

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
EASTERN DISTRICT OF CALIFORNIA

TREVOR L. SMITH,

Plaintiff,

v.

PAUL COUNTS; SCOTT BENNETT;
ERIC HOLMLUND; JASON BOYCE;
COUNT ON US LLC; and SMILING
LLAMA PRODUCTIONS LLC,

Defendants.

No. 2:20-cv-02441-TLN-JDP

ORDER

This matter is before the Court on Plaintiff Trevor L. Smith’s (“Plaintiff”) Motion to Proceed *in Forma Pauperis* and *Ex Parte* Motion for a Temporary Restraining Order (“TRO”) against Defendants Paul Counts (“Counts”), Scott Bennett (“Bennett”), Eric Holmlund (“Holmlund”), Jason Boyce (“Boyce”), Count on Us LLC, and Smiling Llama Productions LLC (collectively, “Defendants”). (ECF Nos. 2–3.) For the reasons set forth below, both of Plaintiff’s motions are GRANTED.

///
///
///
///

I. FACTUAL AND PROCEDURAL BACKGROUND

1 **I. FACTUAL AND PROCEDURAL BACKGROUND**
2 Plaintiff seeks damages and injunctive relief for alleged copyright infringement arising
3 from “the development, production, and post-production of a motion picture called
4 Unbelievers . . . which was written, produced, and directed by Plaintiff and filmed in and around
5 Sacramento, California.” (ECF No. 1 at ¶ 12.) Plaintiff wrote the novel *Unbelievers* (“Novel”) in
6 2012, which was published in 2013 and copyrighted under the number TXu001849048. (*Id.* at ¶
7 21.) Plaintiff subsequently wrote the screenplay for *Unbelievers* (“Screenplay”) based on the
8 Novel and copyrighted it under the number Pau003975095. (*Id.* at ¶ 22.) Plaintiff has been the
9 executive producer and producer for the Unbelievers motion picture (“Film”) since its inception,
10 and Plaintiff’s wife Kristi Smith (“Kristi”) became the second producer in 2013. (*Id.* at ¶¶ 23–
11 24.) In May 2014, Plaintiff met Counts’s wife, Kristen Counts (“Kristen”), and the following
12 month Kristen suggested that Plaintiff contact Counts for assistance with the Film. (*Id.* at ¶¶ 25–
13 26.) Plaintiff then invited Kristen to be a producer and Counts to be an executive producer and
14 producer. (*Id.* at ¶ 27.) Plaintiff is the sole copyright claimant for the pre-registration¹ of the
15 Film, under the number PRE000010799. (*Id.* at ¶ 12.)

16 Plaintiff met Counts for the first time in or around December 2014, when Counts and
17 Kristen flew to Sacramento to work with Plaintiff on a teaser for the Film. (*Id.* at ¶ 28.) In
18 September 2015, Plaintiff authorized Counts “to start Unbelievers Movie, LLC (‘UM
19 LLC’) . . . fully understanding and agreeing that UM LLC was to be a temporary company in
20 Washington [State] and Plaintiff would start the official [Unbelievers] movie company in
21 California.” (*Id.* at ¶ 29.) Thereafter, Plaintiff alleges UM LLC was registered in Washington
22 State as a temporary company in order to satisfy the Screen Actors’ Guild (“SAG”) requirements
23 and for banking purposes only.² (*Id.* at ¶¶ 20, 29, 31.) Plaintiff further alleges UM LLC was
24 collectively owned and managed by Plaintiff, Kristi, Kristen, and Counts. (*Id.* at ¶ 30.) Plaintiff

25 ¹ The U.S. Copyright Office allows for preregistration of “works that have had a history of
26 prerelease infringement. It focuses on the infringement of movies, recorded music, and other
27 copyrighted materials before copyright owners have had the opportunity to market fully their
28 products.” See Preregister Your Work, U.S. COPYRIGHT OFFICE, available at
<https://www.copyright.gov/prereg/> (last visited Dec. 13, 2020).

² UM LLC is not a party to this suit.

1 authorized Counts to draft the UM LLC Operating Agreement, which all managers signed. (*Id.* at
2 ¶ 32.) Plaintiff also authorized Counts to submit the SAG paperwork, which Counts signed in or
3 around October 2015 and swore under penalty of perjury that Plaintiff, Kristi, Kristen, and Counts
4 were all managers of UM LLC. (*Id.* at ¶¶ 32–34.) The UM LLC Operating Agreement
5 “evidences that no money, goods, services, property, intellectual property, or anything of value
6 was contributed to or promised to UM LLC by Plaintiff or any of its members.” (*Id.* at ¶ 35.)
7 Plaintiff authorized Counts to open an agreed-upon bank account for UM LLC in Washington
8 State in accordance with the UM LLC Operating Agreement. (*Id.* at ¶ 36.) Plaintiff further
9 alleges Counts “was fully aware and in agreement that the UM LLC bank account would be a
10 temporary account” until Plaintiff opened the official bank account in California. (*Id.*)

11 Plaintiff alleges Counts and Bennett³ filed a civil suit in or around January or February
12 2017 “that contained blatant and knowingly false claims against Plaintiff.” (*Id.* at ¶ 37.) Counts
13 and Bennett posted the civil suit online and “emailed the unverified complaint to [the
14 Unbelievers] cast and crew, causing swift and immediate severe and irreparable harm to
15 Plaintiff’s reputation, business, creative projects, physical and mental well-being and the well-
16 being of Plaintiff’s family.” (*Id.* at ¶ 38.) During the litigation of this civil suit, Plaintiff alleges
17 Defendants were “unlawfully editing” the Film and attempting to sell it, despite Plaintiff’s cease
18 and desist demands and assurance from Counts and Bennett’s attorney that neither of them would
19 violate Plaintiff’s legal rights to the Film. (*Id.* at ¶ 39.)

20 Plaintiff alleges Counts and Bennett voluntarily dismissed the suit in or around June 2019,
21 the day after Plaintiff informed Counts and Bennett’s attorney that he “intended to file a counter
22 lawsuit” against them. (*Id.* at ¶ 40.) On or around October 11, 2019, Plaintiff filed suit against
23 Counts, Bennett, and others with the Eastern District of California. (*Id.* at ¶ 41.) However,
24 Plaintiff subsequently dismissed this suit on or around July 27, 2020, based on his “shared
25 religious beliefs” with Counts and Bennett, believing they could resolve the matter out of court.

26
27 ³ Plaintiff does not introduce Bennett prior to this reference in his Complaint’s statement of
28 facts, nor does Plaintiff provide further information as to who Bennett is or how Bennett is related
to Plaintiff or Counts.

1 (*Id.* at ¶ 42.)

2 Plaintiff alleges Defendants have “continued to edit, display and try to sell [Unbelievers],”
3 “[w]ithout legal right, Plaintiff’s consent, and against Plaintiff’s repeated demands to Defendants
4 to cease and desist.” (*Id.* at ¶ 43.) On or around November 4, 2020, a Film cast member
5 informed Plaintiff of a December 2020 release date for the Film listed on the Internet Movie
6 Database (“IMDB”). (*Id.* at ¶ 44.) On or around November 6, 2020, Plaintiff called and left
7 voicemails for Counts and Bennett, in addition to sending them emails. (*Id.* at ¶ 45.) Plaintiff
8 asked to discuss “how [they] could possibly move forward together, and advised them again that
9 Defendants have no legal rights to work on or distribute [the Film].” (*Id.*) Plaintiff also notified
10 them legal action would be taken if they attempted to release the Film, but he received no
11 response. (*Id.*) On or around the same day, Counts, Bennett, Holmlund, Lago, and Kristen were
12 listed as producers on IMDB. (*Id.* at ¶ 46.)

13 Plaintiff called Counts and Bennett and sent emails to them again on or around December
14 4, 2020, to ask about the December 16, 2020 release date for the Film. (*Id.* at ¶ 47.) Plaintiff
15 notified Defendants that if he did not receive a response from them before Monday, December 7,
16 2020, then “Plaintiff would be forced to file a lawsuit against them.” (*Id.*) Neither Counts,
17 Bennett, nor Holmlund responded to Plaintiff. (*Id.*)

18 Plaintiff alleges “Defendants have unlawfully altered and used Plaintiff’s [Novel] and
19 [Screenplay], and backup copies of Plaintiff’s [Unbelievers] raw film footage to illegally create,
20 display, and market [the Film], set to be distributed and publicly released on December 16, 2020.”
21 (*Id.* at ¶ 48.) Plaintiff further alleges “Defendants intended to commit fraud against Plaintiff to
22 profit from the [Film] they had and have no legal right to edit, sell or distribute.” (*Id.* at ¶ 49.)

23 On December 9, 2020, Plaintiff filed a Complaint in this Court, alleging six claims for: (1)
24 copyright infringement; (2) contributory copyright infringement; (3) fraud; (4) breach of fiduciary
25 duty; (5) injunctive relief to restrain Defendants from sharing, displaying, and distributing the
26 Film; and (6) accounting of Defendants’ financial records pertaining to the Film. (*See* ECF No.
27 1.) On the same date, Plaintiff filed the instant Motions to Proceed *in Forma Pauperis* and for a
28 TRO. (ECF Nos. 2–3.)

II. STANDARD OF LAW

A TRO is an extraordinary remedy. The purpose of a TRO is to preserve the status quo pending a fuller hearing. *See* Fed. R. Civ. P. 65. In general, “[t]emporary restraining orders are governed by the same standard applicable to preliminary injunctions.” *Aiello v. One West Bank*, No. 2:10-cv-0227-GEB-EFB, 2010 WL 406092, at *1 (E.D. Cal. Jan. 29, 2010) (internal citations omitted); *see also* E.D. Cal. L.R. 231(a).

Injunctive relief is “an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (citing *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam)). “The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held.” *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981); *see also Costa Mesa City Emps. Ass’n v. City of Costa Mesa*, 209 Cal. App. 4th 298, 305 (2012) (“The purpose of such an order is to preserve the status quo until a final determination following a trial.”); *GoTo.com, Inc. v. Walt Disney, Co.*, 202 F.3d 1199, 1210 (9th Cir. 2000) (“The status quo ante litem refers not simply to any situation before the filing of a lawsuit, but instead to the last uncontested status which preceded the pending controversy.”).

“A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest.” *Winter*, 555 U.S. at 20. A plaintiff must “make a showing on all four prongs” of the *Winter* test to obtain a preliminary injunction. *All. for the Wild Rockies v. Cottrell (Alliance)*, 632 F.3d 1127, 1135 (9th Cir. 2011). In evaluating a plaintiff’s motion for preliminary injunction, a district court may weigh the plaintiff’s showings on the *Winter* elements using a sliding-scale approach. *Id.* A stronger showing on the balance of the hardships may support issuing a preliminary injunction even where the plaintiff shows that there are “serious questions on the merits . . . so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest.” *Id.* Simply put, a plaintiff must demonstrate, “that [if] serious questions going to the merits were raised [then] the balance of hardships [must] tip[] sharply” in the plaintiff’s favor

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.