

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA

3 CANNABIS SCIENCE, INC.,)
4)
5 Plaintiff,)
6 vs.)
7 MOHAMMAD ISAM AFANEH, RPH,)
8 Defendant.)
9)

Case No.: 2:13-cv-00114-GMN-CWH

ORDER

10 Before the Court is Plaintiff Cannabis Science, Inc.’s Ex Parte Emergency Motion for
11 Temporary Restraining Order (ECF No. 4), filed contemporaneously with its Complaint (ECF
12 No. 1) on January 22, 2013.

13 **I. BACKGROUND**

14 Plaintiff is a Nevada Corporation with its principal offices in Colorado Springs,
15 Colorado, and is “in the business of manufacturing, marketing and distributing legal
16 cannabis/hemp products worldwide.” (See Compl., ECF No. 1; Management Agreement, Ex. B
17 to Mot. TRO, ECF No. 4.) Plaintiff alleges that Defendant Mohammad Isam Afaneh, RPh, “is
18 a United States citizen who was domiciled in the State of Florida,” and has directed its
19 Summons to Defendant’s Florida address. (Compl., ECF No. 1.)

20 Plaintiff’s six causes of action arise out of a business arrangement between the parties in
21 which Defendant was contracted to serve as Plaintiff’s Chief Operating Officer (“COO”) and to
22 receive shares of Plaintiff’s common stock: (1) breach of contract; (2) breach of the implied
23 covenant of good faith and fair dealing; (3) unjust enrichment; (4) common law fraud; (5)
24 constructive fraud; and (6) replevin. (Compl., ECF No. 1; Management Agreement, Ex. B &
25 Management Bonus Agreement, Ex. E to Mot. TRO, ECF No. 4.)

1 With the instant motion, Plaintiff requests that the Court issue a temporary restraining
2 order prohibiting Defendant from transferring or registering the shares of Plaintiff's common
3 stock previously issued to Defendant pursuant to the parties' Management Bonus Agreement
4 (Ex. E to Mot. TRO, ECF No. 4-1).

5 **II. LEGAL STANDARD**

6 Federal Rule of Civil Procedure 65 governs preliminary injunctions and temporary
7 restraining orders, and requires that a motion for temporary restraining order include "specific
8 facts in an affidavit or a verified complaint [that] clearly show that immediate and irreparable
9 injury, loss, or damage will result to the movant before the adverse party can be heard in
10 opposition," as well as written certification from the movant's attorney stating "any efforts
11 made to give notice and the reasons why it should not be required." Fed. R. Civ. P. 65(b).

12 Temporary restraining orders are governed by the same standard applicable to
13 preliminary injunctions. See *Cal. Indep. Sys. Operator Corp. v. Reliant Energy Servs., Inc.*, 181
14 F.Supp. 2d 1111, 1126 (E.D. Cal. 2001). Furthermore, a temporary restraining order "should
15 be restricted to serving [its] underlying purpose of preserving the status quo and preventing
16 irreparable harm just so long as is necessary to hold a hearing, and no longer." *Granny Goose
17 Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers Local No. 70*, 415 U.S. 423, 439 (1974).

18 A preliminary injunction may be issued if a plaintiff establishes: (1) likelihood of
19 success on the merits; (2) likelihood of irreparable harm in the absence of preliminary relief; (3)
20 that the balance of equities tips in his favor; and (4) that an injunction is in the public interest.
21 *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). "Injunctive relief [is] an
22 extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is
23 entitled to such relief." *Id.* at 22.

24 The Ninth Circuit has held that "serious questions going to the merits' and a hardship
25 balance that tips sharply toward the plaintiff can support issuance of an injunction, assuming

1 the other two elements of the Winter test are also met.” Alliance for the Wild Rockies v.
2 Cottrell, 632 F.3d 1127, 1132 (9th Cir. 2011).

3 “In deciding a motion for a preliminary injunction, the district court ‘is not bound to
4 decide doubtful and difficult questions of law or disputed questions of fact.’” *Int’l. Molders’ &*
5 *Allied Workers’ Local Union No. 164*, 799 F.2d 547, 551 (9th Cir. 1986) (quoting *Dymo Indus.,*
6 *Inc. v. Tapeprinter, Inc.*, 326 F.2d 141, 143 (9th Cir. 1964)).

7 **III. DISCUSSION**

8 In an eleven-line paragraph, Plaintiff argues that “Plaintiff has a significant chance of
9 success on the merits.” (Mot. TRO, 8:3-13, ECF No. 4.) However, Plaintiff provides no legal
10 support for this argument, and merely summarizes the allegations from the Complaint. The
11 Complaint itself is vague as to the circumstances from which the causes of action arise, and
12 appears to refer to documents that have only been provided to the Court as exhibits to the
13 instant motion.

14 As discussed below, Plaintiff has failed to show a strong likelihood of success on the
15 merits or serious questions going to the merits. Accordingly, Plaintiff has not shown that it is
16 entitled to the requested relief, and the motion must be denied.

17 **Breach of Contract**

18 In Nevada, to succeed on a claim for breach of contract a plaintiff must show: (1) the
19 existence of a valid contract; (2) that plaintiff performed or was excused from performance; (3)
20 that the defendant breached the terms of the contract; and (4) that the plaintiff was damaged as
21 a result of the breach. See Restatement (Second) of Contracts § 203 (2007); *Calloway v. City of*
22 *Reno*, 993 P.2d 1259, 1263 (Nev. 2000) (“A breach of contract may be said to be a material
23 failure of performance of a duty arising under or imposed by agreement”). Here, Plaintiff has
24 provided only an excerpt of the Management Agreement, and a copy of the Management Bonus
25 Agreement that is unsigned by Defendant. (See Management Agreement, Ex. B, Management

1 Bonus Agreement, Ex. E to Mot. TRO, ECF No. 4.) Accordingly, it is unclear whether
2 Plaintiff has a likelihood of success on the merits of this claim, and whether recovery of the
3 shares is a remedy to which Plaintiff is entitled upon success on the merits.

4 **Breach of the Implied Covenant of Good Faith and Fair Dealing**

5 To succeed on a claim for breach of the covenant of good faith and fair dealing, Plaintiff
6 must show that: (1) Plaintiff and Defendant were parties to an agreement; (2) Defendant owed a
7 duty of good faith to the Plaintiff; (3) Defendant breached that duty by performing in a manner
8 that was unfaithful to the purpose of the contract; and (4) Plaintiff's justified expectations were
9 denied. *Perry v. Jordan*, 900 P.2d 335, 338 (Nev. 1995) (per curiam). In Nevada, an implied
10 covenant of good faith and fair dealing exists in every contract, *Consol. Generator–Nevada,*
11 *Inc. v. Cummins Engine Co., Inc.*, 971 P.2d 1251, 1256 (Nev. 1998) (per curiam), and a
12 plaintiff may assert a claim for its breach if the defendant “deliberately countervenes the
13 intention and spirit of the contract,” *Morris v. Bank of Am. Nev.*, 886 P.2d 454, 457 (Nev. 1994)
14 (internal quotation marks omitted). Here, as discussed above, Plaintiff has provided
15 insufficient basis for the Court to find a likelihood of success on the merits of this claim,
16 particularly where the validity and the terms of the contracts are unclear.

17 **Unjust Enrichment**

18 “An action based on a theory of unjust enrichment is not available when there is an
19 express, written contract, because no agreement can be implied when there is an express
20 agreement.” *Leasepartners Corp. v. Robert L. Brooks Trust*, 942 P.2d 182, 187 (Nev. 1997)
21 (per curiam). Thus the doctrine of unjust enrichment only “applies to situations where there is
22 no legal contract but where the person sought to be charged is in possession of money or
23 property which in good conscience and justice he should not retain but should deliver to
24 another [or should pay for].” *Id.* Here, since Plaintiff appears to base the claims on two written
25 contracts, the Court cannot find that Plaintiff has shown a likelihood of success on the merits of

1 this cause of action.

2 **Fraud**

3 To succeed on a claim for fraud or intentional misrepresentation, a plaintiff must show:
4 (1) a false representation by the defendant that is made with either knowledge or belief that it is
5 false or without sufficient foundation; (2) an intent to induce another's reliance; and (3)
6 damages that result from this reliance. See *Nelson v. Heer*, 163 P.3d 420, 426 (Nev. 2007).
7 Furthermore, a claim of "fraud or mistake" must be alleged "with particularity." Fed. R. Civ. P.
8 9(b). A complaint alleging fraud or mistake must include allegations of the time, place, and
9 specific content of the alleged false representations and the identities of the parties involved.
10 See *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007) (per curiam). Here, the Court
11 cannot find that Plaintiff has shown a likelihood of success on this cause of action since the
12 circumstances of Defendant's alleged fraud are incompletely and vaguely alleged in the
13 Complaint.

14 **Replevin**

15 "Replevin" is "[a]n action for the repossession of personal property wrongfully taken or
16 detained by the defendant, whereby the plaintiff gives security for and holds the property until
17 the court decides who owns it." *Black's Law Dictionary* 1413 (9th ed. 2009). In Nevada,
18 replevin is governed by Section 17.120 of Nevada Revised Statutes. Plaintiff states no other
19 legal basis for his claim for replevin. Accordingly, and as discussed above, the Court cannot
20 find that Plaintiff has shown a likelihood of success on the merits of this cause of action.

21 Here, Plaintiff has not demonstrated a likelihood of success or serious questions going to
22 the merits on these causes of action. Furthermore, Plaintiff's attorney has not submitted written
23 certification stating "any efforts made to give notice and the reasons why it should not be
24 required" pursuant to Federal Rule of Civil Procedure 65(b)(1)(B). Plaintiff has also failed to
25 provide "specific facts in an affidavit or a verified complaint [that] clearly show that immediate

1 and irreparable injury, loss, or damage will result to the movant before the adverse party can be
2 heard in opposition.” See Fed. R. Civ. P. 65(b)(1)(A). Accordingly, this Court may not issue a
3 temporary restraining order without written or oral notice to Defendant. For these reasons and
4 because Plaintiff has failed to make a clear showing of entitlement to the requested relief, the
5 motion will be denied.

6 **IV. CONCLUSION**

7 **IT IS HEREBY ORDERED** that Plaintiff’s Ex Parte Emergency Motion for
8 Temporary Restraining Order (ECF No. 4) is **DENIED**.

9 **DATED** this 23rd day of January, 2013.

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13 Gloria M. Navarro
14 United States District Judge
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