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8 **United States District Court**  
9 **Central District of California**  
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11 EARTH GEN BIOFUEL INC., a Nevada  
12 corporation,

13 Plaintiff,

14 v.

15 JONATHAN FINK, an individual; DOES  
16 1 through 50, inclusive,  
17 Defendants.  
18

Case № 2:16-cv-07161-ODW (SS)

**ORDER DENYING PLAINTIFF'S  
EX PARTE APPLICATION FOR  
TEMPORARY RESTRAINING  
ORDER [27]**

19 **I. INTRODUCTION**

20 Before the Court is Plaintiff Earth Gen Biofuel Incorporated's ex parte  
21 application for a temporary restraining order to enjoin Defendant Jonathan Fink from  
22 making further sales in its stock and to freeze his assets pending resolution of this  
23 case. (ECF No. 27.) For the following reasons, the Court **DENIES** the application.<sup>1</sup>

24 **II. FACTUAL BACKGROUND**

25 Plaintiff is a Nevada corporation headquartered in Los Angeles, California.  
26 (Compl. ¶ 1, ECF No. 1.) Defendant is a resident of Los Angeles County. (*Id.* ¶ 2.)  
27

28 <sup>1</sup> After carefully considering the papers filed in support of the application, the Court deems the matter appropriate for decision without oral argument. Fed. R. Civ. P. 78; C.D. Cal. L.R. 7-15.

1 On September 23, 2016, Plaintiff filed this case alleging: (1) violations of Securities  
2 Exchange Act Section 10(b) and Rule 10b-5; (2) breach of fiduciary duty; (3) unjust  
3 enrichment; and (4) common law fraud. (Compl. ¶¶ 13–36.) Plaintiff filed this ex  
4 parte application for a temporary restraining order on January 19, 2017, seeking to  
5 enjoin Defendant from making further sales in its stock and to freeze Defendant’s  
6 assets pending resolution of this case. (Appl. 15, ECF No. 27.) Defendant filed an  
7 opposition to Plaintiff’s application on January 20, 2017. (ECF Nos. 29–30.)  
8 Because the parties have presented very different versions of the facts in their  
9 submissions, the Court summarizes both versions below.

10 **A. Plaintiff’s Version**

11 On September 25, 2013, Defendant approached Plaintiff’s chief executive  
12 officer, George Shen, about helping to register Plaintiff as a publicly traded  
13 corporation. (Shen Decl. ¶ 2, ECF No. 27.) Shen thereafter hired Defendant as a  
14 consultant. (*Id.* ¶ 3.) However, Shen never made Defendant an officer or employee of  
15 Plaintiff. (*Id.*)

16 Shen indicates that on “several occasions,” Plaintiff forged Shen’s name, issued  
17 himself and other investors stock, and then sold the stock for his personal benefit.<sup>2</sup>  
18 (*Id.* ¶¶ 5, 12.) On April 28, 2016, and June 8, 2016, Defendant told Plaintiff’s  
19 shareholder, Mark Andres, that he needed some of his stock to finance Plaintiff’s  
20 operations. (*Id.* ¶¶ 6–7.) Believing that the proceeds from these sales would be  
21 returned to the company, Andres agreed to surrender a significant number of his  
22 shares. (*Id.* ¶ 8.) Defendant then sold that stock for his personal benefit and failed to  
23 remit any portion of the proceeds to Plaintiff. (*Id.* ¶¶ 6–7.) After the April 28, 2016  
24 incident, Defendant forged Shen’s signature to issue new shares of Plaintiff’s stock.  
25 (*Id.* ¶ 5.)

26 On July 13, 2016, and July 17, 2016, Defendant convinced Shen to infuse funds  
27 into investor relations. (*Id.* ¶¶ 13, 15.) This drove up the value of Plaintiff’s stock.

28 \_\_\_\_\_  
<sup>2</sup> Shen suggests that Defendant last engaged in forgery on July 22, 2016. (*Id.* ¶ 12.)

1 (*Id.* ¶¶ 10, 14.) Once the stock had increased in value, Defendant sold “blocks” of his  
2 shares. (*Id.*) Sale of Defendant’s shares drove the value of Plaintiff’s shares back  
3 down. (*Id.* ¶ 16.)

4 At some point in October 2016, Defendant attempted to remove the restrictive  
5 ledger from “additional stock.”<sup>3</sup> (*Id.* ¶ 18.) He represented to “Corporate Stock  
6 Transfer” that Plaintiff had given him authorization to do so. (*Id.*)

### 7 **B. Defendant’s Version**

8 Defendant asserts that he met Shen in March 2012. (Fink Decl. ¶ 2.) Shen  
9 sought Defendant’s advice about registering one of his companies as a publically  
10 traded corporation. (*Id.*) Shen then formed Earth Gen Biofuel Incorporated on  
11 August 28, 2012. (*Id.*) That same day, Shen issued Defendant 1,440,000<sup>4</sup> shares of  
12 stock in Plaintiff for \$1,000. (*Id.* ¶ 3.) At its peak, this issuance equated to roughly  
13 1.64 percent of all outstanding shares in the corporation. (*Id.*) Defendant claims that  
14 this was the only time he was issued shares of Plaintiff’s stock. (*Id.*)

15 Defendant served as secretary of the corporation from August 28, 2012, to  
16 September 25, 2012. (*Id.* ¶ 2.) On September 25, 2012, Defendant resigned that post  
17 and in October 2012 became a consultant for the corporation. (*Id.*)

18 Defendant categorically denies that Andres ever surrendered shares to him on  
19 June 8, 2016. (*Id.* ¶ 8.) Defendant further asserts that he never sold “any” shares  
20 “owned by Mark Andres.” (*Id.*) Additionally, he claims not to have received  
21 “proceeds” from any sale of Andres’ shares. (*Id.*) Defendant also denies forging  
22 Shen’s signature and issuing shares to investors for his personal benefit. (*Id.* ¶ 9;  
23 Opp’n 3, ECF No. 29.)

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27 <sup>3</sup> It is unclear whether this activity occurred before or after Shen was served with the complaint on  
October 16, 2016. (*See* ECF No. 10.)

28 <sup>4</sup> This figure represents the total number of shares Defendant purchased on August 28, 2012, after  
several reissuances and a stock split. (Fink Decl. ¶ 6.)

1 Further, Defendant denies that his motivation for encouraging the infusion of  
2 funds into investor relations was a desire for personal gain. (*Id.* ¶ 10.) He claims that  
3 such investment was necessary for Plaintiff’s growth. (*Id.*)

4 Lastly, Defendant denies representing to “Corporate Stock Transfer” that  
5 Plaintiff had given him authority to remove restrictive ledgers from certain stocks.  
6 (*Id.* ¶ 11.) He alleges that owners of stock with restrictive ledgers may, under  
7 Securities and Exchange Commission (“SEC”) guidelines, legally ask a transfer agent  
8 to remove such ledgers. (*Id.*)

9 **LEGAL STANDARD**

10 “An application for a temporary restraining order involves the invocation of a  
11 drastic remedy which a court of equity ordinarily does not grant, unless a very strong  
12 showing is made of a necessity and desirability of such action.” *Youngstown Sheet &*  
13 *Tube Co. v. Sawyer*, 103 F. Supp. 978, 980 (D.D.C. 1952). The standard for granting  
14 a temporary restraining order “is identical to the standard for issuing a preliminary  
15 injunction.” *Brown Jordan Intern. v. Mind’s Eye Interiors, Inc.*, 236 F. Supp. 2d  
16 1152, 1154 (D. Haw. 2002).

17 Pursuant to Federal Rule of Civil Procedure 65, a court may grant preliminary  
18 injunctive relief in order to prevent “immediate and irreparable injury.” Fed. R. Civ.  
19 P. 65(b). To obtain this relief, the plaintiff must establish: (1) a likelihood of success  
20 on the merits; (2) a likelihood that he will suffer irreparable harm if the preliminary  
21 relief is not granted; (3) that the balance of equities tips in his favor; and (4) that the  
22 injunction is in the public interest. *See Winter v. Natural Res. Def. Council, Inc.*, 555  
23 U.S. 7, 20 (2008). In the Ninth Circuit, the *Winter* factors may be evaluated on a  
24 sliding scale: “serious questions going to the merits, and a balance of hardships that  
25 tips sharply toward the plaintiff can support issuance of a preliminary injunction, so  
26 long as the plaintiff also shows that there is a likelihood of the irreparable injury and  
27 that the injunction is in the public interest.” *Alliance for the Wild Rockies v. Cottrell*,  
28 632 F.3d 1127, 1135 (9th Cir. 2011) (internal quotations omitted).

1 **III. DISCUSSION**

2 **A. Likelihood of Success on the Merits**

3 The primary issue in this case is whether Defendant committed fraud. A  
4 defendant may be held liable for securities fraud under Rule 10b-5 where he directly  
5 or indirectly uses any means or instrumentality of interstate commerce, or the mails or  
6 any facility of any national securities exchange, (a) to employ any device, scheme, or  
7 artifice to defraud, or (b) to make any untrue statement of a material fact, or (c) to  
8 engage in any act, practice, or course of business which operates or would operate as a  
9 fraud or deceit upon any person, in connection with the purchase or sale of any  
10 security. 17 C.F.R. § 240.10b-5. A defendant may be held liable for fraud under  
11 California law where he makes: “(1) a misrepresentation (false representation,  
12 concealment, or nondisclosure); (2) with knowledge of its falsity (or scienter); (3)  
13 with the intent to defraud; (4) that caused justifiable reliance; and (5) resulting  
14 damage.” *Robinson Helicopter Co., Inc. v. Dana Corp.*, 34 Cal. 4th 979, 990 (2004).

15 If the assertions in Plaintiff’s declaration are true, then Plaintiff possesses a fair  
16 likelihood of success on the merits as to its securities fraud claim, if not its common  
17 law fraud claim as well. Plaintiff allegedly issued himself and others stock by forging  
18 the name of Plaintiff’s CEO George Shen. (Shen Decl. ¶ 5.) He then sold those  
19 shares for his own benefit. (*Id.*) This is securities fraud plain and simple; use of a  
20 deceitful or manipulative device in connection with the subsequent sale of securities.  
21 *SEC v. Fehn*, 97 F.3d 1276, 1289 (9th Cir. 1996). Further, Plaintiff alleges that  
22 Defendant made false statements to obtain shares from Mark Andres, and then sold  
23 those shares for his personal benefit without remitting any of the proceeds to Plaintiff.  
24 (Shen Decl. ¶¶ 6–7.) Again, this may constitute securities fraud because there were  
25 false statements made in connection with a subsequent sale of securities. *Fehn*, 97  
26 F.3d at 1289.

27 However, Defendant disputes Plaintiff’s account in its entirety. Defendant  
28 asserts that he never forged the signature of Plaintiff’s CEO to issue himself stock,

1 and that all of his stock in Plaintiff was purchased lawfully on August 28, 2012. (Fink  
2 Decl. ¶¶ 3, 9; Opp’n 3.) He also claims that Andres never provided him with stock  
3 and that he never sold “any” stock “owned by” Andres. (*Id.* ¶ 8.)

4 Where there is a limited evidentiary record and material facts are in dispute,  
5 courts have generally considered the likelihood of success factor to weigh against  
6 granting a temporary restraining order. *See Purdum v. Wolfe*, No. C–13–04816 DMR,  
7 2014 WL 171546, at \*6 (N.D. Cal. Jan. 15, 2014) (“As the record before the court is  
8 limited, the court declines to resolve this factual dispute, and accordingly finds that  
9 Plaintiffs have failed to demonstrate a likelihood of success on the merits on this  
10 claim.”); *Hansen Beverage Co. v. Vital Pharm., Inc.*, No. 08–CV1545 IEG (POR),  
11 2008 WL 5427601, at \*4 (S.D. Cal. Dec. 30, 2008) (finding that the plaintiff failed to  
12 demonstrate a likelihood of success where there was a limited record and disputes of  
13 material fact).

14 Almost every material fact in this case is disputed. Additionally, each side has  
15 offered only a single declaration concerning the substantive issues, leaving the Court  
16 with an extremely limited record from which to render a decision. As such, the Court  
17 follows the lead of other district courts in the Ninth Circuit and finds that the  
18 likelihood of success factor weighs against granting the temporary restraining order.

### 19 **B. Immediate and Irreparable Injury**

20 The Court also finds that the immediate and irreparable injury factor weighs  
21 against granting the temporary restraining order. To begin, the parties seem to agree  
22 that Plaintiff has not engaged in any additional forgery since July 2016 or fraud of any  
23 kind since October 2016 when he tried to remove the restrictive ledgers from certain  
24 securities without Plaintiff’s permission. (Shen Decl. ¶¶ 12, 18.) Further, there is no  
25 indication that Plaintiff has continued to sell off his existing stock since this case was  
26 filed. Thus, it is unclear why a temporary restraining order is necessary at *this*  
27 particular point in time, more than three months after Defendant was served with the  
28 complaint.

1 Plaintiff also presents scant evidence that the potential harm would be  
2 irreparable. In the context of evaluating whether to grant a temporary restraining  
3 order, harm is irreparable where it extends beyond pecuniary injury. *See Regents of*  
4 *Univ. of Cal. v. Am. Broad. Cos., Inc.*, 747 F.2d 511, 519 (9th Cir. 1984) (“a party is  
5 not entitled to a preliminary injunction unless he or she can demonstrate more than  
6 simply damages of a pecuniary nature”).

7 Here, Plaintiff attempts to dress up straightforward monetary injury as a loss of  
8 corporate goodwill. While Ninth Circuit case law allows for the possibility that  
9 damage to a corporation’s goodwill may be “irreparable,” Plaintiff has not put forth  
10 any evidence, beyond conclusory statements in the application itself, that Defendant’s  
11 actions have caused or will cause meaningful damage to its reputation. (Appl. 9–10);  
12 *see also Herb Reed Enters., LLC v. Florida Entm’t Mgmt., Inc.*, 736 F.3d 1239, 1250  
13 (9th Cir. 2013) (“Evidence of loss of control over business reputation and damage to  
14 goodwill could constitute irreparable harm.”). The complaint and Plaintiff’s  
15 declaration are completely devoid of any mention of corporate goodwill or  
16 reputational injury; these submissions do not indicate that investors view Plaintiff less  
17 favorably or that they are less inclined to invest in Plaintiff as a result of Defendant’s  
18 alleged activities. *See* Fed. R. Civ. P. 65(b)(1) (an *ex parte* application for a  
19 temporary restraining order must be supported by specific facts in “an affidavit or a  
20 verified complaint”). Because there does not appear to be an immediate risk of  
21 irreparable harm, the Court finds that the second factor weighs against granting the  
22 temporary restraining order.

### 23 **C. Balance of Equities**

24 The third factor balances potential harm to the plaintiff in the absence of a  
25 temporary restraining order with potential harm to the defendant if a temporary  
26 restraining order is granted. *Johnson v. Macy*, 145 F. Supp. 3d 907, 920 (C.D. Cal.  
27 2015). The Court finds that the potential harm to Defendant outweighs the potential  
28 harm to Plaintiff. While there is a chance Plaintiff might experience additional

1 downward pressure on its share price if Defendant continues to sell off his stock,  
2 Defendant's small stake in the corporation makes it unlikely that his activities are  
3 capable of delivering a fatal blow to Plaintiff.<sup>5</sup> (See Fink Decl. ¶ 3.) Conversely, a  
4 total asset freeze is likely to have a crippling effect on Defendant. It is unclear how  
5 Defendant, as an individual, would be able to cover his day-to-day expenses for the  
6 duration of this potentially year-long lawsuit if such a freeze is put in place. For these  
7 reasons, the Court finds that the balance of equities factor weighs against granting the  
8 temporary restraining order.

9 **D. The Public Interest**

10 Neither party discusses the public interest factor. As the other three factors  
11 weigh against granting the temporary restraining order, the Court finds it unnecessary  
12 to address the public interest factor. See *Melamed v. Herold*, No.  
13 215CV05524ODWJEM, 2015 WL 6870009, at \*4 (C.D. Cal. Nov. 6, 2015) (holding  
14 that it is not necessary to address the public interest factor where the other three  
15 *Winter* factors weigh against granting a temporary restraining order).

16 **IV. CONCLUSION**

17 Because three out of the four *Winter* factors weigh against granting a temporary  
18 restraining order, Plaintiff has not made "a clear showing that [he] is entitled to such  
19 relief." 555 U.S. at 22. The Court therefore **DENIES** Plaintiff's application for a  
20 temporary restraining order. (ECF No. 27.)

21  
22 **IT IS SO ORDERED.**

23 January 24, 2017

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26 **OTIS D. WRIGHT, II**  
27 **UNITED STATES DISTRICT JUDGE**

28 <sup>5</sup> The Court also finds that it is unlikely Plaintiff would be able to engage in additional forgery or fraud now that Defendant is aware of his tactics.