA).

²⁹ *Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007) (citing *Koerner v. Grigas*, 328 F.3d
1039, 1048 (9th Cir. 2003)).

1 and because this case is in its infancy and I anticipate that this new evidence might cause Gold
2 Water to seek to amend its pleading, I decline to consider the arguments that are raised for the
3 first time in Gold Water's reply.

4 This leaves me with the fact that all of Gold Water's claims depend on its ability to
5 establish that it entered into a *purely oral* agreement with JAI to be its exclusive wholesaler of
6 HiteJinro-branded beer and soju alcoholic beverages in Nevada. Based on this record, I cannot
7 find that Gold Water has demonstrated that it is likely to succeed on the merits of establishing
8 the existence of such an agreement. Nor can I find that there are serious questions going to the
9 merits of the existence of such an agreement. Because the test for the relief of a temporary
10 restraining order requires satisfaction of all four *Winter* factors, the failure to satisfy any one of
11 them—as Gold Water has failed to demonstrate that it is likely to succeed on the merits of its
12 claims—requires denial of its motion for that relief.

13 **Conclusion**

14 Accordingly, IT IS HEREBY ORDERED that Gold Water's emergency motion for a
15 temporary restraining order and preliminary injunction [ECF No. 7] is **DENIED**.

16 Dated: March 6, 2018

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19 U.S. District Judge Jennifer A. Dorsey
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