UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

San Francisco Division

DANIEL FISHER,

Plaintiff,

v.

BIOZONE PHARMACEUTICALS, INC., et al.,

Defendants.

Case No.12-cv-03716-LB

PRELIMINARY INJUNCTION

[Re: ECF No. 95]

INTRODUCTION

This case is before the court on the parties' crossing motions to enforce a 2013 settlement agreement.[1] The court issued an order on March 23, 2017, in which it reserved decision on plaintiff Daniel Fisher's request to enjoin defendant CoCrystal Pharma, Inc. from foreclosing on the commercial property involved in this dispute.[2] The court asked the parties to further brief the "irreparable injury" requirement for injunctions.[3] The parties have since filed those briefs.[4] The

[1] Motions – ECF Nos. 95–96. Record citations are to material in the Electronic Case File ("ECF"); pinpoint citations are to the ECF-generated page numbers at the top of documents.

[2] Order – ECF No. 113.

[3] *Id.* at 2, 10, 14.

[4] ECF Nos. 115–16.

court now grants the plaintiff's motion and enjoins the defendant from foreclosing on the property (580 Garcia Avenue; Pittsburg, California) until a final decision on the merits of the plaintiff's claim for breach of the settlement agreement.

ANALYSIS

This discussion assumes that the reader is familiar with the court's previous orders and thus with the relevant aspects of this case. With its most recent order (ECF No. 113) as a background, the court would now make only two points.

1. Irreparable Injury and the Status Quo

The court appreciates the defendant's point that investment properties are not automatically deemed unique. Money will generally compensate for lost interests in such real estate, so that the loss is not "irreparable" within the meaning of injunctive law. The plaintiff insists that the commercial property in question here is unique: emphasizing, for example, that the lease on the property requires the tenant to pay both the mortgage and an additional $3500 monthly. This "guarantees [the] mortgage payment and provides a positive monthly return."[5] The plaintiff also points to the property's federal and state certifications as a "Good Manufacturing Practices" facility.[6] But these are economic or even purely financial characteristics of the property and its associated lease. Their loss presumably could be replaced by dollars. With respect to the good-manufacturing certification, the plaintiff implicitly recognizes this, arguing that this feature "adds significantly to the property's valu[e], and sales price with the right buyer."[7] The plaintiff also claims that foreclosure would cause injuries other than lost equity. But everything that the plaintiff identifies in this respect — "enforcement of . . . [the] personal guarant[i]es . . . , damages for . . . emotional distress and even punitive damages" — is (as the plaintiff's own language suggests) regularly compensated for by money damages.

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[5] ECF No. 116 at 4.

[6] *Id.* at 4, 6.

[7] *Id.* at 6.

Nevertheless, the court thinks that roughly three things make it "likely" that a foreclosure now might inflict irreparable harm. *See Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008) (plaintiff seeking injunction must show she is "likely to suffer irreparable harm"). First, this is an odd situation. Exactly because it breached the lease and settlement agreement, the defendant was in a position to buy the property note, and is now empowered to foreclose on the property — and perhaps to enforce the personal guaranties against the plaintiff and his wife. Those harms (even if they could be remedied with money) thus spring in an unusual way from a different, underlying injury (the contractual breach) that was inflicted by the same defendant. Second, some facts remain uncertain. What is the property's value? What is owed on the note? What has been paid and what not? Which is to say, exactly why — for what specific failings — is the plaintiff in default? All this remains less than pellucid. Without better clarity on these points, the more judicious course is to expect that foreclosure may bring some harm that could not be adequately recompensed by money. Third, the purpose of a preliminary injunction is exactly to preserve the status quo until a full determination on the merits clarifies a situation and makes apparent what remedy, if any, should follow. *E.g., Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1200 (9th Cir. 1980) ("[T]he basic function of a preliminary injunction is to preserve the status quo ante litem pending a determination of the action on the merits."); *Tanner Motor Livery, Ltd. v. Avis, Inc.*, 316 F.2d 804, 808 (9th Cir. 1963). With those last two considerations in mind, it is worth recalling that, "[i]n deciding a motion for a preliminary injunction, the district court 'is not bound to decide doubtful and difficult questions of law or disputed questions of fact.' " *Int'l. Molders' & Allied Workers' Local Union No. 164 v. Nelson,* 799 F.2d 547, 551 (9th Cir. 1986) (quoting *Dymo Indus., Inc. v. Tapeprinter, Inc.,* 326 F.2d 141, 143 (9th Cir. 1964)).

Considering all this, the court finds that the plaintiff has shown that a foreclosure would "likely" cause him irreparable harm.

2. The Equities Favor the Plaintiff

On the record before it, the court finds that equity favors the plaintiff more markedly than the

court previously thought. This changes the court's earlier finding.[8] The defendant is in a position to foreclose on the property only because it breached the settlement agreement (when it assigned the lease to MusclePharm). The court still does not infer bad faith from that breach. (In this respect the court reaffirms its earlier discussion.[9]) Nevertheless, allowing the foreclosure to go forward would allow the defendant to take advantage of its own breach — and that foreclosure could harm the plaintiff much more seriously than a preliminary injunction will harm the defendant. The plaintiff moreover claims that the lease has been assigned again. This is concerning. If it is true, this development would further flout the intent of the settlement agreement. An additional assignment may also further complicate the relief that can ultimately be granted. Will the court have to unwind a transaction? Will it have to address the problem of bona fide purchasers? A further assignment may also mean that there really is no way to preserve the pre-suit status quo.[10]

Preliminarily barring the foreclosure may thus be the least the court can do to avoid further irreversible developments. Equity must at least hesitate before letting a party so drastically exploit its own contractual breach. Taking this whole situation into view, the court thinks that equity weighs heavily in favor of preliminarily enjoining the foreclosure.

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[8] *See* Order – ECF No. 113 at 10 (finding that equities "probably tip slightly in the plaintiff's favor").

[9] *Id.* at 10–11 ("[A] breach of contract does not itself constitute or imply bad faith or tortious misconduct.").

[10] "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 . . . .'" *GoTo.com, Inc. v. Walt Disney Co.*, 202 F.3d 1199, 1210 (9th Cir. 2000) (quoting *Tanner Motor Livery,* 316 F.2d at 809 (quoting in turn *Westinghouse Elec. Corp. v. Free Sewing Mach. Co.,* 256 F.2d 806, 808 (7th Cir. 1958)). Thus, in a trademark-infringement suit, "the status quo ante litem existed before Disney began using its allegedly infringing logo." *GoTo.com*, 202 F.3d at 1210. Here, the last "uncontested" moment was probably before CoCrystal assigned the lease. An additional assignment (beyond MusclePharm) would take us still further away from that status quo — and so gives another reason for generally applying the brakes to this situation.

CONCLUSION

Defendant CoCrystal Pharma, Inc. is enjoined from foreclosing on the property located at 580 Garcia Avenue in Pittsburg, California until further order of this court. Both parties must continue making whatever normal payments they are currently required to make under the note and lease. This injunction does not entitle the plaintiff, for example, to stop making monthly loan payments. The parties are ordered not to interfere with any third party's paying or meeting its other obligations under the lease. The parties may otherwise continue to prepare their respective claims: the plaintiff for breach of the lease and settlement agreement; defendants Honig and Brauser for breach of the settlement agreement's non-disparagement clause.

The court sets this matter for a case-management conference on April 27, 2017 at 11:00 a.m. The parties must file a joint case-management statement with their proposed next steps to address matters that remain unresolved after this order and the order at ECF No. 113. The joint statement must be filed by April 20, 2017.

IT IS SO ORDERED.

Dated: April 5, 2017

LAUREL BEELER
United States Magistrate Judge

United States District Court
Northern District of California