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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 ARCTURUS THERAPEUTICS LTD.,
12 Plaintiff,
13 v.
14 JOSEPH E. PAYNE; PETER FARRELL;
15 ANDREW SASSINE; BRADLEY
16 SORENSON; JAMES BARLOW; and
17 DOES 1 THROUGH 100,
18 Defendants.

Case No.: 18cv766-MMA (NLS)

**ORDER DENYING PLAINTIFF'S
MOTION FOR TEMPORARY
RESTRAINING ORDER;**

**VACATING AND RESETTING
HEARING ON MOTION FOR
PRELIMINARY INJUNCTION AND
EXPEDITED DISCOVERY;**

**SETTING BRIEFING SCHEDULE;
AND**

[Doc. No. 10]

**DENYING AS MOOT DEFENDANT
PAYNE'S MOTION FOR AN
EXTENSION OF TIME**

[Doc. No. 17]

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26 On April 19, 2018, Plaintiff Arcturus Therapeutics Ltd. ("Plaintiff" or "Arcturus")
27 filed the instant action alleging violations Section 13(d) of the Securities Exchange Act of
28 1934, 15 U.S.C. § 78m(d), and Regulation 13D promulgated thereunder, against

1 Defendants Joseph E. Payne, Peter Farrell, Andrew Sassine, Bradley Sorenson, and
2 James Barlow. Doc. No. 1 (“Compl.”). Currently pending before the Court is Plaintiff’s
3 motion for a temporary restraining order (“TRO”), preliminary injunction, and for
4 expedited discovery. Doc. No. 10-1. For the reasons set forth below, the Court **DENIES**
5 Plaintiff’s motion for a TRO, **VACATES** the hearing scheduled for May 1, 2018, and
6 **RESETS** a hearing on Plaintiff’s motion for a preliminary injunction and expedited
7 discovery for **May 21, 2018 at 2:30 p.m. in Courtroom 3D.**

8 **BACKGROUND**

9 Plaintiff Arcturus is a corporation “working to develop and commercialize RNA
10 technologies to treat various diseases,” including cancer. Compl., ¶ 10; Doc. No. 10-1 at
11 8. Defendants are a group of shareholders who have allegedly “unlawfully and secretly
12 agreed to buy, sell, and vote a controlling block of Ordinary Shares” of Arcturus in
13 support of Defendant Payne’s proxy contest to take control of the Board of Directors of
14 Arcturus (“Board”). Compl., ¶ 1. Plaintiff alleges that Defendants have violated Section
15 13(d) and Regulation 13D by depriving shareholders of basic information needed to fairly
16 assess the facts to inform their votes at an upcoming Extraordinary General Meeting
17 (“EGM”). *See id.* Specifically, Plaintiff alleges that Defendants have failed to file
18 Schedules 13D and amendments which disclose the existence of the group, the identities
19 of the group’s members, and the accompanying beneficial ownership of Arcturus’
20 securities held by such group members. Compl., ¶ 4.

21 At Defendant Payne’s request, Arcturus scheduled an EGM for May 7, 2018.
22 Compl., ¶ 8. However, Plaintiff alleges it “was forced to postpone the EGM due to a
23 series of filings that Payne has made in Israeli court (where Payne has brought litigation
24 against Arcturus), which collectively cast significant uncertainty on the agenda of the
25 EGM.” *Id.* In response, Payne filed motions in Israeli court to compel Arcturus to hold
26 the EGM. *Id.* A hearing in Israeli court is scheduled on that matter for May 9, 2018. *Id.*

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1 DISCUSSION

2 The purpose of a TRO is to preserve the status quo before a preliminary injunction
3 hearing may be held; its provisional remedial nature is designed merely to prevent
4 irreparable loss of rights prior to judgment. *Granny Goose Foods, Inc. v. Brotherhood of*
5 *Teamsters & Auto Truck Drivers*, 415 U.S. 423, 439 (1974). The standard for a TRO is
6 the same as for a preliminary injunction. *See Stuhlberg Int’l Sales Co. v. John D. Brush*
7 *& Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001). To obtain preliminary injunctive relief, the
8 moving party must show: (1) a likelihood of success on the merits; (2) a likelihood of
9 irreparable harm to the moving party in the absence of preliminary relief; (3) that the
10 balance of equities tips in the moving party’s favor; and (4) that an injunction is in the
11 public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The
12 court may apply a sliding scale test, under which “the elements of the preliminary
13 injunction test are balanced, so that a stronger showing of one element may offset a
14 weaker showing of another.” *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127,
15 1131 (9th Cir. 2011). A restraining order is an “extraordinary remedy that may only be
16 awarded upon a clear showing that the plaintiff is entitled to such relief.” *Winter*, 555
17 U.S. at 22.

18 With respect to issuing an *ex parte* TRO, Federal Rule of Civil Procedure 65(b)(1)
19 provides that a “court may issue a temporary restraining order without written or oral
20 notice to the adverse party or its attorney only if: (A) specific facts in an affidavit or a
21 verified complaint clearly show an immediate and irreparable injury, loss, or damage will
22 result to the movant before the adverse party can be heard in opposition; and (B) the
23 movant’s attorney certifies in writing any efforts made to give notice and the reasons why
24 it should not be required.”¹ Fed. R. Civ. P. 65 (emphasis added).

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¹ It is not clear whether Plaintiff attempted to file an *ex parte* TRO. To the extent it did, Plaintiff did not
comply with Rule 65. *See* Doc. No. 10.

1 The United States Supreme Court has held that there are stringent restrictions
2 imposed by Rule 65 because “our entire jurisprudence runs counter to the notion of court
3 action taken before reasonable notice and an opportunity to be heard has been granted
4 both sides of a dispute.” *Granny Goose*, 415 U.S. at 439. “[C]ircumstances justifying
5 the issuance of an ex parte order are extremely limited.” *Reno Air Racing Ass’n v.*
6 *McCord*, 452 F.3d 1126, 1131 (9th Cir. 2006). There are “a very narrow band of cases in
7 which *ex parte* orders are proper because notice to the defendant would render fruitless
8 the further prosecution of the action.” *Id.* (quoting *American Can Co. v. Mansukhani*,
9 742 F.2d 314, 322 (7th Cir. 1984)). For example, to justify an *ex parte* proceeding where
10 an alleged infringer is likely to dispose of infringing goods before the hearing, the
11 “applicant must do more than assert that the adverse party would dispose of evidence if
12 given notice.” *Id.* (citation omitted). “[P]laintiffs must show that defendants would have
13 disregarded a direct court order and disposed of the goods within the time it would take
14 for a hearing . . . [and] must support such assertions by showing that the adverse party has
15 a history of disposing of evidence or violating court orders or that persons similar to the
16 adverse party have such a history.” *Id.* (citation omitted).

17 On April 25, 2018, Defendant Payne filed a motion to extend time to file his
18 opposition to Plaintiff’s motion for a TRO and to move the hearing date. Doc. No. 17. In
19 support, Payne explains that “there is no exigency supporting Plaintiff’s extraordinary
20 request” because “there is no EGM currently set.” *Id.* at 17. Upon considering
21 Plaintiff’s motion and supporting evidence, the Court agrees with Defendant Payne and
22 finds that Plaintiff has failed to “clearly show that immediate and irreparable injury, loss,
23 or damage will result to the movant before the adverse party can be heard in opposition,”
24 as required for the issuance of an *ex parte* TRO. *See* Fed. R. Civ. P. 65(b) (emphasis
25 added).

26 As mentioned previously, an EGM was scheduled for May 7, 2018 to vote on the
27 following proposals raised by Defendant Payne: (1) removal and transfer of five persons
28 “as well as any other person that may be appointed to the Board . . . as of the date hereof

1 and until the EGM” from the office of directors on the Board; (2) to amend particular
2 articles “of the AOA, with immediate effect, so that the authority to determine the
3 number of directors of the Company, as well as the authority to elect new directors to the
4 Board, is also provided – in any circumstances – to extraordinary general meetings of the
5 shareholders of the Company;” and (3) to elect Payne’s four nominees (Defendants
6 Farrell, Sassine, and Barlow, and Magda Marquet) to serve as directors on the Board.
7 Compl., Exhibit 2 at 6-7. On April 8, 2018, the Board postponed the EGM without
8 setting a new date. Compl., Exhibit 1 at 7. Payne has since filed motions in Israeli court
9 to compel Arcturus to hold the EGM, and the matter is set for hearing on May 9, 2018.
10 Compl., ¶ 8.

11 Plaintiff’s motion states that the EGM is “on the immediate horizon,” but contends
12 that even if the EGM is postponed, the urgency of requiring the alleged group to correct
13 the disclosure record remains. Doc. No. 10-1 at 11 n.2. Plaintiff asserts that “immediate
14 intervention is required to ensure an even playing field in the upcoming shareholder vote,
15 and shareholders’ access to the SEC-mandated disclosures about [Defendants’]
16 activities.” *Id.* at 11. According to Plaintiff, failure to do so immediately will result in
17 irreparable harm. *See id.*

18 In *Treadway Companies, Inc. v. Care Corp.*, 638 F.2d 357 (2d Cir. 1980), the
19 Second Circuit explained that the interests section 13(d) protects “are fully satisfied when
20 the shareholders receive the information required to be filed.” *Treadway*, 638 F.2d at
21 380. There, the Court held that “there was no risk of irreparable injury and no basis for
22 injunctive relief” where the shareholders received the required information four months
23 before the proxy contest in that case. *Id.* In 2011, the Second Circuit indicated that
24 where disclosure, “[w]hether timely or not,” allows informed action by shareholders,
25 there is no irreparable harm. *CSX Corp. v. Children’s Inv. Fund Mgmt. (UK) LLP*, 654
26 F.3d 276, 287 (2d Cir. 2011).

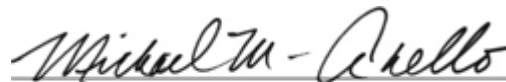
27 Here, Plaintiff does not dispute that there is no currently scheduled EGM. *See*
28 Doc. No. 18 (opposing Defendant Payne’s motion for an extension of time, but not

1 addressing Payne's exigency argument). As a result, even if all of Plaintiff's allegations
2 are true, the Court cannot determine whether Plaintiff and its shareholders are irreparably
3 harmed because the Court has no information regarding the next scheduled EGM. In
4 other words, the Court finds no exigency in determining whether or not Defendants must
5 file corrected or original Schedules 13D because Plaintiff has not met its burden of
6 establishing that failure to do so immediately would result in shareholders taking
7 uninformed action.

8 While the Court finds no exigency requiring the issuance of a TRO, the Court
9 acknowledges Plaintiff's request for a preliminary injunction and request for expedited
10 discovery. *See* Doc. No. 10-1. Accordingly, the Court **DENIES** Plaintiff's motion for a
11 TRO, **VACATES** the hearing currently set for May 1, 2018, and **RESETS** the hearing on
12 Plaintiff's motion for a preliminary injunction and expedited discovery for **May 21, 2018**
13 **at 2:30 p.m. in Courtroom 3D**. As such, Defendants must file an opposition, if any, on
14 or before **May 7, 2018** and Plaintiff must file its reply, if any, on or before **May 14,**
15 **2018**.² As Defendants have not yet appeared in this action, the Court **ORDERS** Plaintiff
16 to provide a copy of this Order to Defendants no later than **5:00 p.m. Pacific Daylight**
17 **Time on Thursday, April 26, 2018**.

18 **IT IS SO ORDERED.**

19 Dated: April 26, 2018



20 Hon. Michael M. Anello
21 United States District Judge

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27 ² In light of this Order, the Court **DENIES AS MOOT** Defendant Payne's motion for an
28 extension of time. Doc. No. 17.