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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

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| CHINESE 6 THEATERS, et al.,<br><br>Plaintiffs and Respondents,<br><br>v.<br><br>CIM/H&H RETAIL, et al.,<br><br>Defendants and Appellants. | B271764<br><br>(Los Angeles County Super. Ct. No.BC597670) |

APPEAL from an order of the Superior Court of Los Angeles County, Deidre Hill, Judge. Affirmed.

Sullivan & Cromwell, Robert A. Sacks and Diane L. McGimsey for Defendants and Appellants.

Quinn Emanuel Urquhart & Sullivan, Gary E. Gans and Jeanine M. Zalduendo for Plaintiffs and Respondents.

## INTRODUCTION

Plaintiffs and respondents Chinese 6 Theatres and Chinese Theatres, LLC sued defendants and appellants CIM/H&H Retail L.P. and CIM/H&H Retail Owner L.P. regarding a lease affecting the historic Chinese Theatre and the newer Dolby Theatre in the Hollywood & Highland Center Mall. Defendants are the landlords at the Hollywood & Highland Center Mall; plaintiffs are tenants. The lease at issue limits the number of movie premieres and motion picture screenings that may be held at the Dolby Theatre. Plaintiffs allege defendants breached the lease by allowing the Dolby Theatre to hold multiple premieres and television festivals. Plaintiffs sought a preliminary injunction to maintain the status quo while the litigation was pending, and the trial court issued the injunction. Defendants appeal from that order.

We affirm. Defendants have not demonstrated that the trial court abused its discretion in determining that plaintiffs demonstrated a likelihood of prevailing on the merits, and that the relative balance of harms warranted injunctive relief.

## FACTUAL AND PROCEDURAL BACKGROUND

### A. The theatres and Theatre Lease

Plaintiffs operate the historic theatre formerly known as Grauman's Chinese Theatre (Grauman's), which opened in 1927. Grauman's is a Los Angeles Historic-Cultural Monument, and is the world's largest IMAX theatre. Plaintiffs also operate a theatre complex originally called the Chinese 6 Theatres (the Chinese 6) in the Hollywood & Highland Center Mall. Plaintiffs stated in their complaint that they "operate Grauman's and the Chinese 6 essentially as a seven-screen unit." Plaintiffs allege

that Grauman's and the Chinese 6 host film premieres and other movie screenings, which generate substantial revenues. Following a naming rights agreement with an affiliate of Chinese electronics manufacturer TCL Corporation, Grauman's and the Chinese 6 are now known as the "TCL Chinese Theatres."

The Dolby Theatre, formerly known as the Academy Theatre and the Kodak Theatre, is also located in the Hollywood & Highland Center Mall. The Dolby Theatre has hosted events such as the Academy Awards, the Daytime Emmy Awards, American Idol finals, and performances by the American Ballet Theatre. Plaintiffs allege that the Dolby Theatre also competes with Grauman's and the Chinese 6 "with respect to hosting premieres and other screenings." The Dolby Theatre operators are not parties to this case.

Defendants operate the Hollywood & Highland Center Mall, and are landlords of the Chinese 6 and Dolby Theatre premises. The contract at issue, the "Theatre Lease," is a 97-year lease relating to premises in the Hollywood & Highland Center Mall including the Chinese 6. The parties' predecessors-in-interest entered into the Theatre Lease in 1999. According to section 5.5 of the Theatre Lease, the Dolby Theatre (then known as the Academy Theatre) would be used for "various performances," including hosting the Academy Awards. Section 5.5 then states, "Except as otherwise set forth below, the Academy Theatre shall not be used as a motion picture theatre." An exception allows the Academy Theatre to show "a historical, tourist-oriented film" of less than one hour duration that is "destination specific and not generally and otherwise commercially shown."

Lease amendment number 8, executed in June 2013, acknowledges the naming rights agreement with Dolby Laboratories, Inc. for the newly-renamed Dolby Theatre. The amendment notes that Dolby intended to use the Dolby Theatre for up to 12 events per calendar year, and some of those events might include "motion picture premieres." The amendment states that defendants "shall be permitted to hold up to a maximum of twelve (12) motion picture premieres in the Academy Theatre in each calendar year" provided that only one such premiere would be allowed within any three-week period. The amendment notes, "Landlord acknowledges that two (2) motion picture premieres have been conducted in the Academy Theatre in calendar year 2013 and that such premieres shall count toward the twelve (12) Permitted Academy Theatre Premieres in calendar year 2013." The amendment also reiterates, "Landlord acknowledges and agrees that the Academy Theatre shall not be used as a motion picture theatre, except as expressly allowed under Section 5.4 and 5.5 of the Lease."[1]

**B. Plaintiffs' complaint[2]**

Plaintiffs sued defendants in October 2015, alleging breach of contract and related causes of action. Plaintiffs alleged that defendant violated the Theatre Lease when four premieres were held at the Dolby Theatre within a three-week period in October and November 2014. Three of the four premieres were held as

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[1] Section 5.4 states that no part of the Hollywood & Highland Center Mall shall be used as a "movie theatre" except as otherwise provided in the Theatre Lease, and includes restrictions on the sale of popcorn and candy within the mall.

[2] The facts in this section are taken from plaintiffs' complaint and the documents and evidence submitted relating to plaintiffs' request for a preliminary injunction.

part of the 2014 AFI Film Festival. Plaintiffs also alleged that two premieres were held within a three-week period in December 2014. Plaintiffs also alleged that defendants allowed the Dolby Theatre "to be used as a movie theatre to hold screenings of" television programs in March 2014 and March 2015 as part of the annual William S. Paley Television Festival, or "PaleyFest."

In April 2015, plaintiffs learned that three premieres were scheduled to be held at the Dolby Theatre in June 2015: Jurassic World, distributed by Universal, on June 9; Terminator Genisys, distributed by Paramount, on June 28; and Ant-Man, distributed by Disney, on June 29. Plaintiffs alleged that when they approached the managing director of the Dolby Theatre about this potential breach of the Theatre Lease, the director threatened to tell the film distributors that they could not hold their premieres at the Dolby Theatre because of plaintiffs' objections, and to tell the distributors that they should take up their concerns with plaintiffs directly. Plaintiffs then contacted defendants' counsel, who told them that only the Jurassic World premiere was scheduled for June 9, 2015, and no other premieres were scheduled for June 2015. However, plaintiffs learned from other sources that there were plans to hold the Terminator Genisys and Ant-Man premieres at the Dolby Theatre.

Disney contacted plaintiffs to request permission to have the Ant-Man premiere held at the Dolby Theatre on June 29. To preserve their relationship with Disney, plaintiffs granted Disney permission to hold the premiere, but reserved their contractual rights against defendants. Paramount also contacted plaintiffs to request permission to hold the Terminator Genisys premiere at the Dolby Theatre on June 28. According to plaintiffs, Paramount threatened to no longer hold premieres at Grauman's

or the Chinese 6 if plaintiffs refused to allow the Terminator Genisys premiere at the Dolby Theatre. Plaintiffs granted permission to Paramount to hold the Terminator Genisys premiere at the Dolby Theatre on June 28, and accepted a damages payment offered by Paramount. In a letter to defendants' counsel, plaintiffs' counsel wrote, "Based on the discussion with Paramount, The Chinese Theatres will agree not to enforce its contractual right against CIM limiting the number of premieres at the Dolby Theatre during a three-week period with respect to this specific premiere of The Terminator on June 28."

**C. Plaintiffs' request for a preliminary injunction**

Plaintiffs also sought a preliminary injunction.[3] Plaintiffs requested specific performance of the limitations in the Theatre Lease relating to premieres and use of the Dolby Theatre as a motion picture theatre. Plaintiffs noted that the Theatre Lease included a right to seek injunctive relief and specific performance. Plaintiffs asserted that defendants willfully and repeatedly breached the Theatre Lease, and "attempted to coerce Plaintiffs to consent to the breaches by threatening to and actually interfering with Plaintiffs' relationships with their studio clients." Plaintiffs argued that they would likely prevail on the merits on each of their causes of action. Plaintiffs also contended that the balance of the hardships weighed in their favor, because defendants' conduct resulted in lost revenues,

[3] Along with their complaint, plaintiffs filed an ex parte application for a temporary restraining order and order to show cause re: preliminary injunction. The ruling on that application is not in the record, but defendants' opposition to plaintiffs' motion for a preliminary injunction states that the request for a TRO was denied.

damaged plaintiffs' relationships with their clients, and damaged the value of the naming rights associated with Grauman's and the Chinese 6. Plaintiffs asserted that defendants would suffer no hardships as a result of an injunction requiring them to comply with the Theatre Lease. Plaintiffs submitted evidence in support of their motion, including the Theatre Lease and declarations providing facts about the alleged breaches and related communication among the relevant parties.

Defendants opposed the motion. They argued there was no need for an injunction because there were no planned events that would violate the Theatre Lease, and defendants did not intend to violate the Theatre Lease in the future. Defendants also argued that plaintiffs either consented to or did not object to prior uses of the Dolby Theatre that they alleged were breaches of the Theatre Lease, such as the 2014 AFI film festival and the two premieres in December 2014. Defendants contended that the Ant-Man and Terminator Genisys premieres were confirmed only after receiving consent from plaintiffs. In addition, defendants argued that plaintiffs had never before contended that the annual PaleyFest, which involved live events and panel presentations as well as television show screenings, constituted use of the Dolby Theatre as a "motion picture theatre." Defendants confirmed that the 2016 PaleyFest was scheduled to be held at the Dolby Theatre in March 2016, but argued that this would not violate the Theatre Lease because it did not constitute use of the Dolby Theatre as a motion picture theatre.

Defendants also argued that plaintiffs' request should be denied because plaintiffs had failed to show imminent, irreparable harm warranting a preliminary injunction. Defendants also asserted that although plaintiffs argued their

naming rights and sponsorship agreements would be damaged, plaintiffs "offer no insight into how the use of the Dolby Theatre in any way affects Plaintiffs' rights under the value of such agreements." Defendants also argued that plaintiffs did not demonstrate that they were likely to succeed on their claims. Defendants submitted declarations and evidence in support of their opposition, and objected to some of plaintiffs' evidence. Plaintiffs filed a reply, additional evidence, and objections to some of defendants' evidence.

**D. The hearing and the court's ruling**

At the hearing on plaintiffs' motion in February 2016, defendants argued there was no reason for an injunction, because "as soon as plaintiffs objected to the holding of more than one premiere in a three-week period, the defendants stopped scheduling premieres within a three-week period." Defendants also noted that the parties disagreed about the restrictions on the Dolby Theatre as a "motion picture theatre" in the lease: "We have here a term, the use as a motion picture theatre[,] that could be extraordinarily broad if you ask plaintiffs what it means, or it may be clear and limited to certain specifically defined areas if you ask defendants what it means." Defendants argued that this provision should be limited to theatrically released movies only, and it should not include television shows, the PaleyFest, or motion pictures used in conjunction with concerts or other live events. Defendants also pointed out that the annual PaleyFest had been held at the Dolby Theatre in previous years, and plaintiffs did not object. The upcoming festival, scheduled for March 2016, had been widely advertised, and tickets to the festival had already been sold. Defendants asserted that the balance of the harms required the PaleyFest to go forward.

Plaintiffs argued that defendants' contentions that they did not intend to breach the Theatre Lease were not reliable because defendants said the same thing with respect to the June 2015 premieres, forcing plaintiffs into an untenable position with respect to their clients. Plaintiffs also argued that the definition of "motion picture" is clear: "[S]howing moving pictures on a screen is using the Dolby as a motion picture theatre." Plaintiffs contended that the PaleyFest is included in that definition. Plaintiffs asserted that they were not required to show harm, because the Theatre Lease provided for equitable remedies and within the contract the parties stipulated that any breach would have material and adverse consequences to plaintiffs. Even so, "[I]rreparable harm is established. When you have these major premieres, it affects the value of the Chinese Theatre's name, its naming rights, it's [*sic*] sponsorships. All of that is damaged which is incalculable."

The parties and the court discussed the issues further, including the evidence submitted by both parties. Defendants argued that because the parties contested the meaning of the phrase "motion picture," including that language in an injunction would "subject[ ] our client to a violation of a court order without any clarity actually around what the restrictions are." The court asked defense counsel what language she would prefer to separate the PaleyFest from other types of showings. Defense counsel argued that there was little evidence about the parties' intent as to the definition of "motion picture," and "[t]he only evidence of the part[ies'] intent is that they intended this to cover only theatrically released motion pictures." Plaintiffs disagreed that any evidence supported this interpretation.

The court held that plaintiffs made a substantial showing of the need for an injunction. Although defendants said there were no premieres currently scheduled, defendants' past conduct regarding the June 2015 premieres suggested additional protections were warranted. The court said it would grant plaintiffs' request for an injunction, and it would consider whether the injunction would include the upcoming PaleyFest. The court asked plaintiffs to prepare an order "to be reviewed by the defense and then submitted to the court to see if you can meet and confer over the language of the order." The court added, "[I]nformally I will be available to discuss and try to work this out." The court later reiterated that plaintiffs would file a proposed preliminary injunction, and "review has to occur by the defense." The court said to defense counsel, "I understand you have a standing objection that the preliminary injunction should not issue at all. . . . But in terms of assuming the court is going to order it, and that is confirmed, what language should be in there is the next issue." Defense counsel responded, "Okay."

The court issued a written ruling the same day. The ruling stated that plaintiffs demonstrated a probability of prevailing on the merits: "The terms of the lease are straightforward and self-explanatory. The Landlord—Defendants in this case—aver to not allow a fellow tenant—the Dolby Theatre—to hold more than a maximum of 12 premier[e]s a year, and no more than one per three week period." It was undisputed that the Dolby Theatre held more than one premiere within a three-week period in June 2015, and defendants did not show that plaintiffs' consent to the premieres—which plaintiffs contended was not voluntarily given—excused the alleged breach. The court also noted that defendants agreed in the Theatre Lease that "a violation of the

premiere-limiting provisions constitutes a 'material and adverse financial impact on the Tenant.'" In "balancing the equities," the court found that "Plaintiffs' provide evidence of several sponsorship agreements that would be affected by repeated violations of the lease agreement. Defendants, on the other hand, seem to concede that they will not be harmed at all as they repeatedly assure the court that only a limited number of premier[e]s will be held at the Dolby Theatre, in accordance with the lease terms provisions." The court therefore found good cause to issue the injunction, and said prior restraint was required to avoid a multiplicity of judicial proceedings. The court also ordered plaintiffs to deposit a $500,000 bond with the court.

Plaintiffs filed a proposed injunction ordering defendants to "specifically perform pursuant to Section 5.5 of the Theatre Lease." The proposed order enjoined defendants and their "agents, employees, employers, assignees, representatives, parents, subsidiaries, affiliates, and all persons acting in concert or participating with them" from "scheduling, reserving, or holding more than one motion picture premiere at the Dolby Theatre within any three-week period" or "permitting the Dolby Theatre to be used as a motion picture theatre for screenings other than motion picture premieres." The proposed language excluded the PaleyFest from the injunction.

Defendants objected to plaintiffs' inclusion of language about "agents, employees, employers, assignees, representatives, parents, subsidiaries, affiliates, and all persons acting in concert or participating with" defendants, and objected that the proposed order was overly broad in that it restricted the "scheduling" or "reserving" dates for movie premieres. Defendants submitted their own proposed order, stating in simpler language that

defendants are "ordered [to] comply with the terms set forth in Section 5.5 of the Theatre Lease."

The court signed plaintiffs' proposed order, but limited the language about "agents, employees, employers, assignees, representatives, parents, subsidiaries, affiliates, and all persons acting in concert or participating with" defendants. Defendants timely appealed.

## STANDARD OF REVIEW

In an appeal following the imposition of a preliminary injunction, review is limited to whether the trial court's decision was an abuse of discretion. (*Butt v. State of California* (1992) 4 Cal.4th 668, 677-678.) ""The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court."' [Citations.]" (*Goodman v. Lozano* (2010) 47 Cal.4th 1327, 1339.) "[T]he burden is on the party challenging the preliminary injunction to prove it was improperly granted." (*Costa Mesa City Employees' Assn. v. City of Costa Mesa* (2012) 209 Cal.App.4th 298, 306.)

## DISCUSSION

### A. The trial court did not abuse its discretion by granting plaintiffs' request for a preliminary injunction.

"[A]s a general matter, the question whether a preliminary injunction should be granted involves two interrelated factors: (1) the likelihood that the plaintiff will prevail on the merits, and (2) the relative balance of harms that is likely to result from the granting or denial of interim injunctive relief." (*White v. Davis* (2003) 30 Cal.4th 528, 554.) These factors operate on a sliding

scale, so "the more likely it is that plaintiffs will ultimately prevail, the less severe must be the harm that they allege will occur if the injunction does not issue. This is especially true when the requested injunction maintains, rather than alters, the status quo." (*King v. Meese* (1987) 43 Cal.3d 1217, 1227.) Defendants contend the trial court erred by finding in favor of plaintiffs on both of these factors. We examine each below.

First, however, we address defendants' argument that before a court can consider these two factors, the court must make a threshold finding that the applicant has demonstrated a threat of immediate and irreparable injury.[4] Defendants cite *Choice-in-Education League v. Los Angeles Unified School Dist.* (1993) 17 Cal.App.4th 415, 422 (*Choice-in-Education*) and *Triple A Machine Shop, Inc. v. State of California* (1989) 213 Cal.App.3d 131, 138 (*Triple A Machine Shop*) in support of their argument. *Choice-in-Education*, quoting *Triple A Machine Shop*, stated that before a court may issue an injunction, the party applying for the injunction "'must make a prima facie showing of entitlement to injunctive relief. The applicant must demonstrate a real threat of immediate and irreparable injury [citations] due to the inadequacy of legal remedies.'" (*Choice-in-Education*, 17 Cal.App.4th at p. 422, quoting *Triple A Machine Shop*, *supra*, 213 Cal.App.3d at p. 138.) In support of this statement, *Triple A Machine Shop* cited Witkin's California Procedure treatise. The

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[4] Federal rules state that a temporary restraining order may be issued where the moving party shows that "immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition." (Fed. Rules Civ.Proc., rule 65, 28 U.S.C.) As discussed herein, however, California does not require a showing of immediate and irreparable injury before a temporary injunction may be issued.

Witkin treatise makes clear that this is not a separate factor: "It is common to speak of the necessity of a showing of threatened 'irreparable injury' as the basis for an injunction," but "[i]t has been suggested that the term adds nothing to the broader concept of inadequacy of the legal remedy, and that both are merely shorthand expressions covering the factors that determine the right to an injunction." (6 Witkin, Cal. Procedure (3d ed. 1985) Provisional Remedies, § 254, p. 221; see also 6 Witkin, Cal. Procedure (5th ed. 2008) Provisional Remedies § 295.)

Thus, although *Choice-in-Education* and *Triple A Machine Shop* used language referencing an "immediate and irreparable injury," those cases did not impose a separate, threshold requirement that the court must consider in issuing an injunction. To the contrary, *Choice-in-Education* also quoted *Triple A Machine Shop* when it stated, "'The trial court considers two interrelated factors when deciding whether to issue preliminary injunctions.'" (*Choice-in-Education, supra*, 17 Cal.App.4th at p. 422, quoting *Triple A Machine Shop, supra*, 213 Cal.App.3d at p. 138.) A showing of immediate, irreparable injury is not a third, separate factor. (See *Cohen v. Board of Supervisors* (1985) 40 Cal.3d 277, 286 fn. 5 [requirements incorporating "irreparable injury" are "simply different ways of describing the 'interim harm' factor"].)

Courts overwhelmingly cite these two interrelated factors—the likelihood plaintiffs will prevail on the merits and the relative balance of harms—as the requirements for a preliminary injunction. (See, e.g., *White v. Davis, supra,* 30 Cal.4th at p. 554; *People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1109; *Cohen v. Board of Supervisors, supra,* 40 Cal.3d at p. 286; *IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 69-70; *Continental*

*Baking Co. v. Katz* (1968) 68 Cal.2d 512, 528.) Cases do not include immediate, irreparable injury as a separate, additional requirement. Although Code of Civil Procedure, section 526, subdivision (a)(2) mentions irreparable injury in stating that an injunction may be granted where "the commission or continuance of some act during the litigation would produce waste, or great or irreparable injury, to a party to the action," it is only one of many factors the court may consider. The same statute states that an injunction may be appropriate where the plaintiff is "entitled to the relief demanded" and the relief consists of constraining "the act complained of" (subd. (a)(1)), the opposing party is about to do an act in violation of the other's rights (subd. (a)(3), pecuniary compensation would not provide adequate relief (subd. (a)(4)), it would be extremely difficult to ascertain the amount of compensation that would afford adequate relief (subd. (a)(5)), or restraint is necessary to prevent a multiplicity of judicial proceedings (subd. (a)(6)). It is therefore clear that "irreparable injury" is not the sole basis upon which a preliminary injunction may be based, and we decline to adopt defendants' argument that a threshold showing of immediate, irreparable injury is required before a court may consider the two interrelated preliminary injunction factors.

We turn now to those two interrelated factors: the likelihood that plaintiffs will prevail on the merits and the relative balance of harms likely to result from interim injunctive relief.

1. *Likelihood that plaintiffs will prevail on the merits*

Defendants argue that the trial court abused its discretion by finding a likelihood that plaintiffs would prevail on the merits

because "Plaintiffs' consent to the allegedly violative premieres and Plaintiffs' failure to provide the notice required under the Theatre Lease's terms precludes Plaintiffs from recovering in contract."

Defendants' argument assumes defendants breached the Theatre Lease by holding the premieres associated with the 2014 AFI film festival and the June 2015 premieres. Defendants argue, however, that plaintiffs consented to the breaches, and therefore waived any claim for damages relating to those breaches. Plaintiffs, on the other hand, submitted evidence that they objected to the June 2015 premieres of Ant-Man and Terminator Genisys, and consented to those premieres only after defendants' actions threatened plaintiffs' ongoing relationships with Disney and Paramount. The question before us, therefore, is whether the trial court abused its discretion by finding, based on this evidence, that plaintiffs were likely to succeed on the merits.

Defendants' argument that plaintiffs waived their contractual claims by consenting to the premieres is not supported by the evidence. When plaintiffs contacted defendants in May 2015 about the premieres scheduled for June 2015, plaintiffs asked that defendants comply with the Theatre Lease and stated that their letter "shall not be construed as a waiver of any of Chinese Theatres' rights, remedies, or claims, legal or equitable, all of which are expressly reserved." In an email dated May 11, 2015, counsel for plaintiffs stated, "All of my clients' rights are reserved." A letter from plaintiffs' counsel to defendants' counsel dated May 20 included the same sentence. In a letter from plaintiffs' representative to Disney regarding the Ant-Man premiere, plaintiffs' representative stated, "[W]e will

not take any action to prevent Disney from holding the premiere, however we reserve all our rights against CIM." The evidence therefore does not support defendants' argument that plaintiffs' consent to the June 2015 premieres operated as a waiver of plaintiffs' contractual claims against defendants with respect to all of those premieres.[5]

Defendants cite two cases that they argue "mandate" a finding that plaintiffs' consent to the premieres renders plaintiffs' contract claims unsustainable. The first case is *Rubin v. Los Angeles Fed. Sav. & Loan Assn.* (1984) 159 Cal.App.3d 292, in which a bank loan relating to a property was secured with a due-on-sale clause, giving the bank the right to call its loan due if the property was sold. The bank later discovered that the owner sold the property, but the bank "accept[ed] the monthly payments from [the new owner] as they became due over a substantial period of time without any reservation of rights and with full knowledge that the property had been transferred to [the new owner] in 1978." (*Id.* at p. 299.) Several years later the bank attempted to invoke the due-on-sale clause, but the trial court

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[5] With respect to the Terminator Genisys premiere, plaintiffs' counsel wrote to defendants' counsel, "Based on the discussion with Paramount, The Chinese Theatres will agree not to enforce its contractual right against CIM limiting the number of premieres at the Dolby Theatre during a three-week period with respect to this specific premiere of The Terminator on June 28." Given this language, defendants' waiver argument may have merit with respect to the Terminator Genisys premiere. Plaintiffs contend that this waiver was not freely given due to Paramount's threats. These contested issues need not be determined here, as the evidence shows that, at least for the Ant-Man premiere, plaintiffs reserved their contractual rights against defendants.

and Court of Appeal held that the bank had waived its right to invoke that clause. The Court of Appeal noted, "Although waiver is frequently said to be the intentional relinquishment of a known right, waiver may also result from conduct 'which, according to its natural import, is so inconsistent with the intent to enforce the right in question as to induce a reasonable belief that such right has been relinquished.' [Citation.]" (*Rubin, supra*, 159 Cal.App.3d at p. 298.) Because the bank accepted payments without reserving any rights or invoking the due-on-sale clause, the court held that its actions constituted a waiver.

The second case defendants rely on is *A.B.C. Distributing Co. v. Distillers Distributing Corp*. (1957) 154 Cal.App.2d 175, a contract case involving distribution of alcoholic beverages. The plaintiff, an importer of alcoholic beverages, alleged the defendant breached a contract and interfered with the plaintiff's business "by means of wrongful refusal to deliver supplies for resale in accordance with contracts between the immediate parties." (*Id*. at p. 178.) The case did not focus on waiver, but noted that the plaintiff alleged use of a particular distributor constituted a breach of the parties' contract. (*Id*. at p. 186.) The Court of Appeal said there was no evidence to support a finding that the parties had reached an implied agreement not to use additional distributors. (*Id*. at pp. 186-187.) The court added, "Moreover, plaintiff waived such alleged breaches of contract by continued performance on its part without any claim of breach by defendant. [Citations.]." (*Id*. at p. 187.) The court did not expand on this issue or discuss waiver further.

Neither of these cases supports defendants' argument that, as a matter of law, plaintiffs' actions constitute a waiver. With respect to the Ant-Man premiere, plaintiffs made clear in several

written communications that they were not waiving their rights against defendants under the contract. Plaintiffs then sued defendants for breach of contract four months later, and sought a preliminary injunction to bar defendants from further breaching the Theatre Lease. These actions cannot reasonably be construed to constitute continued performance of a contract in a manner that might induce a belief that contractual rights been relinquished. To the contrary, these are the actions of a party attempting to preserve—not waive—contractual rights.

Moreover, plaintiffs correctly point out that the Theatre Lease includes a no-waiver provision: "No waiver of any provision of this Lease shall be implied by any failure of Landlord or Tenant to enforce any remedy on account of the violation of this provision, even if such violation shall continue or be repeated subsequently, any waiver by Landlord or Tenant of any provision of this Lease may only be in writing." Here, plaintiffs did not waive any part of the Theatre Lease in writing; instead they preserved their rights in writing and filed a lawsuit shortly after the alleged June 2015 breaches.

Defendants point to evidence indicating that plaintiffs sought to involve the Dolby Theatre as part of the 2014 AFI film festival, and even asked the Dolby Theatre to hold one of the related premieres. As a result, defendants argue, plaintiffs have waived any right to assert breach of contract with respect to the premieres relating to that event. Even so, defendants have not demonstrated that a waiver relating to the 2014 AFI film festival could constitute a waiver of all future breaches. In short, the evidence does not support defendants' argument that plaintiffs consented to each of the breaches.

Defendants also argue that plaintiffs were obligated under the Theatre Lease to provide defendant with 30 days' notice and the opportunity to cure any breach. They point to section 19.7.1 of the Theatre Lease, which defines a "default" by the landlord to include "any failure by Landlord to observe or perform any other provision, covenant or condition of this Lease to be observed or performed by Landlord . . . where such failure continues for thirty (30) days after written notice thereof from Tenant to Landlord specifying in detail Landlord's failure to perform. . . ." Defendants assert, "Plaintiffs' failure to offer any evidence that they complied with this notice provision . . . negates any likelihood of success."

Plaintiffs point out that they "gave notice with respect to the June 2015 premieres" by sending a letter on May 5, 2015, stating that the planned June 2015 premieres breached the Theatre Lease. This letter was sent more than 30 days before any of the three June premieres, and therefore appears to meet the notice timing requirements of the Theatre Lease. Defendants state, in a footnote in their reply brief, that plaintiffs' letter "did not comply with the Theatre Lease's requirements concerning the form of notice." This assertion, with no explanation as to why the letter failed to provide defendants adequate notice, is not sufficient to establish that the trial court erred in assessing the likelihood of plaintiffs' potential success on the merits.

We therefore find the that trial court did not abuse its discretion in finding a likelihood that plaintiffs will prevail on the merits.

2. *Balance of the harms likely to result from interim injunctive relief*

An injunction may be properly issued when "the interim harm to the plaintiff if the injunction is denied outweighs the interim harm to the defendant if the injunction is issued." (*San Francisco Unified School District ex. rel. Contreras v. First Student, Inc.* (2013) 213 Cal.App.4th 1212, 1227.)

The trial court found that defendants "seem to concede that they will not be harmed at all as they repeatedly assure the court that only a limited number of premieres will be held at the Dolby Theatre, in accordance with the lease terms provisions." Defendants argue this is not the case, because "the ambiguity and potentially broad scope of the injunction" subjects defendants to violations of a court order, even if they are in compliance with the Theatre Lease. This argument is not well taken, because the injunction orders defendants to specifically perform its obligations under the Theatre Lease, and does not appear to limit defendants' activities beyond what the Theatre Lease requires. To the extent defendants argue that the injunction is overbroad because its terms are vague, that argument has been forfeited, as discussed more fully in the following section.

Defendants argued below against the issuance of an injunction on the grounds that other than the March 2016 PaleyFest, no premieres were scheduled to be held at the Dolby Theatre. They make the same argument on appeal, pointing to the declaration of the general manager of the Dolby Theatre, who stated that the theatre had no intent to schedule premieres in a manner that would breach the Theatre Lease. Defendants have therefore demonstrated that they would not be harmed by an

injunction compelling them to specifically perform their duties set out in the Theatre Lease.

Defendants also contend that the trial court erred because plaintiffs did not provide the court with evidence to show how repeated violations of the Lease Agreement "would have any effect on the payments owed under, or the value of, Plaintiffs' sponsorship agreements." Plaintiffs, however, submitted the declaration of Alwyn Hight Kushner, president and chief operating officer of plaintiffs. Kushner stated that plaintiffs' business is "largely based on relationships" with major motion picture studios, and premieres from those studios are "not only a significant source of revenue for [plaintiffs], but also create incalculable value for the naming rights and sponsorships for the Chinese Theatres." Kushner further stated that restrictions on the premieres and other screenings at the Dolby Theatre "are extremely important to protecting the business we get from the studios, as well as our relationships with the studios." It may be inferred from these statements that plaintiffs' business with the studios could be damaged by breaches of the Theatre Lease relating to the premiere restrictions at the Dolby Theatre. Plaintiffs therefore have presented evidence that continuing violations of the Theatre Lease could result in harm to plaintiffs' business.

Plaintiffs also note that the Theatre Lease includes a provision in which the parties agree that defendants' breach constitutes material harm: "Landlord acknowledges that the restrictions on Permitted Academy Theatre Premieres contained in this Section 5.5 . . . are material to Tenant and that a breach of such provisions by Landlord will have a material and adverse financial impact on the Tenant." Given that defendants, in the

contract at issue, agreed that a breach materially impacts plaintiffs, their argument that a breach does not materially impact plaintiffs is not well taken.

Defendants argue that any harm plaintiffs have demonstrated is too speculative to warrant injunctive relief. They argue that "the trial court's ruling must be supported with concrete, factual evidence that the defendant *intends* to engage in the conduct the moving party seeks to enjoin." In support of this argument, defendants cite *Korean Philadelphia Presbyterian Church v. California Presbytery* (2000) 77 Cal.App.4th 1069 (*Korean Presbyterian*), which involved a rift between a church and its larger religious organization. The appellant religious organization, the Presbytery, argued that the injunction issued by the trial court was overbroad because it barred the Presbytery from using the church's name, entering into contracts for the church, or opening bank accounts in the church's name. (*Id*. at p. 1083-1084.) The Court of Appeal agreed that it was overbroad: "The provisions of the preliminary injunction that prevent the Presbytery from establishing bank accounts or entering into contracts on behalf of the Church or representing to third persons that it speaks for the Church appear entirely superfluous. There was no evidence that the Presbytery has done or intends to do any such thing. An injunction cannot issue in a vacuum based on the proponents' fears about something that may happen in the future. It must be supported by actual evidence that there is a realistic prospect that the party enjoined intends to engage in the prohibited activity." (*Korean Philadelphia*, *supra*, at p. 1084.)

*Korean Presbyterian* does not support defendants' argument that a trial court may not issue a preliminary injunction until the applicant presents proof of the other party's

specific intent. Rather, the court simply found that the church had not presented evidence to show that the injunction related to the evidence presented. Here, on the other hand, plaintiffs presented evidence that defendants already breached the Theatre Lease with respect to premieres on several occasions. The trial court's injunction directing defendants to specifically perform its obligations under the Theatre Lease with respect to use of the Dolby Theatre related directly to the issues between the parties. The trial court's ruling was not "issued in a vacuum" without supporting evidence, as in *Korean Presbyterian*.

We therefore find that the trial court did not abuse its discretion in issuing a preliminary injunction based on the two interrelated factors, the likelihood that the plaintiff will prevail on the merits and the relative balance of harms.

### B. Defendants have forfeited the argument that the injunction is impermissibly vague.

Defendants also argue that the injunction is vague because it fails to adequately define the activity it enjoins: "On its face, the Order is impermissibly unclear because it largely adopts—and mandates that Defendants comply with—terms of the Theatre Lease whose proper interpretation is the very question at issue in this litigation, i.e., the interpretation of the terms 'motion picture premieres' and 'use as a motion picture theatre.'" Defendants argue that the court erred because "'men of common intelligence' differ in their understanding of what 'use as a motion picture theatre' entails, and the court's ruling and the Order do not resolve any of these issues, instead simply restating the disputed phrase without providing clarity as to its scope."

Plaintiffs contend that defendants have forfeited any such argument "because [they] failed to object to the Preliminary Injunction on that basis in the trial court." We agree.

It is well established that a "party who fails to alert the trial court to an issue that has been left unresolved forfeits the right to raise that issue on appeal." (*Araiza v. Younkin* (2010) 188 Cal.App.4th 1120, 1127.) "It is clearly unproductive to deprive a trial court of the opportunity to correct such a purported defect by allowing a litigant to raise the claimed error for the first time on appeal." (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1138.)

The doctrine of forfeiture applies to the language of an injunction. For example, in *City of San Marcos v. Coast Waste Management, Inc.* (1996) 47 Cal.App.4th 320, the trial court issued a preliminary injunction, and the defendant, Coast, argued on appeal that the language in it was "impermissibly vague and ambiguous." (*Id.* at p. 327.) The Court of Appeal rejected this argument, noting that Coast had several different opportunities in the trial court to object to or seek clarification of the order language, but it did not. "By repeatedly failing to object to the language of the proposed written order, Coast effectively waived any objection to it . . . . Coast simply failed to state a timely objection to the language of the proposed written order. Accordingly, we decline to condone Coast's belated objection and conclude Coast cannot contend on appeal that the language of the order adopted and issued by the court did not correctly reflect its original ruling." (*Id.* at p. 328.)

Similarly, in *People ex rel. Herrera v. Stender* (2012) 212 Cal.App.4th 614, the appellant challenged specific language in an injunction on appeal, but the Court of Appeal rejected the

argument. "This specific argument was forfeited by appellant's failure to raise it in the trial court: Although appellants were given the opportunity to challenge and seek modification of the language of the notice, and did so in many particulars, they raised no issue with this aspect of the notice." (*Id.* at p. 644-645.)

Here, the trial court was aware that definitions of proscribed conduct relating to "motion pictures" were at issue in this case, and specifically told counsel to work together to come to an agreement about the language in the injunction. The judge even offered to make herself available to the parties if they needed assistance. There is no indication in the record that the parties attempted to have specific language about the enjoined activity included in the injunction. Although defendants objected to the proposed order submitted by plaintiffs, they did not object that the language regarding "motion picture premieres" or "use as a motion picture theatre" was vague. Indeed, the language in the preliminary injunction mirrors the language in the Theatre Lease. In their alternate proposed injunction, defendants specifically requested that the court order defendants to comply with the language in the Theatre Lease, and they did not seek to clarify the meaning of "motion picture premieres" or "use as a motion picture theatre." Defendants cannot now argue that the language they accepted and requested is impermissibly vague.

In their reply brief, defendants contend they did not forfeit this argument because they argued to the trial court that the "motion picture" phrases were vague, and therefore they "put the trial court on notice of the ambiguity of the terms included in the order." Indeed, it was clear at the hearing that one issue in this contract case will be the definition of the terms "motion picture" and "motion picture theatre" in Section 5.5. However, this does

not excuse defendants' failure to challenge the language of the injunction at the trial court level. "The general purpose of a preliminary injunction is to preserve the status quo pending a determination on the merits of the action." (*SB Liberty, LLC v. Isla Verde Association, Inc.* (2013) 217 Cal.App.4th 272, 280.) The preliminary injunction does just that, and defendants have forfeited their argument that the lease language is too vague to be included in or incorporated into the preliminary injunction.[6]

**DISPOSITION**

The order granting a preliminary injunction is affirmed. Plaintiffs are entitled to costs on appeal.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

COLLINS, J.

We concur:

WILLHITE, Acting P. J.

MANELLA, J.

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[6] While this appeal was pending, defendants filed a motion asking us to take judicial notice of motions filed by plaintiffs in the trial court seeking to modify the preliminary injunction to enjoin the 2017 PaleyFest. According to defendants, "[t]hat Plaintiffs felt the need to [file these motions] reflects the ambiguity in the" preliminary injunction order. Because we hold that defendants forfeited the ambiguity argument by failing to object to the language they now contend is vague, we deny the motion for judicial notice.