No. 16-_____

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JONATHAN CORBETT,
Plaintiff-Appellant

v.

INSOMNIAC HOLDINGS, LLC,
SPEEDWAY MOTORSPORTS, INC.,
Defendant-Appellees

On Appeal from the United States District Court
for the Central District of California
(Hon. Philip S. Gutierrez, Presiding)
District Court Case No. 16-CV-3604

EMERGENCY MOTION UNDER CIRCUIT RULE 27-3

PLAINTIFF'S MOTION FOR INJUNCTION PENDING APPEAL

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CIRCUIT RULE 27-3 CERTIFICATE

(i) Contact Information for the Parties

Plaintiff-Appellant appears *pro se*:

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Defendant-Appellees have not yet appeared in the District Court case and have not yet indicated their chosen counsel to Plaintiff-Appellant. Their corporate headquarters addresses are:

Insomniac Holdings, LLC.
9441 W Olympic Blvd
Beverly Hills, CA 90212

Speedway Motorsports, Inc.
5555 Concord Pkwy. S.
Concord, NC 28027

(ii) Existence and Nature of Emergency

This case is brought under the Americans with Disabilities Act alleging the publication and pending enforcement of an unlawful, discriminatory policy at an event produced by Insomniac Holdings, Inc. ("Insomniac") at a venue owned by Speedway Motorsports, Inc. ("Speedway"). The event, and thus enforcement of

the policy, begins on June 17th, 2016, a date 17 days in the future of the printing of this motion.

The event in question is known as "Electric Daisy Carnival," and is billed as the largest multi-day music festival in North America. Each day, in excess of 100,000 individuals will attend Electric Daisy Carnival. However, Insomniac has declared that they will not allow any of these 100,000+ attendees to enter with any over-the-counter medication and states that they will conduct a "TSA-style search" in order to effect this policy. Additionally, if any of these 100,000+ attendees wish to enter with any prescription medication, they must meet and confer with an Insomniac "safety officer" to discuss their need for the medication to their satisfaction.

Title III of the Americans with Disabilities act provides that "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 12182(a); 28 CFR Part 36. Insomniac's medication policy effectively bans those who rely on over-the-counter medication to treat their medical condition and requires an unreasonable intrusion, with risk of denied entry, on those who require prescription medication.

(iii) Notification Regarding Service of Motion

This appeal stems from the district court's denial of a motion for a temporary restraining order ("TRO"), followed by a denial of a motion to re-consider that motion as a preliminary injunction, both of which were denied within hours of filing, without response from the opposing parties. As such, the opposing parties have not yet appeared in this case, and their counsel has not yet been identified.

Plaintiff-Appellant, in good faith, has effected personal service of the complaint and original motion for TRO upon the primary target of the injunction, Insomniac, at their Beverly Hills, CA headquarters, and has delivered a copy of the same to Speedway at their Concord, NC headquarters. Plaintiff has also mailed copies of the motion to reconsider as a preliminary injunction to both parties, and has mailed a copy of this motion, via USPS overnight mail, to both parties. Additionally, Plaintiff-Appellant has used best effort to identify the e-mail addresses for the in-house legal contacts of both companies, and has e-mailed all documents above to Insomniac at their generic legal contact e-mail info@insomniac.com and to Speedway's General Counsel, Cory Tharringon, at ctharington@smiproperties.com. Neither party has, to date, responded to any of Plaintiff's contacts.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Rules

RELIEF REQUESTED

Pursuant to Fed. R. App. P. 8(a)(2) and 9th Cir. Rule 27-3, Plaintiff-Appellants Jonathan Corbett ("Corbett") submits this emergency motion for an injunction pending appeal enjoining named Defendants, their officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them, from publishing, continuing the publication of, enforcing or otherwise implementing any policy which:

1. Prohibits any attendee from entering or remaining at the Electric Daisy Carnival event with reasonable quantities of medication, whether prescription or over-the-counter, or
2. Requires any attendee at the event to explain or justify reasonable quantities of medication, whether prescription or over-the-counter.

"Reasonable quantities" shall be defined as the greater of: one original container (per medicine) filled with up to the quantity indicated as the contents of that original container on its label, or, if no container is present, 10 units (pills/capsules/*etc*.).

I. INTRODUCTION

The Americans with Disabilities Act, and the related state nondiscrimination laws, were created to prevent those with disabilities from being needlessly barred from participating in society to the fullest extent possible. Unless the Court intervenes, one of the largest public gatherings in this country will effectively ban Corbett and countless members of the public from attendance.

The district court failed to take the time to allow for arguments on the matter, and in fact denied Corbett's motion within hours of submission. This failure was a clear and significant abuse of discretion, as well as a violation of the Federal Rules of Civil Procedure.

Had the district court properly analyzed Corbett's motion, it would have found that the motion properly described the four-factor balancing test established by the U.S. Supreme Court to determine whether a preliminary injunction should issue, and then made compelling arguments for each of those factors.

For these reasons, the Court should enter an injunction pending appeal.

II. BACKGROUND

Defendant-Appellee Insomniac is a large and well-known music event producer, and describes itself and the Electric Daisy Carnival ("EDC") music festival on its Web site as follows:

> "Throughout its 20-year history, Insomniac has produced more than 250 festivals, concerts and club nights for nearly 4 million attendees in California, Colorado, Florida, Mexico, Michigan, Nevada, New York, Texas, Puerto Rico, and the United Kingdom. The company's premier annual event, Electric Daisy Carnival Las Vegas, is the largest multi-day music festival in North America, attracting 400,000 fans over three days in June 2014."

An EDC event is hosted annually outside Las Vegas, NV at the Las Vegas Motor Speedway, owned by Defendant-Appellee Speedway. The next edition is scheduled to begin June 17th, 2016.

As alleged in the original complaint, Insomniac has adopted, and Speedway has permitted, a policy for those attending EDC that states that they may not bring non-prescription, over-the-counter ("OTC") medicine into the festival under any circumstances, and further that prescription medication may only be brought into the festival if an attendee brings a copy of a doctor's prescription and gets the approval of an Insomniac employee they refer to as a "safety officer." Appendix 1, District Court Complaint, ¶¶ 18 – 20 and Exhibit A; Affidavit of Jonathan Corbett, ¶ 5. The Web site makes no mention of the qualifications of the safety officer, nor

of the criteria the safety officer may use to determine whether an attendee may bring their medicine into the festival. *Id*., Exhibit A. To effect the medication ban, Insomniac hires an independent security firm to search, "TSA-style," every attendee as they enter the festival.

Corbett, as a musician and music enthusiast, attends music festivals regularly, including and especially the EDC festival. Corbett planned to attend the upcoming 2016 edition of EDC, but upon inspection of the latest version of the EDC Web site found the above-described policies. *Id*., ¶¶ 17, 18; Appendix 2, Motion for TRO, Affidavit of Jonathan Corbett, ¶¶ 3, 4. As CORBETT needs both prescription and OTC medication on his person to treat health issues, these policies give CORBETT a choice between attending the festival without that medication and risking adverse health effects, or not attending at all. *Id*.

Corbett started this action in the U.S. District Court for the Central District of California on May 24th, 2016, and his case was assigned to the Hon. Philip G. Gutierrez. Along with a civil complaint, Corbett filed a motion for a temporary restraining order under Fed. R. Civ. P., Rule 65. Appendix 1, District Court Complaint; Appendix 2, Motion for TRO. In that motion, Corbett explained the factual background above, stated the correct rule of law – the well-known four-factor balancing test established by the U.S. Supreme Court for both a TRO as well

as a motion for preliminary injunction – and articulated a cogent argument as to why the facts of this case meet the requirements of the balancing test.

The district court denied that motion the same day as filing, ruling that it was inappropriate to consider the motion *ex parte* because the TRO did not state that "damage will result to the movant before the adverse party can be heard in opposition." Appendix 3, Order Re: Motion for TRO. The TRO did articulate a timeframe in which a normal service and briefing schedule would not typically result in a ruling before the date of the impending injury which, at the time, was a mere 24 days away. C.D. Cal. Rule 6-1 (requiring 28 day minimum). It further alleged present and continuing injury from the mere advertisement of a discriminatory policy.

Notwithstanding, to address the district court's concerns, Corbett asked the district court to instead consider the motion as a motion for preliminary injunction with an expedited briefing schedule. Appendix 4, Motion for Re-Consideration and Expedited Briefing Schedule. The district court, again, denied that motion the same day as filing, without even awaiting an opposition from the other side or allowing Corbett the opportunity to reply to that opposition, but this time, the district court offered no explanation for its decision. Appendix 5, Order Re: Motion for Re-Consideration and Expedited Briefing Schedule.

III. Legal Standards

The U.S. Supreme Court has articulated a four-factor balancing test for evaluating motions for temporary restraining orders: (1) a likelihood of success on the merits; (2) a likelihood of suffering irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in the moving party's favor; and (4) that an injunction is in the public interest. *Winter v. Natural Resources Defense Council*, 555 U.S. 7 (2008). The factors are considered together, and a weak showing in one can be overcome by a stronger showing in the others. *Rent-A-Ctr., Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 602 (9th Cir. 1991) (allowing injunction when "serious questions are raised and the balance of hardships tips sharply in [movant's] favor"). The standard for granting an injunction pending appeal is the same as for a preliminary injunction in the district court. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987).

An appellate court "review[s] the denial of a preliminary injunction for abuse of discretion[1]. *Alliance for the Wild Rockies*, 632 F.3d 1127, 1131 (9th Cir.

[1] In some instances, some courts will make a *de novo* review when there have been no non-written proceedings before the lower court (as in this case). "Although generally we review the grant of preliminary injunction for an abuse of discretion… where, as here, the district court made the requisite findings based solely on a written record, we review the record de novo because we are in as good a position as the district court to read and interpret the submitted materials." *Innovative Health Sys. v. City of White Plains*, 117 F.3d 37, 43 (2nd Cir. 1997) (*internal citation omitted*)

2011). A district court abuses its discretion if it bases its decision 'on an erroneous legal standard or clearly erroneous findings of fact.' *Id*. (*quoting Lands Council v. McNair*, 537 F.3d 981, 986 (9th Cir. 2008) (*en banc*)). We review a district court's legal conclusions *de novo* and its factual findings for clear error. *Id*. (*quoting Lands Council*, 537 F.3d at 986 – 87). In doing so, 'we first look to whether the trial court identified and applied the correct legal rule to the relief requested. Second, we look to whether the trial court's resolution . . . resulted from a factual finding that was illogical, implausible, or without support in inferences that may be drawn from the facts in the record.' *United States v. Hinkson*, 585 F.3d 1247, 1263 (9th Cir. 2009) (*en banc*)." *M.R. v. Dreyfus*, 697 F.3d 706, 725 (9th Cir. 2012); *see also Tracy Rifle & Pistol LLC v. Harris*, No. 15-16501, 2016 U.S. App. LEXIS 3148, *2 (9th Cir., Feb. 23, 2016).

"We evaluate these factors via a 'sliding scale approach,'" such that a weak showing in one of the four prongs may be made up for by a strong showing in the others. *Arc of Cal. v. Douglas*, 757 F.3d 975, 983 (9th Cir. 2014). Particularly, an injunction of "limited nature" (*i.e.*, a strong showing on the "balance of equities" prong) relaxes the requirements on the movant in showing the other three prongs. *Boardman v. Pac. Seafood Grp.*, Nos. 15-35257, 15-35504, 2016 U.S. App. LEXIS 8008, *25 (9th Cir., May 3, 2016).

There are many ways that a district court can abuse its discretion, and it is clear that a "court abuses its discretion if it fails to apply the correct legal rule or standard." *Smith v. L.A. Unified Sch. Dist.*, 2016 U.S. App. LEXIS 9249 (9th Cir. 2016). If "the current record is insufficient" to determine whether the lower court applied the correct rule, reversal is appropriate. *Arc of Cal.* at 992. Further, "[w]hen the district court bases its decision on an erroneous legal standard, we review the underlying issues of law *de novo*." *Id.* at 983 (*internal citation omitted*).

IV. Argument

A. Plaintiff is Likely to Succeed on this Appeal

Regardless of whether the Court decides remands to the district court to articulate its reason for denying Corbett's motion for a preliminary injunction, or reviews the district court motion and decides the merits on its own, it is clear that the district court abused its discretion in summarily denying Corbett's motion and therefore Corbett shall prevail on the appeal.

At the outset, the district court failed to follow the Federal Rules of Civil Procedure and Local Rules of the Central District of California. Fed. R. Civ. P Rule 6(c)(2) contemplates the availability of a time to file oppositions, while C.D.

Cal. Rule 7-10 allows the movant an opportunity to address any concerns via a reply. The purpose of this briefing is not merely for the benefit of the non-movant: it allows the movant, by rule, the opportunity to address any shortcomings within his or her motion after the non-movant's opportunity to point out those shortcomings. Plaintiff was denied that opportunity without cause.

In declining to follow the normal procedural rules, the district court offered no authority, nor any kind of justification, for the deviation. Indeed, no reasonable justification exists: Corbett's motion was not frivolous or non-conforming with any rules and the opposing parties clearly would not be prejudiced by giving them an opportunity to be heard.

A review for abuse of discretion requires the Court to consider two things: 1) whether the court below applied the correct legal rule, and 2) whether the court below applied that rule in a way that is "illogical, implausible, or without support in inferences that may be drawn from the facts in the record." *Hinkson* at 1263. In the instant case, the Court may stop at the first prong: the court below did not state any legal rule whatsoever, and therefore certainly cannot be said to have applied the *correct* legal rule. Nor was any such legal rule applied by the district court in an earlier context. *Dish Network Corp. v. FCC*, 653 F.3d 771, 775 (9th Cir. 2011) (divining court's rationale behind order denying preliminary injunction without opinion from statements of the court on the record during oral arguments).

Arc of Cal. v. Douglas is illustrative. In that case, the district court did conduct a significant amount of fact finding, but the record was insufficient because of changed circumstances, mistakes of law, and improper factual finding, and the case was thus remanded to fix the record. The instant case consists of a less-compelling record: the district court conducted no fact-finding, conducted no legal analysis, and left us no record save for a 3-sentence order. *See also Liti v. Comm'r*, 289 F.3d 1103, 1106 (9th Cir. 2002) (remanded to explain "which elements of the record it found persuasive").

In other "abuse of discretion" contexts, this Court and others have been even more clear that "no written findings" = "no affirmation." *Klamath-Lake Pharm. v. Klamath Med. Serv. Bureau*, 701 F.2d 1276, 1292, 1293 (9th Cir. 1983) ("where the record does not clearly dictate the district court's denial, we have been unwilling to affirm absent written findings"); *Hohlbein v. Utah Land Res. LLC*, 432 F. App'x 655, 657 (9th Cir. 2011) (only possible to affirm "if the district court provides an explanation that we can meaningfully review") (*internal citation omitted*); *Foman v. Davis*, 371 U.S. 178, 182 (1962) (denial of motion "without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion"). But even in the context of the more rarely granted preliminary injunction, a court is "obliged to address" the movant's arguments, *Heil Trailer Int'l Co. v. Kula*, 542 F. App'x 329, 337 (5th Cir. 2013); must take in evidence,

United States v. Peninsula Communs., Inc., 287 F.3d 832, 839 (9th Cir. 2002); and may even be required to have a hearing when evidence is in reasonable dispute, *Farnsworth v. Nationstar Mortg., LLC*, 569 F. App'x 421, 427 (6th Cir. 2014). The district court allowed for none of the above.

B. Applying the Four-Factor Winter *Test, Defendant-Appellees Should Be Enjoined*

Because the district court did not specify which of the four factors it found to be deficient, all four must be discussed in this appeal:

1. Merits of the Case. The U.S. Congress and the legislatures of nearly every state, including California and Nevada, have made clear that Americans who live with medical disabilities are protected against discrimination by enacting extensive statutory schemes prohibiting such discrimination. Americans with Disabilities Act, 42 U.S.C. § 12182(a); Unruh Civil Rights Act, Cal. Civ. Code, § 51, *et. seq.*; Nevada's Nondiscrimination Law, NRS 651 *et. seq*. To ensure that individuals with disabilities may go about their normal lives even when they are interacting with private businesses, these laws have placed a duty on places of public accommodation not merely to refrain from making affirmative

discriminatory acts, but also to avoid discrimination through inaction by requiring "reasonable accommodation" to be made to any disabled person who needs such accommodation to enjoy the services of a business as a person without such a disability would. 28 CFR Part 36.

In the matter before the Court, Insomniac has stated that it will affirmatively discriminate against those whose disabilities require medication by turning them away from the festival (with OTC medication) and/or by forcing them to explain themselves to someone other than their doctor (with prescription medication). Appendix 1, Exhibit A. Ostensibly, Insomniac has created these policies because it is worried about the unlawful possession, sale, and consumption of drugs at its events, an issue that arises at every music festival since Woodstock in 1969. However, by stating that it will ban attendees from possessing even medication that is clearly lawfully possessed, neither of these two policies passes the muster of federal or state nondiscrimination laws. Insomniac may not pursue a goal of curtailing illegal drug use by effectively excluding, or harassing, the disabled.

2. Irreparable Harm. Every music festival is a unique experience (a point EDC's marketing team would clearly concede), and by excluding Corbett because of his disability, Insomniac and Speedway would be taking that experience from him. Such an injury cannot be compensated with cash,

as it is not a purely economic loss, and is considered an "intangible injury" under Ninth Circuit precedent. *Rent-A-Ctr* at 603 ("intangible injuries, such as damage to ongoing recruitment efforts and goodwill, qualify as irreparable harm"). Accordingly, the harm is considered irreparable. Compare irreparable harm: *Rent-A-Ctr* (goodwill); *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053 (9th Cir. 2014) (inability to obtain driver's licenses); *United States SEC v. Daspin*, 557 F. App'x 46, 48 (2nd Cir. 2014) (health complications); with non-irreparable harm: *In re: Carey*, No. 11-60021, 2012 U.S. App. LEXIS 26795, at *4 (9th Cir., Nov. 21, 2012) (litigation costs); *Ky., Educ. & Workforce Dev. Cabinet, Office for the Blind v. United States*, 759 F.3d 588, 599 (6th Cir. 2014) (loss of profits); *but see Iowa Utils. Bd. v. FCC*, 109 F.3d 418, 426 (8th Cir. 1996) (if potential economic loss is unrecoverable, it is irreparable).

It should be noted that the test for "irreparable harm" for the purposes of a preliminary injunction does not consider the *severity* of the harm, but rather the *likelihood* of its occurrence. *Id*. The likelihood of the harm coming about is plainly admitted by Insomniac on its Web site: it states in unambiguous terms that Corbett will not be allowed into the festival with his OTC medication, and will not be allowed into the festival without explaining his prescription medication to a "safety officer" and hoping that the

explanation is satisfactory to this individual. Appendix 1, Appendix 2. Thus, the likelihood of Corbett encountering the harm is near certain.

Moreover, a reasonable argument can be made that the mere advertising of a discriminatory policy constitutes a *present and continuing harm*. Antidiscrimination laws are intended to allow those with disabilities to feel as integrated with the rest of society as possible, and the mere advertisement of discriminatory policy, even before enforcement, is actionable harm. *See*, *e.g.*, 28 CFR § 36.203 (requiring businesses to provide *the opportunity* for equal participation); § 36.206(b) (prohibiting mere *threatening* of discrimination), *etc*. A person afraid of denied entry as a result of the policies complained of herein may be dissuaded from purchasing a ticket and reserving accommodations near the festival out of fear that they will lose the value of their purchase when turned away at the gate, or out of fear that they will be forced to endure the embarrassment of having to explain their medical condition to an Insomniac "safety officer." No one should be forced to, *e.g.*, disclose their HIV status, discuss their treatment for schizophrenia, or expound upon their Irritable Bowel Syndrome in order to enjoy a music event, or fear that they will be asked to do any of the above.

3. Balance of Equities. The injunction requested would require virtually no effort or expense for the defendants: they simply need to stop advertising their medicine bans on their Web site and to refrain from stopping attendees from bringing medication into EDC. If anything, prohibiting their medicine policies will actually save their companies the time they would have spent dealing with medicine found on attendees at the entrance. The injunction requested is narrowly tailored to addressing the actual harm Corbett complains of and does not burden the continuation of the event or the related revenue sources (ticket sales, concessions, and merchandise sales) of Insomniac and Speedway.

4. Public Interest. Worse than the fact that these policies will prevent wise individuals with disabilities from attending EDC, the policies will dangerously encourage young, overly-enthusiastic individuals with disabilities to attempt to forego their medication in order to attend the festival. Regarding the OTC policy, consider the individual with severe allergies who carries diphenhydramine (Benadryl) wherever he goes, but leaves it at home for EDC because of the policy, hoping that he does not have an allergic reaction. Or the individual who knows she often gets migraine headaches, and therefore carries ibuprofen (Advil) wherever she goes, but leaves it at home for EDC, thereafter suffering severe pain

triggered by the loud music and bright lights of the festival. Regarding the prescription policy, consider those who need to explain their psychiatric medications, epinephrine injectors ("EpiPen"), or HIV medication.

While these hypotheticals are illustrative of why EDC's policies are dangerous to the public and an injunction is in the interest of the public, the law is clear without the need to ponder these possibilities: Congress and the state legislators of California and Nevada have determined that public policy is that discrimination be eradicated. As such, there can be no question that a policy of preventing individuals who need medication from having access to that medication at a place of public accommodation is in the public interest.

V. Conclusion

For the above reasons, the Plaintiff respectfully requests the Court **grant** Plaintiff's motion, and issue the proposed preliminary injunction pending appeal.

Dated: Los Angeles, CA
May 31st, 2016

Respectfully submitted,

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Jonathan Corbett
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CERTIFICATE OF SERVICE

I, Jonathan Corbett, *pro se* Plaintiff-Appellant, hereby certify that I have served all defendants in this case via USPS Priority Mail Express (overnight service) on May 31st, 2016, at the following addresses:

Insomniac Holdings, LLC.
9441 W Olympic Blvd
Beverly Hills, CA 90212

Speedway Motorsports, Inc.
5555 Concord Pkwy. S.
Concord, NC 28027

Dated: Los Angeles, CA
May 31st, 2016

Respectfully submitted,

_____

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