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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 WILLIAM HEATHCOTE,

11 Plaintiff,

12 v.

13 SPINX GAMES LTD., *et al.*,

14 Defendants.
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Case No. C20-1310-RSM

ORDER DENYING PLAINTIFF
HEATHCOTE'S MOTION FOR
TEMPORARY RESTRAINING ORDER

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17 **I. INTRODUCTION**

18 This matter comes before the Court on Plaintiff William Heathcote's Motion for a
19 Temporary Restraining Order ("TRO") against Defendants SpinX Games, Ltd. ("SpinX
20 Games"), Grande Games Ltd. ("Grande Games"), and Beijing Bole Technology Co., Ltd.
21 ("Beijing Bole") (collectively, "Defendants"). Dkt. #15. Plaintiff has requested oral argument.
22 The Court finds oral argument unnecessary for ruling on the motion. Having reviewed Plaintiff's
23 motion and Defendants' response, the Court DENIES Plaintiff's motion.
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25 **II. BACKGROUND**

26 Plaintiff is a Washington citizen who began playing "Cash FrenzyTM Casino – Free Slots
27 Games" and "Vegas Slots – Casino Slots," which are virtual casino games owned and operated
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ORDER DENYING PLAINTIFF HEATHCOTE'S MOTION FOR TEMPORARY
RESTRAINING ORDER - 1

1 by Defendants. Dkt. #14 at ¶¶ 1-4. All three Defendants are Chinese companies with principal
2 places of business outside the United States, in either Hong Kong or Beijing. *Id.* at ¶¶ 8-10.
3 However, Plaintiff claims that SpinX Games maintains an office at 2021 Fillmore St., #93 in San
4 Francisco, California given that U.S.-based customers may contact Defendants at that address.
5 *Id.* at ¶ 8.

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7 Players play Defendants’ virtual casino games on their mobile phones. *Id.* at ¶¶ 2-4.
8 Defendants provide a bundle of free “coins” to first-time visitors used in the slot machine games,
9 but once players lose their initial bundle of coins, they may purchase additional coins starting at
10 \$1.99 for 750,000 coins. Plaintiff began playing these virtual casino games on or around spring
11 2020. *Id.* at ¶ 7. He lost his initial bundle of free coins and began purchasing additional coins.
12 Between June 2020 and August 2020, Plaintiff lost approximately \$300 through playing
13 Defendants’ virtual casino games. *Id.*

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15 Plaintiff initiated this action on September 1, 2020 against Grande Games on behalf of
16 himself and putative class members, alleging violations of Washington law for recovery of
17 money lost at gambling, RCW § 4.24.070, the Washington Consumer Protection Act, RCW §
18 19.86.010, and unjust enrichment. Dkt. #1 at ¶¶ 36-69. After summons were issued, Plaintiff
19 moved to strike the case schedule on the basis that he was commencing service upon Grande
20 Games through the Hague Convention. Dkt. #6. Because Plaintiff anticipated that service
21 through the Hague Convention would take “4 to 6 months,” the Court granted Plaintiff’s request
22 to strike deadlines and granted him until March 22, 2021 to update the Court as to the status of
23 service. Dkt. #7.

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26 On March 30, 2021, Plaintiff submitted a status report advising that he was “still working
27 through the Hague Convention” to effect service, but “just learned that Defendant now has a
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1 subsidiary head quartered in California.” Dkt. #8 at 1-2. Plaintiff advised that he would be filing
2 a petition for alternative service on the subsidiary “in the near future” and would update the Court
3 on status of service on or before April 30, 2021. *Id.* at 2. On April 9, 2021, Plaintiff filed an
4 Amended Complaint adding SpinX Games and Beijing Bole as Defendants. Dkt. #14 at ¶¶ 8,
5 10. As of the date of this Order, Plaintiff has not filed a petition for alternative service. Instead,
6 on April 20, 2021, Plaintiff filed the instant TRO motion. Dkt. #15.

8 Plaintiff’s TRO motion seeks emergency relief related to a pop-up window that currently
9 displays on players’ devices when they open the gaming application. This pop-up identifies
10 Defendants’ new Terms of Service and Privacy Policy, which was updated on February 8, 2021
11 and published on Defendants’ website on February 23, 2021. Dkt. #28 at ¶ 8. The updated Terms
12 of Service added an arbitration agreement and Class Action Waiver not contained in the previous
13 Terms of Service. Dkt. 16-2. Since the updated Terms of Service were published, players
14 opening any of Defendants’ games encounter a pop-up notice entitled, “We updated our Terms
15 of Service and Privacy Policy.” Dkt. #16-1. The complete notice states:

18 By tapping the button below, you agree to our updated Terms of Service. These
19 terms include a “Dispute Resolution and Arbitration Provision” requiring
20 individual arbitration of any dispute and waiving your right to join any class action
21 lawsuit or other representative proceeding. You may opt out of this provision by
22 mailing us written notice within 30 days after you first accept these Terms of
23 Service, as explained here. If you have questions about the legal effect of the Terms
24 of Service, you should contact an attorney.

25 Players in WASHINGTON STATE ONLY, please continue reading: There is a
26 pending lawsuit in federal court in Washington State relating to Grande Games,
27 Ltd. This lawsuit asserts claims under Washington Law, including the Recovery of
28 Money Lost at Gambling Act and the Consumer Protection Act. The lawsuit seeks
to recover money allegedly lost while playing Grande Games’ games. Grande
Games denies the claims and believes they have no merit. The court has not yet
decided who is right or whether the lawsuit can proceed as a class action. The
plaintiff in the lawsuit is represented by attorneys at the law firm of Bursor &
Fisher, P.A., who may be contacted at (646) 837-7150. If you accept the Terms of

1 Service and do not opt out of the Dispute Resolution and Arbitration Provision, you
2 cannot participate in this lawsuit, even if a class is certified.

3 By tapping the button below you agree to the Terms of Service and acknowledge
4 you have read the Privacy Policy.

5 Dkt. #16-1. Below the notice is a button that reads in bolded letters: “I agree, Let’s Play!” *Id.*

6 In mid-April, Plaintiff’s counsel began to receive phone calls from players inquiring
7 about the “pop-up” window in the virtual casino games. Dkt. #16 at ¶ 5. The following week,
8 on April 20, 2021, Plaintiff filed the instant TRO requesting that the Court assert control over
9 communications by Defendants with putative class members pursuant to Fed. R. Civ. P. 23(d).
10 Dkt. #15. Specifically, Plaintiff requests this Court require Defendants to (1) immediately stop
11 displaying the pop-up; and (2) restore the Terms of Use to the version in place at the time the
12 case was filed. *Id.* at 16. On April 23, 2021, Defendants filed a Response opposing Plaintiff’s
13 motion. Dkt. #27.

14 III. DISCUSSION

15 A. Failure to Effect Service

16 As an initial matter, Defendants argue that this Court lacks personal jurisdiction over this
17 action given Plaintiff’s failure to effect service. *Id.* at 7-8. Plaintiff concedes that he has not
18 served Defendants with the summons and complaint. Dkt. #15 at 11. Although he claims that
19 Defendants “have evaded service of the lawsuit,” *id.* at 20, he has not petitioned for alternative
20 service. To the extent he deposited a copy of the instant motion at a mailbox address in San
21 Francisco, Defendants dispute that delivery to the Fillmore Street address constitutes proper
22 service, given that it is not the address of any office of Defendants. *See* Dkt. #27 at 5-6 (“SpinX
23 is currently leasing a post office box in San Francisco for the sole purpose of accepting opt-out
24 notices from U.S. players, as set forth in the New Terms”). The Court finds it highly doubtful
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1 that Defendants have been properly served at this time. However, given the analysis below, the
2 Court declines to rule on the service issue before the matter is fully briefed. Likewise, given that
3 Defendants have appeared and filed a response, it will not deny the instant motion for failure to
4 provide notice under LCR 65.

5 **B. Legal Standard**

6 The standard for issuing a TRO is the same as the standard for issuing a preliminary
7 injunction. *See New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1347 n.2
8 (1977). A TRO is “an extraordinary remedy that may only be awarded upon a clear showing that
9 the plaintiff is entitled to such relief.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24
10 (2008). “The proper legal standard for preliminary injunctive relief requires a party to
11 demonstrate (1) ‘that he is likely to succeed on the merits, (2) that he is likely to suffer irreparable
12 harm in the absence of preliminary relief, (3) that the balance of equities tips in his favor, and (4)
13 that an injunction is in the public interest.’” *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1127 (9th
14 Cir. 2009) (citing *Winter*, 555 U.S. at 20).

15 As an alternative to this test, a preliminary injunction is appropriate if “serious questions
16 going to the merits were raised and the balance of the hardships tips sharply” in the moving
17 party’s favor, thereby allowing preservation of the status quo when complex legal questions
18 require further inspection or deliberation. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127,
19 1134-35 (9th Cir. 2011). However, the “serious questions” approach supports a court’s entry of
20 a TRO only so long as the moving party also shows that there is a likelihood of irreparable injury
21 and that the injunction is in the public interest. *Id.* at 1135. The moving party bears the burden
22 of persuasion and must make a clear showing that he is entitled to such relief. *Winter*, 555 U.S.
23 at 22.

1 For the reasons set forth below, Plaintiff has failed to carry his burden under either test.
2 He has not demonstrated a likelihood of success on the merits on his claim that Defendants'
3 communication interferes with putative class members' rights under Fed. R. Civ. P. 23(d), nor
4 has he raised serious questions going to the merits of that claim.

5 i. Controlling Class Communications under Rule 23(d)

6 Under Fed. R. Civ. P. 23(d), courts are afforded "considerable discretion" to regulate
7 defendant communications with class members in order to prevent abuse. *Kater v. Churchill*
8 *Downs Inc.*, 423 F. Supp. 3d 1055, 1061 (W.D. Wash. 2019) (quoting *Jimenez v. Menzies*
9 *Aviation Inc.*, No. 15-CV-02392-WHO, 2015 WL 4914727, at *5 (N.D. Cal. Aug. 17, 2015)).
10 "Because class actions 'present opportunities for abuse, [] a district court has both the duty and
11 the broad authority to exercise control over a class action and to enter appropriate orders
12 governing the conduct of counsel and the parties.'" *Id.* (quoting *Hoffmann-La Roche Inc. v.*
13 *Sperling*, 493 U.S. 165, 171 (1989)) (internal quotations omitted). However, any order regulating
14 communications between parties and putative class members must "be based on a clear record
15 and specific findings that reflect a weighing of the need for a limitation and the potential
16 interference with the rights of the parties." *Id.* (internal quotations omitted).
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20 When considering whether a defendant's effort to obtain an arbitration provision from
21 putative class members interferes with their rights under Rule 23(d), courts analyze the timing of
22 the communication, its potential to mislead putative class members, and the risk that putative
23 class members may forfeit their rights "without really knowing what they are." *Id.*; *see also*
24 *Jimenez*, 2015 WL 4914727, at *6 (finding new arbitration policy invalid as applied to putative
25 class members who were not informed of the pending lawsuit). In contrast, the communication
26 with putative class members is deemed proper if it "does so in a manner that discloses information
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1 about this suit and affords an opt-out.” *McKee v. Audible, Inc.*, No. CV 17-1941-GW(EX), 2018
2 WL 2422582, at *8-9 (C.D. Cal. Apr. 6, 2018).

3 ii. Defendants’ Pop-Up Window and Revised Terms of Service

4 Plaintiff argues that Defendants’ pop-up is misleading, given that it fails to “meaningfully
5 inform users about their potential rights.” Dkt. #15 at 14 (citing *Kater*, 423 F. Supp. 3d at 1063).
6 In *Kater*, the court analyzed issues similar to those presented here—specifically, the legality of
7 a pop-up window in a virtual gambling mobile application that referenced pending class action
8 litigation and prevented players from continuing play unless they clicked “I Agree.” *See Kater*,
9 423 F. Supp. 3d at 1063. However, the terms of the pop-up in *Kater* are readily distinguishable
10 from the terms at issue here.
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13 In *Kater*, the pop-up deemed improper by the court failed to provide information about
14 the current status of pending litigation, the type of relief being sought, previous decisions by the
15 court regarding arbitration or how to contact plaintiffs’ counsel. *Id.* at 1059. The pop-up also
16 failed to advise players to seek their own counsel if they had questions about the terms. *Id.* In
17 granting plaintiffs’ motion for a preliminary injunction, the *Kater* court set forth three
18 requirements for defendants’ pop-up or other initial communication to putative class members:
19 (1) it must reference putative class members’ ability to opt out of arbitration and out of the
20 agreement to waive their status as a putative class member, and provide instruction on how to do
21 so; (2) it must “briefly explain the rights at issue” in the lawsuit such that “an average user would
22 understand what they are giving up” by clicking “I Agree”; and (3) it must advise players to
23 contact an attorney for advice on the legal terms, and provide contact information for plaintiff’s
24 attorney in the class action lawsuit. *Id.* at 1065. Pursuant to this order, the *Kater* defendants
25 revised their pop-up communication to contain the above-listed information, and the court
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1 approved it. *See* Dkt. #27 at 26-29 (attaching *Kater v. Downs*, C15-0612-RBL, Dkt. #145 (W.D.
2 Wash. Dec. 19, 2019) (Order on Parties’ Proposed Pop-Up Language)).

3 Here, Defendants’ notice meets the three above-listed requirements and is largely
4 identical to the revised pop-up communication approved by the *Kater* court. *See id.* It provides
5 the same opt-out procedure of mailing written notice within thirty days of accepting the terms of
6 use. Dkt. #16-1. Furthermore, it expressly informs players about the pending lawsuit. *See* Dkt.
7 #16-1 (“There is a pending lawsuit in federal court in Washington State relating to Grande
8 Games, Ltd. This lawsuit asserts claims under Washington Law, including the Recovery of
9 Money Lost at Gambling Act and the Consumer Protection Act. The lawsuit seeks to recover
10 money allegedly lost while playing Grande Games’ games.”). It likewise informs putative class
11 members of the rights they forfeit by agreeing to the terms: “If you accept the Terms of Service
12 and do not opt out of the Dispute Resolution and Arbitration Provision, you cannot participate in
13 this lawsuit, even if a class is certified.” *Id.* The notice also advises putative class members to
14 consult an attorney if they have any questions and provides contact information for Plaintiff’s
15 counsel in this lawsuit. *Id.* In addition to bearing close similarity to defendants’ approved
16 communication in *Kater*, the language in Defendants’ pop-up is also substantially identical to the
17 terms addressed in *Wilson v. Huuuge, Inc.*—another case in this district that analyzed the legality
18 of a pop-up window in a virtual gambling application during the pendency of a class action
19 lawsuit. *See* 2020 WL 8771059-RBL, at *1 (W.D. Wash. Apr. 20, 2020). In light of this case
20 law, the Court finds minimal support for Plaintiff’s position that the terms of the pop-up window
21 are improper or coercive.
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26 In addition to *Kater*, Plaintiff relies on other cases from the Ninth Circuit addressing the
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lawfulness of a defendant’s communication about a new arbitration agreement sent during the

1 pendency of litigation. Dkt. #15 at 13-14 (citing *Jimenez*, 2015 WL 4914727, at *5; *Balsanyan*
2 *v. Nordstrom, Inc.*, 2012 WL 760566 (S.D. Cal. Mar. 8, 2012); *O’Connor v. Uber Techs., Inc.*,
3 2013 WL 6407583 (N.D. Cal. Dec. 6, 2013); *McKee v. Audible, Inc.*, No. CV 17-1941-GW(EX),
4 2018 WL 2422582 (C.D. Cal. Apr. 6, 2018). However, the communications at issue in these
5 cases are factually distinguishable from the pop-up at issue here, given that the improper
6 communications failed to inform putative class members of the pending litigation and/or
7 provided no reasonable opt-out mechanism.

9 In *Jimenez*, *Balsanyan*, and *McKee*, the communications offered no opt-out procedure
10 whatsoever. See *Jimenez*, 2015 WL 4914727, at *5 (“[T]he manner in which Menzies issued the
11 policy—not informing Mijos and other putative class members of the pending litigation, not
12 explaining the consequences of agreeing to the policy, and not providing an opt-out procedure
13 constituted improper class communication.”); *Balsanyan*, 2012 WL 760566, at *3 (finding
14 invalid Nordstrom’s communication regarding an arbitration agreement that did not alert putative
15 class members of the litigation, and provided no opt-out); *McKee*, 2018 WL 2422582, at *6
16 (“Audible’s actions . . . effectively asked putative class members to waive their ability to
17 participate in this, or any class action, in exchange for continued use and enjoyment of their
18 Audible Membership, and did so without providing notice of the present action or affording opt
19 out rights.”). In *O’Connor*, defendants’ communication contained an opt-out provision, but the
20 court found that its requirement that users send a letter via “hand delivery or overnight mail” was
21 “extremely onerous.” 2013 WL 6407583, at *6. However, the court noted that opt-out by a “less
22 burdensome means,” such as delivery by first-class mail, could have “accomplished the same
23 end.” *Id.* None of these cases apply to the communication at issue here, which notifies putative
24 class members of this lawsuit, informs them that they relinquish their rights to participate in the
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1 lawsuit if they accept, and allows players to opt out by sending notice via U.S. mail. *See* Dkt.
2 #16-1.

3 Finally, Plaintiff argues that the statements in the pop-up window and Terms of Service
4 are misleading, given that the Court has not determined that a post-lawsuit arbitration clause may
5 be enforceable, the terms do not provide details about Plaintiffs' claims, and they do not inform
6 putative class members that they may be foregoing claims under Washington law because of the
7 California choice of law provision contained therein. Dkt. #15 at 15. However, the pop-up need
8 not explain "how each provision from the terms could affect the claims" in this case. *Wilson*,
9 2020 WL 8771059 at *1. Rather, it merely needs to inform players of "the much more easily-
10 understood bottom line": that clicking "I agree" precludes them from participating in this lawsuit.
11 *Id.* Such is the case here. To the extent Plaintiff argues that *Wilson* was "decided incorrectly"
12 and "goes against the weight of authority within this Circuit," Dkt. #15 at 17, the Court finds no
13 support for this argument. Plaintiff relies on several cases addressing settlement offers, none of
14 which bear on the issue presented here regarding communications of new arbitration agreements.
15 *See, e.g., Kirby v. Kindred Healthcare Operating, LLC*, No. 19- cv-00833-JLS-DFM, 2020 WL
16 4639493, at *3 (C.D. Cal. May 1, 2020) (settlement offer that failed to append complaint was
17 impermissible); *Kutzman v. Derrel's Mini Storage, Inc.*, 354 F. Supp. 3d 1149, 1151–1152, 1156
18 (E.D. Cal. 2018) (settlement offers to putative class members impermissible); *Slavkov v. Fast*
19 *Water Heater Partners I, LP*, 2015 WL 6674575, at *2-3 (N.D. Cal. Nov. 2, 2015) (same).
20 Accordingly, the Court finds no basis to diverge from Judge Leighton's reasoning in *Wilson*.
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25 For these reasons, Plaintiff has failed to demonstrate a likelihood of success on the merits
26 of his claim that Defendants' communications to class members are improper. Nor has he raised
27 serious questions going to the merits. Because Plaintiff has failed to show likelihood of success
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1 or serious questions going to the merits, the Court need not address the remaining elements to
2 obtain preliminary injunctive relief. *See Winter*, 555 U.S. at 20; *Cottrell*, 632 F.3d at 1134–35.

3 Accordingly, the Court DENIES Plaintiff’s motion.

4 **IV. CONCLUSION**

5 For the foregoing reasons, the Court DENIES Plaintiff’s TRO Motion, Dkt. #15.
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8 DATED this 28th day of April, 2021.
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12 RICARDO S. MARTINEZ
13 CHIEF UNITED STATES DISTRICT JUDGE
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