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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 SAN DIEGO COMIC CONVENTION, a
12 California non-profit corporation,
13 Plaintiff,
14 v.
15 DAN FARR PRODUCTIONS, a Utah
16 limited liability company; DANIEL
17 FARR, an individual; and BRYAN
18 BRANDENBURG, an individual,
19 Defendants.

Case No.: 14-CV-1865 AJB (JMA)

**ORDER DENYING DEFENDANTS'
EX PARTE APPLICATION TO
STAY ENFORCEMENT OF
JUDGMENT**

(Doc. No. 553.)

19 Presently before the Court is Defendants' ex parte application to stay enforcement
20 of judgment. (Doc. No. 553.) Plaintiff opposes the motion. (Doc. No. 560.) As explained
21 more fully below, the Court **DENIES** Defendants' ex parte application to stay enforcement
22 of judgment.
23

24 **BACKGROUND**

25 The Court is already well-versed as to the events leading up to the institution of this
26 action. Thus, for the purposes of this Order, the Court will only provide a narrow review
27 of this lawsuit's factual and procedural background.

28 On August 7, 2014, Plaintiff San Diego Comic Convention ("SDCC") filed a lawsuit

1 against Defendants Dan Farr Productions, LLC (“DFP”), Daniel Farr, and Bryan
2 Brandenburg (collectively, “Defendants”) alleging two causes of action: (1) Federal
3 Trademark Infringement, 15 U.S.C. § 1114; and (2) False Designation of Origin, 15 U.S.C.
4 § 1125(a). (*See generally* Doc. No. 1.) On August 23, 2018, this Court entered final
5 judgment, awarding SDCC both monetary and injunctive relief. (Doc. No. 553-1 at 2; *see*
6 *generally* Doc. Nos. 538, 543.) In relevant part, the injunction enjoined Defendants from
7 the following:

- 8 1. The use of SDCC’s three trademarks asserted in this case,
9 any confusingly similar marks, or any phonetic
10 equivalents, in the name of any comic or popular arts
11 convention or event or in connection with the promotion,
12 advertising, products or marketing of any comic or popular
13 arts convention or event.
- 14 2. The use or operation of any social media site (i.e.
15 Facebook, Twitter, Instagram, Pinterest, or Snapchat) that
16 incorporates into the name of any comic arts, popular
17 fiction, or subject related event, any of SDCC’s three
18 trademarks asserted in this case, any confusingly similar
19 marks, or any phonetic equivalents.
- 20 3. Registering or using a domain name that incorporates any
21 of SDCC’s three trademarks asserted in their case, any
22 confusingly similar mark or any phonetic equivalents in
23 relation to any comic arts or popular fiction conventions
24 or subject related events or in such a way that would lead
25 consumers to believe that DFP is sponsored by or related
26 to SDCC.

27 (Doc. No. 538 at 14–15.) The final judgment was in the amount of \$3,982,486.84. (Doc.
28 No. 543.) On September 14, 2018, Defendants appealed the judgment to the Ninth Circuit.
(*See generally* Doc. No. 549.)

On September 18, 2018, Defendants filed the present matter, their ex parte motion
to stay enforcement of judgment. (Doc. No. 553.) This Order follows.

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1 **LEGAL STANDARD**

2 **A. Modification or Waiver of the Bond Requirement**

3 Federal Rule of Civil Procedure 62(d) permits a stay of the execution of a final
4 judgment pending appeal if the moving party obtains a supersedeas bond. “The bond may
5 be given upon or after filing the notice of appeal or after obtaining the order allowing the
6 appeal. The stay takes effect when the court approves the bond.” Fed. R. Civ. P. 62(d). The
7 Court does have “inherent discretionary authority in setting supersedeas bonds,” *Rachel v.*
8 *Banana Republic, Inc.*, 831 F.2d 1503, 1505 n.1 (9th Cir. 1987), and may even “waive the
9 bond requirement if it sees fit.” *Townsend v. Holman Consulting Corp.*, 881 F.2d 788, 796-
10 97 (9th Cir. 1989), *vacated en banc on other grounds*, 929 F.2d 1358 (9th Cir. 1990).

11 “When a party wishes a court to depart from the usual requirement of a full security
12 supersedeas bond, the burden is on the moving party to show reasons for the departure
13 from the normal practice.” *Salameh v. Tarsadia Hotel*, No. 09-CV-2739-GPC (BLM),
14 2015 WL 13158486, at *2 (S.D. Cal. May 19, 2015) (internal citations omitted). “Although
15 the Ninth Circuit has not articulated what factors should be considered when determining
16 whether to waive the bond requirements, courts within the circuit have often considered
17 those laid out in *Dillon v. City of Chicago*, 866 F.2d 902 (7th Cir. 1988).” *Schutz v. City*
18 *of San Diego*, 13-CV-2992-CAB (KSC), 2018 WL 2018041, at *2 (S.D. Cal. Apr. 30,
19 2018) (citing *ThermoLife Int’l, LLC v. Myogenix*, Case No.: 13-CV-651-JLS (MDD), 2018
20 WL 1001095, at *1 (S.D. Cal. Feb. 21, 2018) (“In determining whether to waive the posting
21 of a bond, the Court considers what is known as the *Dillon* factors”); *Salameh*, 2015 WL
22 13158486, at *2 (citing *Dillon* factors); *Kranson v. Fed. Express Corp.*, No. 11-CV-5826-
23 YGR, 2013 WL 6872495, at *1 (N.D. Cal. Dec. 31, 2013) (“Courts in the Ninth Circuit
24 regularly use the *Dillon* factors in determining whether to waive the bond requirement”).
25 The *Dillon* factors are as follows:

- 26 (1) the complexity of the collection process; (2) the amount of
27 time required to obtain a judgment after it is affirmed on appeal;
28 (3) the degree of confidence that the district court had in the
availability of funds to pay the judgment; (4) whether the

1 defendant's ability to pay the judgment is so plain that the costs
2 of a bond would be a waste of money; and (5) whether the
3 defendant is in such a precarious financial situation that the
4 requirement to post a bond would place other creditors of the
5 defendant in an insecure position.

5 *Dillon*, 866 F.2d at 904-07.

6 B. Modification or Stay of the Injunction

7 Federal Rule of Civil Procedure 62(c) permits a court to “suspend, modify, restore,
8 or grant an injunction,” while an appeal is pending from a final judgment that grants an
9 injunction. To determine whether a stay pending appeal under Rule 62(c) should be
10 granted, the court must evaluate the following four *Hilton* factors: “(1) whether the stay
11 applicant has made a strong showing that he is likely to succeed on the merits; (2) whether
12 the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will
13 substantially injure the other parties interested in the proceeding; and (4) where the public
14 interest lies.” *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987).

15 **DISCUSSION**

16 Defendants' ex parte application requests that the Court reduce the amount of the
17 bond or waive the bond requirement as well as modify or stay the injunction. (Doc. No.
18 553.)

19 A. Modification or Waiver of the Bond Requirement

20 Defendants request that the Court set the bond amount sufficient to secure only the
21 jury's \$20,000 damages award, waive the bond requirement as to the fee award, and stay
22 execution of the fee award pending appeal without a supersedeas bond. (*See generally* Doc.
23 No. 553-1.) Defendants contend that “DFP's representatives have made efforts to obtain a
24 supersedeas bond covering the entire amount of the judgment, including the fee awards,
25 but without success.” (*Id.* at 7.) SDCC asserts that if the Court reduces the bond amount or
26 stays enforcement of the judgment, it will be unprotected and likely will never be able to
27 collect the full judgment amount from Defendants if Defendants are unsuccessful on
28 appeal. (Doc. No. 560 at 3.)

1 First, the Court notes that Defendants have not provided the Court with any evidence
2 regarding their contention that sureties will not accept DFP's "going-concern value" as
3 collateral. (Doc. No. 553-1 at 7.) Defendants' affidavits provided in support simply state
4 that sureties will not accept the going-concern value of DFP as collateral. (Doc. No. 553-4
5 at 3; Doc. No. 553-5 at 4.) Defendants have made no indication of their efforts nor have
6 they provided any support from a bond broker or any objective third party as to whether
7 DFP's going-concern value is sufficient collateral. Therefore, the Court declines to set
8 bond in an amount sufficient to secure only the jury's \$20,000 damages award.

9 Second, the Court finds that the *Dillon* factors do not weigh in favor of waiving the
10 bond requirement. Based on Defendants' ex parte application, the Court is not confident in
11 Defendants' ability to pay the judgment if they are unsuccessful on appeal, and further,
12 Defendants' ability to pay the judgment is not so plain that the costs of a bond would be a
13 waste of money. *See Dillon*, 866 F.2d at 904-07. Defendants plainly admit that "[n]et
14 proceeds from this year's event are healthy but not enough to pay (or bond) the attorney-
15 fees award." (Doc. No. 553-1 at 7.) Further, Defendants do not offer real evidence to
16 establish that they are in such a precarious financial situation that the requirement to post
17 a bond would place other creditors of Defendants in an insecure position. *See Dillon*, 866
18 F.2d at 904-07. Rather, Defendants claim that the net proceeds are needed from this year's
19 event to fund next year's event. (Doc. No. 553-1 at 7.) Defendants also assert that DFP will
20 be deprived of the resources necessary to prosecute its appeal. (*Id.* at 8.) Again, Defendants
21 do not provide the Court with financial statements or any evidence to support their
22 conclusory statements. Further, Defendants have been able to conduct their business and
23 plan events during the course of this present litigation. Indeed, Defendants recently
24 proposed to add two major law firms (Horvitz & Levy LLP and Procopio, Cory,
25 Hargreaves & Savitch LLP) as attorneys as reflected in the Joint Motion to Amend the
26 Protective Order in this case. (Doc. No. 572) Thus, the Court finds Defendants' arguments
27 for waiving the bond requirement unconvincing.

28 Third, Defendants assert that SDCC will not be prejudiced by staying enforcement

1 of the judgment because SDCC “does not need the money.” (Doc. No. 533-1 at 10-11.)
2 However, “the issue is not whether they will be harmed,” but whether SDCC “will be
3 protected from any loss resulting from being forced to halt execution on the judgment.”
4 *See Salameh*, 2015 WL 13158486, at *3. Again based on Defendants’ own admissions,
5 SDCC will not be protected from the loss of its judgment if affirmed on appeal since
6 Defendants cannot afford to bond around the fee award. (*See* Doc. No. 533-1 at 7.)

7 Lastly, Defendants have not offered an alternative plan to a supersedeas bond that
8 would secure SDCC’s interests in recovering the *full* amount of the judgment. *See*
9 *Salameh*, 2015 WL 13158486, at * 2 (citing *Bolt v. Merrimack Pharms, Inc.*, No. S-04-
10 893-WBS DAD, 2005 WL 2298423, at *4 (E.D. Cal. Sept. 20, 2005)). Defendants
11 requesting that the Court set bond in an amount sufficient to secure only the jury’s \$20,000
12 damages award is not a sufficient alternative. This does not secure the full amount of the
13 judgment that SDCC was awarded.

14 Therefore, the Court **DENIES** Defendants’ ex parte application for an order
15 reducing the bond amount and staying enforcement of the judgment without posting a
16 supersedeas bond.

17 **B. Modification or Stay of the Injunction**

18 Defendants seek to exempt the following from the injunction:

- 19 1. Maintain and continue operation of social media sites (i.e.
20 Facebook and YouTube) that contain “comiccon” in the
21 URL.
- 22 2. Continue to receive emails at domain names
23 “saltlakecomiccon.com” and “slcomiccon.com.”
- 24 3. Leave intact references to “Salt Lake Comic Con”
25 appearing in legacy content on their website and social
26 media sites.

27 (Doc. No. 553-1 at 2; Doc. No. 560 at 9.) Defendants contend that they will be irreparably
28 harmed if these items are not exempt from the injunction. However, Defendants have failed

1 to satisfy the four *Hilton* factors.

2 First, Defendants have not made a strong showing that they are likely to succeed on
3 the merits. Defendants contend that their post-verdict motions, that this Court denied,
4 raised “serious questions going to the merits.” (Doc. No. 553-1 at 7.) This conclusory
5 statement does not establish that Defendants are likely to succeed on the merits.

6 Second, Defendants have not established they will be irreparably harmed without a
7 stay or modification. Defendants contend that if forced to delete this content, Defendants
8 will lose followers, disrupt existing relationships, and lose legacy content. However,
9 Defendants attracted those followers and established those relationships based on operating
10 social media sties and websites that infringe on SDCC’s trademarks. *See The Mytee Prod.,*
11 *Inc. v. Harris Research, Inc.*, No. 06-CV-1854-CAB, 2010 WL 11509027, at *2 (S.D. Cal.
12 June 25, 2010) (“The loss of sales dependent on the continued use of an infringing product
13 does not constitute irreparable harm from which the infringer should be shielded. One who
14 elects to build a business on a product found to infringe cannot be heard to complain if an
15 injunction against continuing infringement destroys the business so elected.”)

16 Third, Defendants contend that SDCC will not be harmed by a stay or modification,
17 but again provide no support for this baldly-asserted contention. (Doc. No. 553-1 at 11.)
18 This Court has previously determined that SDCC will likely suffer irreparable harm if
19 Defendants are allowed to continue to infringe on SDCC’s trademarks when the Court
20 ordered the injunction. (*See generally* Doc. No. 538.)

21 Finally, Defendants’ argument that the public interest lies in staying the injunction
22 is two-fold. Defendants contend first, that other conventions have an interest in
23 Defendants’ appeal being litigated to conclusion and second, DFP has a beneficial impact
24 on the culture and economy of Utah. (Doc. No. 553-1 at 12.) The Court agrees with SDCC
25 that this is simply not the type of “public interest” that would support staying an injunction.

26 Therefore, the Court **DENIES** Defendants’ ex parte application for an order
27 modifying or staying the injunction.


28 ///

1 **CONCLUSION**

2 As explained more thoroughly above, the Court **DENIES** Defendants' ex parte
3 application to stay enforcement of judgment. (Doc. No. 553.) Further, **no later than**
4 **October 22, 2019**, Defendants must be in compliance with the injunction order, (Doc. No.
5 538), and file with the Court and serve on SDCC a report in writing under oath, setting
6 forth the manner and form in which Defendants have complied with the injunction order.

7 **IT IS SO ORDERED.**

8 Dated: October 5, 2018

9 
10 Hon. Anthony J. Battaglia
United States District Judge