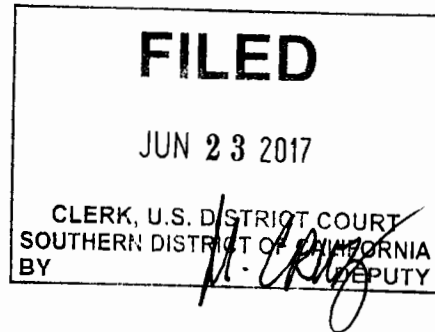


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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

DANIEL J. SCHREIBER, individually
and as Trustee of the Schreiber Living
Trust, a California trust,

Plaintiff,

v.

REDHAWK HOLDINGS CORP., a
Nevada corporation formerly known
as Independence Energy Corp.; et. al.,

Defendants.

CASE NO. 17cv824-WQH-BLM

ORDER

HAYES, Judge:

The matter before the Court is the Ex Parte Application for Temporary Restraining Order and Order to Show Cause RE: Preliminary Injunction (ECF No. 16) filed by Plaintiff Daniel Schreiber, individually and as Trustee of the Schreiber Living Trust (“Plaintiff”) on June 22, 2017.

On April 24, 2017, Plaintiff initiated this action by filing the Complaint (ECF No. 1). On June 5, 2017, Plaintiff filed proof of summons returned executed for Defendants Felix C. Spizale, Redhawk Holdings Corp., and Robert Rhune, Jr. (ECF Nos. 3, 5-6). On June 6, 2017, the parties filed a joint motion to extend time for all Defendants to answer. (ECF No. 7). The joint motion states that counsel for Defendants agreed to accept service for Defendant RedHawk and the remaining Defendants who had not yet been served in this matter. *Id.* at 2. On June 8, 2017, the Court granted the joint motion (ECF No. 8). On June 15, 2017, Plaintiff filed proof of

1 summons returned executed for Defendants Thomas J. Concannon, Phillip Harris IV,
2 Kav Hundle, G. Darcy Klug, Redhawk Holdings Corp., and Andre F. Toce, Sr. (ECF
3 Nos. 9-14).

4 On June 22, 2017, Plaintiff filed the Ex Parte Application for Temporary
5 Restraining Order and Order to Show Cause RE: Preliminary Injunction (ECF No. 16).
6 On June 22, 2017, Defendants RedHawk Holdings Corp., Thomas J. Concannon, G.
7 Darcy Klug, Felix C. Spizale, Phillip Harris IV, Andre F. Toce, Sr., Robert Rhyne, Jr.,
8 and Kav Hundle (“Defendants”) filed a preliminary opposition¹ to the Ex Parte
9 Application for Temporary Restraining Order and Order to Show Cause RE:
10 Preliminary Injunction (ECF No. 17).

11 **I. Allegations of the Complaint (ECF No. 1)**

12 Plaintiff alleges that he “is a former Director and Chief Executive Officer of
13 RedHawk, a publicly traded company[,]” and the Schreiber Living Trust “(the ‘Trust’)
14 is the owner of common shares in RedHawk. Schreiber is the Trustee of the Trust.”
15 (ECF No. 1 at ¶ 1). “Since on or around September 28, 2016, RedHawk, by and
16 through its officers and Board of Directors, has sought to obstruct the Trust’s sale of
17 its shares in RedHawk.” *Id.* at ¶ 2. “[T]hese efforts included an unfounded demand to
18 RedHawk’s transfer agent to prohibit sales of Plaintiff’s stock, delays in filing required
19 SEC forms and, more recently, the termination of RedHawk’s transfer agent.” *Id.*

20 “Schreiber was appointed as a Director to RedHawk’s Board of Directors on
21 March 31, 2014. Schreiber was also the CEO of RedHawk from February 27, 2015.”
22 *Id.* at ¶ 18. “In a sale and purchase transaction dated March 31, 2014, the Trust was
23 issued 57,064,608 shares of restricted RedHawk stock.” *Id.* at ¶ 19. “Due to a strained
24 personal and business relationship between Klug and Schreiber . . . Schreiber was
25 removed from the Board of Directors on April 20, 2016, and resigned as CEO on July
26

27 ¹ Defendants title this pleading a “Preliminary Opposition” because it “is based
28 solely on by [sic] Plaintiff’s counsel oral description of the nature of the application.
Defendants did not receive or review any of Plaintiff’s papers in advance of their
preparation of this preliminary opposition.” (ECF No. 17 at 2 n.1).

1 5, 2016.” *Id.* at ¶ 20. “After Schreiber was removed from his officer and director roles
2 with RedHawk, Schreiber sought to cut all ties with the company and began selling the
3 Trust’s restricted shares of RedHawk.” *Id.* at ¶ 23.

4 “[T]he Trust sought to sell its restricted stock to the public under the registration
5 exemption provisions of the Security and Exchange Commission (‘SEC’) Rule 144[.]”
6 *Id.* at ¶ 24. “The general conditions of Rule 144 . . . limit Plaintiff to selling one
7 percent (1%) of the total outstanding RedHawk shares every 90 days, which as of
8 December 31, 2016, totaled 361,049,027 shares; i.e. Plaintiff can sell approximately
9 3.6 million shares every 90 days.” *Id.* “Between September 2016 and January 19,
10 2017, Plaintiff sold 3,120,000 shares of RedHawk pursuant to the Rule 144
11 requirements . . . [d]ue to RedHawk missing multiple SEC filing requirements,
12 Plaintiff’s subsequent sales were delayed and the Trust has been damaged.” *Id.* at ¶ 25.

13 “On or about January 25, 2017, Plaintiff requested that RedHawk’s transfer
14 agent, Continental Stock Transfer & Trust Company (‘Continental’), remove the
15 restrictive legend on an additional 1,500,000 of the Trust’s shares.” *Id.* at ¶ 26.
16 Plaintiff alleges that “[o]n January 31, 2017, the CFO of RedHawk, Klug, sent a letter
17 requesting that Continental ‘not permit or otherwise facilitate the transfer’ of RedHawk
18 shares” and “reference[d] a lawsuit by RedHawk and another entity . . . filed against
19 Plaintiff in the United States District Court for the for the Eastern District of
20 Louisiana[.]” *Id.* at ¶ 27. “[O]n February 15, 2017, Continental notified Plaintiff’s
21 counsel that Continental had received the issuer’s written consent to proceed with the
22 requested sale transfer of 1,500,000. Because the Rule 144 opinion letter extended
23 only until February 15, 2017, however, the transfer could not be completed by that
24 same day and Continental requested a subsequent letter be issued.” *Id.* at ¶¶ 31-32. “In
25 order for Plaintiff to receive an updated Rule 144 opinion letter then, he needed to wait
26 until RedHawk filed its Form 10-Q. . . . RedHawk did not file its updated 10-Q,
27 however, until March 13, 2017, nearly a month late.” *Id.* at ¶¶ 33, 35.

28 “After RedHawk’s intentional delays, when Plaintiff was finally able to again

1 request that the restrictive legend on the Trust’s shares be removed in March 2017,
2 RedHawk *again* delayed Plaintiff’s sale by secretly terminating its relationship with its
3 transfer agent.” *Id.* at ¶ 36. “On April 6, 2017, Continental informed Plaintiff’s broker
4 it was ‘not currently servicing’ RedHawk as a transfer agent as its services had been
5 “suspended” by RedHawk. . . . RedHawk did not notify the public that it was now
6 operating without a transfer agent. . . . Accordingly, RedHawk mislead the investing
7 public by its failure to file a Form 8-K regarding this material change.” *Id.* at ¶¶ 37, 39,
8 41.

9 “On April 13, 2017, counsel for Plaintiff demanded a response from RedHawk
10 regarding its transfer agent situation. As of the date of filing this complaint, RedHawk
11 has not responded.” *Id.* at ¶ 42. “To-date, Plaintiff has been unable to transfer the
12 Trust’s shares in RedHawk and has been damaged as a result.” *Id.* at ¶ 43. “[A]t a
13 *minimum*, Defendants’ actions have caused Plaintiff to miss sales of at least 7.2 million
14 shares. From September 2016 through the date of this complaint, RedHawk shares
15 have traded between one and two cents, meaning that Defendants’ actions have caused
16 Plaintiff to lose sales between \$72,000 and \$144,000. Further, Defendants’ actions
17 have devalued all of Plaintiff’s outstanding 53,944,608 shares by delaying or
18 preventing their future sale at the earliest possible date.” *Id.* at ¶ 43.

19 **II. Ex Parte Application for Temporary Restraining Order and Order to Show**
20 **Cause RE: Preliminary Injunction (ECF No. 16)**

21 Plaintiff requests the Court issue an order restraining Defendant RedHawk “from
22 blocking the transfer of Plaintiff’s common shares of RedHawk” and allowing Plaintiff
23 “to sell his shares to interested third-parties.” (ECF No. 16 at 2). Plaintiff contends
24 that it continues to suffer harm as the price of RedHawk’s stock has declined in value
25 and Plaintiff’s opportunity to sell his shares “become scarcer.” (ECF No. 16-1 at 4).
26 Plaintiff contends that on June 14, 2017, “RedHawk filed its Form 10-Q Quarterly
27 Report with the [SEC]” which demonstrates “a substantial decrease in the company’s
28 current and total assets since 2016[,] a net decrease in the company’s cash[,]” and that

1 RedHawk intends to sell two real estate assets in 2017. *Id.* at 5. Plaintiff further
2 contends that “RedHawk’s CFO [Defendant Klug] recently made clear that RedHawk’s
3 refusal to transfer Plaintiff’s shares has nothing to do with any legal objection to the
4 transfer, but is instead contingent upon a ‘global resolution’ of disputed claims between
5 the parties.” *Id.*

6 Plaintiff contends that “[w]ithout an injunction preventing RedHawk from
7 further interfering with Plaintiff’s right to sell his shares, Plaintiff will be harmed
8 irreparably because RedHawk has explicitly made clear its intention to block Plaintiff’s
9 transfer of shares while simultaneously selling off the company’s assets, leaving
10 Plaintiff with no remedy if and when he prevails at trial in this matter.” *Id.* at 6.
11 Plaintiff contends that “[f]ormal notice is not necessary in this case due to the
12 impending harm Plaintiff will suffer if there is any delay.” (ECF No. 16 at 2).

13 In their preliminary opposition, Defendants contend that Plaintiff’s request for
14 injunctive relief improperly seeks to change the status quo of this action. Defendants
15 contend that Plaintiff cannot demonstrate an irreparable injury or a non-monetary
16 injury. (ECF No. 17 at 3). Defendants contend that Plaintiff has not demonstrated a
17 substantial likelihood of success on the merits in this action, because Plaintiff is being
18 sued in another action for failing to disclose a material fact at the time when Plaintiff
19 “obtained shares of stock from RedHawk” that are at issue in this action. *Id.*
20 Defendants further request the opportunity “to file a substantive opposition before any
21 ruling is issued” on Plaintiff’s Application, “unless the Court is inclined to summarily
22 deny Plaintiff’s [A]pplication[.]” *Id.* at 2.

23 **III. Analysis**

24 **A. Temporary Restraining Order**

25 Rule 65(b)(1) of the Federal Rules of Civil Procedure states that

26 The court may issue a temporary restraining order without written or oral
27 notice to the adverse party or its attorney only if:

28 (A) specific facts in an affidavit or a verified complaint
clearly show that immediate and irreparable injury, loss, or
damage will result to the movant before the adverse party
can be heard in opposition; and

1 (B) the movant's attorney certifies in writing any efforts
2 made to give notice and the reasons why it should not be
3 required.

4 Fed. R. Civ. P. 65(b)(1). The Supreme Court has explained that "The stringent
5 restrictions imposed by . . . Rule 65, on the availability of ex parte temporary
6 restraining orders reflect the fact that our entire jurisprudence runs counter to the
7 notion of court action taken before reasonable notice and an opportunity to be heard
8 has been granted both sides of a dispute." *Granny Goose Foods, Inc. v. Bhd. of*
9 *Teamsters*, 415 U.S. 423, 438-39 (1974). "Consistent with this overriding concern,
10 courts have recognized very few circumstances justifying the issuance of an ex parte
11 TRO. For example, an ex parte TRO may be appropriate where notice to the adverse
12 party is impossible either because the identity of the adverse party is unknown or
13 because a known party cannot be located in time for a hearing." *Reno Air Racing*
14 *Ass'n, Inc. v. McCord*, 452 F.3d 1126, 1131 (9th Cir. 2006) (citation and quotation
15 marks omitted).

16 In this case, Plaintiff has attached a declaration from its attorney stating that he
17 informed Defendants' attorney by telephone on June 21, 2017 and by email on June 22,
18 2017 that Plaintiff "would be immediately proceeding via an ex parte application for
19 a temporary restraining order and an order to show cause why a preliminary injunction
20 should not be issued." (ECF No. 16-3 at 2; Praskievicz Decl. at ¶ 3). Defendants
21 confirm that Plaintiff's attorney made efforts to provide Defendants with notice of the
22 Application. See ECF No. 17 at 2 n.1. The Court concludes that Plaintiff has satisfied
23 the notice requirement of Rule 65(b)(1)(B).

24 However, Plaintiff has not set forth "specific facts" that "clearly show that
25 immediate and irreparable injury, loss, or damage will result to the movant before the
26 adverse party can be heard in opposition[.]" Fed. R. Civ. P. 65(b)(1)(A).² Plaintiff has

27
28 ² In this case, Defendants filed a preliminary opposition to Plaintiff's Application (ECF No. 17) that Defendants contend was prepared before Defendants had a chance to review the Application. The Court concludes that Defendants have not been given

1 failed to set forth specific facts as to why the Court should grant Plaintiff the injunctive
2 relief that it requests “before reasonable notice and an opportunity to be heard has been
3 granted both sides of a dispute.” *Granny Goose*, 415 U.S. at 439. *See Zakar v. CHL*
4 *Mortg. Pass Through Trust*, No. 11CV457 JLS (WVG), 2011 WL 915293, at *2 (S.D.
5 Cal. Mar. 8, 2011) (Sammartino, J.) (denying the plaintiffs’ application for a temporary
6 restraining order because the plaintiffs “failed to set forth specific facts in an affidavit
7 or a verified complaint clearly showing that immediate and irreparable loss would
8 result before the Defendants could be heard in opposition.”). Because Plaintiff has
9 failed to meet the requirement set forth in Rule 65(b)(1)(A), Plaintiff’s Application for
10 a Temporary Restraining Order is DENIED.

11 **B. Preliminary Injunction**

12 Plaintiff’s Application also includes a request for a preliminary injunction
13 pursuant to Federal Rule of Civil Procedure 65(a). *See* ECF No. 16-1 at 6 (“Plaintiff
14 requests this Court immediately enter a restraining order and preliminary injunction
15 prohibiting RedHawk from further blocking Plaintiff’s requested transfer of shares.”).
16 Rule 65(a) states that “The court may issue a preliminary injunction only on notice to
17 the adverse party.” Fed. R. Civ. P. 65(a)(1). Plaintiff has demonstrated that
18 Defendants received notice of the Application. *See* ECF No. 16 at 4; 16-1 at 17; 16-2
19 at 66; 16-3 at 6. Accordingly, Plaintiff’s request for a preliminary injunction will be
20 set for a hearing on August 3, 2017 at 2:00 PM in Courtroom 14B. Any formal
21 opposition by Defendants must be filed no later than July 17, 2017. Any reply by
22 Plaintiff must be filed no later than July 24, 2017.

23
24 DATE: _____

6/23/17



25 **WILLIAM Q. HAYES**
26 United States District Judge

27 _____
28 the full opportunity to be heard in opposition to Plaintiff’s Application. Therefore, the
Court treats Plaintiff’s Application as an ex parte request for a temporary restraining
order.