

DURIE TANGRI LLP
RAGESH K. TANGRI (SBN 159477)
rtangri@durietangri.com
MARK A. LEMLEY (SBN 155830)
mlemley@durietangri.com
EUGENE NOVIKOV (SBN 251316)
enovikov@durietangri.com
217 Leidesdorff Street
San Francisco, CA 94111
Telephone: 415-362-6666
Facsimile: 415-236-6300

Attorneys for Defendant
INDIEGOGO, INC.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

CHARLES CARREON,

Plaintiff,

v.

MATTHEW INMAN; INDIEGOGO, INC.;
NATIONAL WILDLIFE FEDERATION;
AMERICAN CANCER SOCIETY; AND DOES
1-100,

Defendants.

Case No. 3:12-cv-03112-EMC

**DEFENDANT INDIEGOGO, INC'S
OPPOSITION TO PLAINTIFF'S REQUEST
FOR A TEMPORARY RESTRAINING
ORDER AND ORDER TO SHOW CAUSE RE
PRELIMINARY INJUNCTION**

Date: To Be Set
Time: To Be Set
Ctrm: 5 - 17th Floor
Judge: Honorable Edward M. Chen

TABLE OF CONTENTS

1		
2		PAGE
3	I. STATEMENT OF THE ISSUES TO BE DECIDED.....	1
4	II. INTRODUCTION	1
5	III. BACKGROUND	3
6	A. Indiegogo	3
7	B. Carreon’s Complaint.....	4
8	C. The TRO Application	6
9	IV. ARGUMENT.....	8
10	A. Legal Standard for a TRO.....	8
11	B. No Irreparable Harm.....	8
12	C. No Likelihood of Success on the Merits.....	11
13	1. CDA Immunity	11
14	2. No Private Right of Action Under the California Supervision of Trustees and Fundraisers for Charitable Purposes Act.....	13
15	D. The Balance of Equities Favors Indiegogo.....	17
16	E. The Public Interest Does Not Favor an Injunction.	17
17	V. CONCLUSION.....	17
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

TABLE OF AUTHORITIES

PAGE(S)

Cases

1 *Alliance for the Wild Rockies v. Cottrell*,
2 632 F.3d 1127 (9th Cir. 2011)8

3 *American Trucking Ass’ns, Inc. v. City of Los Angeles*,
4 559 F.3d 1046 (9th Cir. 2009)8

5 *Barnes v. Yahoo!, Inc.*,
6 570 F.3d 1096 (9th Cir. 2009)11

7 *Boyd v. GMAC Mortgage LLC*,
8 2011 WL 6025906 (N.D. Cal. Dec. 5, 2011).....8

9 *Brown v. Allstate Insurance Co.*,
10 17 F.Supp.2d 1134 (S.D. Cal. 1998).....8

11 *Center for Biological Diversity v. U.S. Fish and Wildlife Serv.*,
12 No. C-08-1278, 2011 WL 6813200 (N.D. Cal., Dec. 28, 2011).....9

13 *Edge Games, Inc. v. Elec. Arts, Inc.*,
14 745 F. Supp. 2d 1101 (N.D. Cal. 2010)9

15 *Farmers Ins. Exch. v. Superior Court*,
16 137 Cal. App. 4th 842 (2006)13

17 *Gentry v. eBay, Inc.*,
18 99 Cal. App. 4th 816 (2002)13

19 *Goddard v. Google, Inc.*,
20 No. C 08-2738, 2008 WL 5245490 (N.D. Cal. Dec. 17, 2008)12, 13

21 *Holt v. College of Osteopathic Physicians and Surgeons*,
22 61 Cal.2d 750, 754 (1964)15

23 *L.B. Research & Education v. UCLA Foundation*,
24 130 Cal.App.4th 171 (2005)15, 16

25 *Moradi-Shalal v. Fireman’s Fund Ins. Cos.*,
26 46 Cal.3d 287 (1988)14, 15

27 *Numbers Licensing, LLC v. bVisual USA, Inc.*,
28 643 F.Supp.2d 1245 (E.D. Wash. 2009)7

Pail v. Wells Fargo Bank, N.A.,
2011 WL 109482 (N.D. Cal., Jan. 13, 2011)9

Qwest Communications Corp. v. City of Berkeley,
146 F. Supp. 2d 1081 (N.D. Cal. 2001)9

Richardson v. Robison,
No. 08CV902, 2008 WL 2338611 (S.D. Cal. June 5, 2008)11

1 *San Diego Etc. Boy Scouts of America v. City of Escondido,*
 14 Cal.App.3d 189 (1971)15

2

3 *Sharp Healthcare v. Leavitt,*
 No. 08-CV-0170, 2008 WL 962628 (S.D. Cal. April 8, 2008)10

4 *Stansfield v. Starkey,*
 220 Cal. App. 3d 59 (1990)5

5

6 *Windermere Holdings, LLC v. U.S. Wall Décor, LLC,*
 2011 WL 133023 (N.D. Cal. Jan. 14, 2011)7

7 **Statutes**

8 47 U.S.C. § 230.....11

9 Cal. Business & Professions Code § 17535.....5

10 Cal. Civil Code § 2224.....5

11 Cal. Gov. Code § 12580.....5

12 Cal. Gov. Code § 12599.....12

13 Cal. Gov. Code § 12581.....14

14 Cal. Business & Professions Code § 17500.....8, 12

15
 16
 17
 18
 19
 20
 21
 22
 23
 24
 25
 26
 27
 28

1 Defendant Indiegogo, Inc. (“Indiegogo”) hereby submits this opposition to Plaintiff Charles
2 Carreon’s (“Carreon”) Ex Parte Application for a Temporary Restraining Order (“TRO”) and Order to
3 Show Cause Re Preliminary Injunction, providing certain injunctive relief against Indiegogo.

4 Indiegogo submits that the application is entirely moot, as explained below, but requests a hearing
5 and oral argument should the Court be inclined to consider Carreon’s ex parte application on the merits.

6 **I. STATEMENT OF THE ISSUES TO BE DECIDED.**

7 The issues to be decided by the Court in ruling on Carreon’s Application are these:

- 8 1. Is Carreon’s Application moot in light of the fact that Inman’s share of the proceeds
9 from the BearLove campaign has been sent to the American Cancer Society and the
10 National Wildlife Fund?
- 11 2. Has Carreon carried his burden to show that he is likely to succeed on the merits, that
12 he will suffer irreparable harm if his application is not granted, that the balance of
13 hardships tips in his favor, *and* that the public interest favors an injunction?

14 **II. INTRODUCTION**

15 Carreon filed his complaint in this case on June 15, 2012. (Dkt. 1.) On June 28, 2012, at 4:55
16 p.m., he served this last-minute application for a TRO, asking to enjoin the disbursement of certain funds
17 from Indiegogo, a “crowdfunding” website, to co-defendant and Indiegogo user Matthew Inman, who
18 has promised to donate the money to charity. Declaration of Ragesh Tangri (“Tangri Decl.”), ¶ 2.
19 Carreon then served revised TRO papers shortly after 7:00 p.m. that evening. *Id.* ¶ 3.

20 Carreon did not file his papers until June 30. (Dkt. 20.) By the time he filed them, he had been
21 informed that the money already had been transferred. (Tangri Decl., ¶ 6. & Ex. H.) At Inman’s request,
22 his share of the money contributed to the BearLove campaign was sent by check to the American Cancer
23 Society and the National Wildlife Fund, in equal amounts, on June 29. (Declaration of Slava Rubin
24 (“Rubin Decl.”), ¶ 10.) As explained below, Carreon was aware at least as early as June 15 that the
25 money was liable to be transferred at any time beginning June 26 and at all events no later than Monday
26 July 2. He nevertheless made no effort even to file for a TRO until the close of business on June 28.
27 And, while he notes that the ECF system was down at that time, he offers no explanation for not having
28 sought to file his TRO application well before June 26 – which he knew to be the earliest date the money

1 could have been transferred – so that the Court could have adjudicated it before the time period during
2 which the money was due to be transferred began. Nor does he offer an explanation for having failed at
3 least to bring the application to the Court’s attention by means other than ECF on Friday June 29.¹

4 The simple reason for that is that there never was an emergency here, or any serious threat to
5 anyone or anything. Carreon’s application is gamesmanship. When Carreon filed his original complaint
6 on June 15, he knew that funds would be disbursed within five business days of the close of the
7 fundraising campaign, which was set for June 25. Indeed, on June 26, in conversation with Indiegogo’s
8 counsel, he admitted that he was aware that the funds could be disbursed at any time between the time of
9 that conversation and Monday July 2. (Tangri Decl., ¶ 4.) Yet Carreon waited nearly two weeks after
10 filing his complaint to present the court with his TRO request at the eleventh hour. Had there been any
11 threat of real harm, Carreon would have made this application with more than hours to spare.

12 In any event, the application is substantively meritless. *First*, Carreon cannot demonstrate
13 irreparable harm to anyone, and certainly not to himself. A temporary restraining order is a drastic
14 remedy, intended to prevent the grave and irreversible consequences of some imminent event. Here, the
15 *only* imminent event was the disbursement of just over \$95,000 to the National Wildlife Fund and the
16 American Cancer Society (not \$200,000 as Carreon’s application mistakenly states), fulfilling Inman’s
17 promise to donate the money to those organizations – the very outcome that Carreon claims to desire.
18 Indiegogo will retain roughly \$8,800 as a processing fee. Carreon’s total contribution was \$10. Should
19 it later be determined that any harm flowed from these events, that harm would be readily compensable
20 with an award of monetary damages or restitution.

21 *Second*, Carreon has not demonstrated and cannot demonstrate a likelihood of success on the
22 merits. His claims against Indiegogo are barred by section 230(c)(1) of the Communications Decency
23 Act (“CDA”), which protects from liability a provider of an interactive computer service that merely
24 publishes information provided by another information content provider. And his claims under the
25

26 ¹ For those same reasons, Carreon’s additional request to have his papers “deemed filed” on June 28
27 (Dkt. 21) should be denied. He cites General Order 45.VI(E), but that section refers to filing
28 “deadlines” and authorizes the filing of a document after a deadline where the late filing is the result of a
technical failure. But June 28 was not a “deadline” – it was simply the date Carreon chose to seek relief,
and nothing in General Order 45 authorizes or requires a Court to deem the filing of a document not
subject to a deadline (or, indeed, any other document) to have been filed retroactively or nunc pro tunc.

1 Supervision of Trustees and Fundraisers for Charitable Purposes Act, Cal. Government Code sections
2 12580 *et seq.*, are likewise barred because that statute does not create a private right of action that would
3 afford Carreon standing to sue for its violation.

4 Carreon's application should be denied as moot. As explained further below, it would have had
5 no merit and entitled him to no relief even had he filed it in sufficient time for the Court to have
6 considered it before the money was due to be transferred.

7 **III. BACKGROUND**

8 **A. Indiegogo**

9 Indiegogo is an online service billed as "[t]he world's funding platform." It allows users to
10 "crowdfund" projects of their choosing by soliciting donations from the world at large. Any user can post
11 a description of his project, along with videos and pictures; set a funding goal; and permit other users to
12 contribute money to the project through the website. All of the content on the project description page is
13 user-generated, not approved by Indiegogo, and not reviewed by Indiegogo unless the user requests it.
14 (Rubin Decl., ¶ 7.) Typical projects on the site include independent films, small businesses wanting to
15 fund an expansion or improvement, and individuals in need. (*Id.* at ¶ 2.) Donations can be made in two
16 ways: by credit card payment to Indiegogo, or through a third-party payment processor called PayPal. In
17 the former case, Indiegogo collects the money and disburses it to the user after the completion of the
18 campaign. In the latter case, PayPal transfers the money directly to the user's PayPal account. (*Id.* at ¶
19 4.) This is consistent with Indiegogo's terms and conditions, which state that the user's "Funding
20 Account will be governed by [the user's] agreement with the [Payment] Processor," and that "[a]ll
21 necessary fund transfers will be initiated within 5 business days of the campaign end date." (Rubin
22 Decl., Ex. A, at 3-4 (emphasis added).)

23 Indiegogo charges a fee for use of its service. Indiegogo retains a platform fee equivalent to 9%
24 of all contributions to the project, with a 5% rebate if the project hits its funding goal, for a net of 4% in
25 that circumstance. (Rubin Decl., ¶ 5.) An additional 3% payment processing fee is also charged for
26 credit card contributions.² (*Id.*)

27
28 ² PayPal sets its own processing fee for contributions made through its service. (*Id.*)

1 **B. Carreon’s Complaint**

2 This case involves Indiegogo only peripherally. The dispute at its center is between the Plaintiff,
3 Charles Carreon, and Indiegogo’s co-defendant, an individual named Matthew Inman. It concerns a sum
4 of money raised by Inman through the Indiegogo website.

5 Matthew Inman operates a popular website and internet comic strip called The Oatmeal. *The*
6 *Oatmeal*, <http://www.theoatmeal.com> (last visited June 29, 2012). In June 2011, Inman wrote and
7 published on his website two blog posts, the first entitled “What should I do about FunnyJunk.com?,”
8 and the second entitled “An update on the FunnyJunk situation.” (Tangri Decl., Exs. C and D.) The
9 posts complained that the content aggregator site FunnyJunk.com was republishing Inman’s “Oatmeal”
10 comics without permission or attribution, in order to generate advertising revenue. *Id.* A year later,
11 Inman received a demand letter from Carreon, writing as the attorney for FunnyJunk, LLC, the operator
12 of FunnyJunk.com. (Tangri Decl., Ex. E.) The letter accused Inman’s year-old blog posts of
13 “maliciously accusing FunnyJunk of criminal conduct to injure its business reputation,” and “engag[ing]
14 in false advertising in violation of the Lanham Trademark Act.” (*Id.*) The letter demanded that Inman
15 remove all mention of FunnyJunk from the Oatmeal website, and pay FunnyJunk \$20,000, care of Mr.
16 Carreon. (*Id.*)

17 Inman responded to the demand by publishing and ridiculing the text of the letter in another blog
18 post on The Oatmeal. (Tangri Decl., Ex. F.) He ended the post by declaring his intention to do the
19 following: rather than pay FunnyJunk \$20,000, he would raise \$20,000 from his readers, take a photo of
20 the money, mail FunnyJunk the photo along with a “drawing of your mom seducing a Kodiak bear,” and
21 then donate the actual money to the National Wildlife Federation and the American Cancer Society. (*Id.*)
22 Inman christened this effort “BearLove Good. Cancer Bad.” (*Id.*)

23 Only here does Indiegogo enter the picture. The sum total the allegations in Carreon’s First
24 Amended Complaint concerning Indiegogo is the following:

25 (a) Inman used the Indiegogo website to set up his “BearLove” fundraising campaign, and
26 agreed to Indiegogo’s terms and conditions. (Dkt. 12, ¶¶ 7-10, 15, 53.)

27 (b) Pursuant to the terms and conditions, Inman received access to Indiegogo’s standard set of
28 Analytics tools to help track the progress of his campaign. (*Id.*, ¶ 14.)

1 (c) Indiegogo subsequently published the contents of the BearLove campaign webpage
2 provided by Inman. (*Id.*, ¶¶ 37-40, 54.)

3 (d) Plaintiff subsequently requested that Indiegogo suspend Inman’s BearLove campaign “on
4 the grounds that it violated [Indiegogo’s] terms of service,” which Indiegogo declined to
5 do. (*Id.*, ¶ 44.)

6 (e) Almost two weeks after the campaign began, Indiegogo reported the amount of money
7 thus far pledged to the BearLove campaign. (*Id.*, ¶ 48.)

8 (f) Inman subsequently posted an “update” to the Indiegogo BearLove campaign webpage,
9 stating his intention to add two more charities to the list of recipients of the funds
10 collected by the campaign. (*Id.*, ¶¶ 56-57.)

11 Carreon does not allege that Indiegogo authored, created, developed, or approved any of the BearLove
12 campaign’s content. Indeed, Carreon admits that the BearLove campaign was “initiated by Inman and
13 published by Indiegogo.” (*Id.*, ¶ 49.) And Carreon does not allege any participation by Indiegogo in the
14 alleged harassment of Carreon that followed the campaign’s publication. His attempt to impose liability
15 upon Indiegogo rests solely on Inman’s use of the Indiegogo online service to raise money for his
16 project.

17 The First Amended Complaint names Indiegogo in a single claim for relief: “For Imposition of a
18 Charitable Trust Upon the Proceeds of the BearLove Campaign Solicited by Violations of the [California
19 Supervision of Trustees and Fundraisers for Charitable Purposes] Act and False Advertising in Violation
20 of B. & P. Code § 17500.” (*Id.*, ¶¶ 51-71.) The contours of the claim are not clear. The imposition of a
21 constructive trust is an equitable remedy, not a cause of action. *Stansfield v. Starkey*, 220 Cal. App. 3d
22 59, 76 (1990). The First Amended Complaint cites a number of different statutes under which Carreon
23 thinks a cause of action might arise. First, Carreon alleges that “[t]he Bear Love campaign was
24 conceived and operated in violation of California Business & Professions Code § 17500,” the false
25 advertising statute. (Dkt. 12, ¶ 52.) Carreon then alleges that a statement published on the Indiegogo
26 website was a “misrepresentation” in violation of section 12599(f) of the California Supervision of
27 Trustees and Fundraisers for Charitable Purposes Act, and more generally that the BearLove campaign
28 was conducted “in defiance of the comprehensive regulatory scheme set forth at Cal. Gov. Code §§

1 12580-12599.7.” (*Id.*, ¶¶ 54, 61, 66.) He concludes by citing two statutes that relate to the types of
 2 remedies generally available in state court (Cal. Civil Code § 2224 and Cal. Business & Professions
 3 Code § 17535), and – though he filed his complaint *pro se* – requesting an award of attorneys fees “as a
 4 public attorney general benefitting the public interest in enforcement of the [California Supervision of
 5 Trustees and Fundraisers for Charitable Purposes] Act.” (*Id.*, ¶ 71.)

6 C. The TRO Application

7 When it ended at the close of business on June 25, 2012, Inman’s BearLove campaign had
 8 collected a total of \$220,024. (Rubin Decl., ¶ 10.) Of that amount, \$123,803 was contributed through
 9 PayPal. Inman’s share of that money – believed to be roughly \$108,946.64³ – is not and has never been
 10 in Indiegogo’s possession. (*Id.*) The remaining \$96,221.00 was contributed by credit card. (*Id.*)
 11 Inman’s share of *that* money is \$84,674.48.⁴ (*Id.*) To that amount, Indiegogo adds the 5% fee rebate for
 12 reaching the project’s funding goal -- \$11,001.20⁵ -- for a total of \$95,675.68. (*Id.*) Indiegogo’s terms
 13 and conditions set forth that any necessary fund transfers will occur *within* five business days of the end
 14 of the campaign. (Rubin Decl., Ex. A, at 4.) At Inman’s request, his share of the money contributed by
 15 credit card, along with the 5% rebate, was sent by check to the American Cancer Society and the
 16 National Wildlife Fund on Friday, June 29th. Indiegogo will retain a total of \$8,800.96 in fees.⁶

17 The timeframe for disbursement and the percentage amount of Indiegogo’s fee are publicly set
 18 forth on the Indiegogo website, on the “terms and conditions” page which Carreon’s original and
 19 amended complaints both cited. (Rubin Decl., ¶ 3 and ex. A; Dkt. 1, ¶ 7; Dkt. 12, ¶¶ 8-10 and Ex. A.)
 20 Carreon filed his original complaint on June 15, 2012. (Dkt. 1.) He then waited until June 28, 2012 –
 21 two business days before the deadline for disbursement under the terms and conditions, three business
 22 days *after* he knew the money could have been disbursed pursuant to Indiegogo’s Terms of Service, and
 23 one business day before the money was in fact scheduled to be disbursed – even to serve (though not file)

24 _____
 25 ³ **\$123,803.00 - \$11,142.27** (Indiegogo’s 9% platform fee, transferred to Indiegogo at the time of
 contribution) - **\$3,714.09** (PayPal’s processing fee, estimated at 3%) = **\$108,946.64**.

26 ⁴ **\$96,221.00 - \$8,659.89** (Indiegogo’s 9% platform fee) - **\$2,886.63** (3% payment processing fee) =
\$84,674.48.

27 ⁵ **\$220,024.00** (total amount contributed to the BearLove campaign) * **5%** = **\$11,001.20**.

28 ⁶ Four percent of \$220,024.00 of the total amount collected – i.e., the 9% initially withheld, minus the
 5% rebate.

1 this application for a TRO. The application provides no justification for the delay.

2 The application is accompanied by a declaration from Carreon, which in many cases purports to
 3 give testimony that Carreon is not remotely qualified to give. For example, the declaration states that
 4 “[i]f Indiegogo pays Inman the money in the Charitable Fund, and Inman personally donates the money
 5 to NWF and ACS, he will be unjustly enriched by receiving a large tax write-off that should properly be
 6 allocated pro-rata to the 14,406 small donors who contributed to the Charitable Fund.” (Declaration of
 7 Charles Carreon (“Carreon Decl.”) at ¶ 28.) Carreon does not present himself as an expert on tax law, or
 8 cite to any authority in the tax code for either of the assertions in that statement. Even under the less
 9 formal procedural and evidentiary standards applicable a motion for preliminary injunction, this cannot
 10 be considered competent evidence. *See, e.g., Numbers Licensing, LLC v. bVisual USA, Inc.*, 643
 11 F.Supp.2d 1245, 1248-49 (E.D. Wash. 2009) (striking paragraphs of supporting declaration to a motion
 12 for a preliminary injunction because the declarant lacked personal knowledge). The same is true of
 13 various other parts in Carreon’s declaration, such as his statement that small charitable donations
 14 “certainly” “add up to some measurable tax benefit” for “the other donors to the Bear Love fund”
 15 (Carreon Decl., ¶ 30), and that “[p]ilfering very small amounts of money from very large numbers of
 16 people is a stock mechanism for conducting computer and Internet fraud.”⁷ (Carreon Decl. ¶ 31.)

17 The application requests that Indiegogo be enjoined “from transferring the proceeds of the
 18 BearLove campaign in the amount of not less than \$220,014 (the “Charitable Fund”), or any amount at
 19 all, to Matthew Inman . . . and requiring that the Charitable Fund be held as segregated funds by
 20 Indiegogo” This is impossible, since Indiegogo does not have \$220,014 worth of proceeds from the
 21 BearLove campaign. Indiegogo never had control of the money contributed via PayPal. And at Inman’s
 22 request, his share of the proceeds in Indiegogo’s possession has been sent to the charities directly, so
 23 Carreon’s application is moot as to that money. In any event, Indiegogo should not be enjoined from
 24 transferring or retaining any amount. Carreon’s application is meritless, and the transfer of the money to
 25 the charities (and Indiegogo’s retention of its fee) should proceed as scheduled.

26
 27
 28 ⁷ Indiegogo objects to the incompetent portions of Carreon’s declaration and respectfully requests that they be stricken.

1 **IV. ARGUMENT**

2 **A. Legal Standard for a TRO**

3 A temporary restraining order is “an extraordinary remedy that the court should award only when
4 a plaintiff makes a clear showing that it is entitled to such relief.” *Windermere Holdings, LLC v. U.S.*
5 *Wall Décor, LLC*, No. C 10–03955, 2011 WL 133023, at *1 (N.D. Cal. Jan. 14, 2011) (internal quotation
6 marks omitted). The standards for a TRO are the same as those for a preliminary injunction. *Id.* In
7 order to obtain a TRO, a plaintiff must establish that: (1) he is likely to succeed on the merits; (2) that he
8 is likely to suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities
9 tips in his favor; and (4) that an injunction is in the public interest. *American Trucking Ass’ns, Inc. v.*
10 *City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009).

11 All four factors must weigh in the plaintiff’s favor in order to establish the right to preliminary
12 injunctive relief. *Boyd v. GMAC Mortgage LLC*, No. C 11–5018, 2011 WL 6025906, at *5 (N.D. Cal.
13 Dec. 5, 2011). With respect to likelihood of success, the plaintiff must show either a probability of
14 success, or both “serious questions going to the merits” of his allegations *and* a balance of hardships that
15 tips sharply towards the plaintiff. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th
16 Cir. 2011). In this case, all four factors weigh against a temporary restraining order and preliminary
17 injunction.

18 **B. No Irreparable Harm**

19 The *only* imminent threat alleged in Carreon’s request is that Indiegogo could disburse a portion
20 of the money raised through the BearLove campaign to Inman, who has promised to donate that money
21 to the National Wildlife Fund and the American Cancer Society – precisely what that Carreon’s
22 application ultimately seeks to have happen. (“Memorandum of Points and Authorities in Support of
23 Motion for Temporary Restraining Order and Preliminary Injunction,” Dkt. 17 (hereafter “TRO”), at 3,
24 10.) In fact, Indiegogo did not disburse any money to Inman, but instead sent it directly to the National
25 Wildlife Fund and the American Cancer Society, at Inman’s request. Leaving aside the question whether
26 Carreon’s self-serving ten-dollar donation to the BearLove campaign, made solely in an attempt to
27 contrive a standing argument for this lawsuit, permits Carreon to claim *any* sort of harm flowing from
28 these events, there certainly isn’t and never was any *irreparable* harm. The only thing at stake here was

1 a sum of money, and any harm therefore would be readily compensable through an award of damages or
2 restitution to Carreon of his \$10.⁸

3 “In the context of preliminary injunctive relief, irreparable harm is established when a plaintiff is
4 unlikely to be made whole by an award of monetary damages or some other legal remedy at a later date,
5 in the ordinary course of litigation.” *Edge Games, Inc. v. Elec. Arts, Inc.*, 745 F. Supp. 2d 1101, 1117
6 (N.D. Cal. 2010). Types of harm considered irreparable by this Court have included homelessness, *Pail*
7 *v. Wells Fargo Bank, N.A.*, No. C 10–04016, 2011 WL 109482, at *4 (N.D. Cal., Jan. 13, 2011),
8 environmental damage, *Center for Biological Diversity v. U.S. Fish and Wildlife Serv.*, No. C-08-1278,
9 2011 WL 6813200, at *5-6 (N.D. Cal., Dec. 28, 2011), and serious injury to a business’s goodwill and
10 reputation. *Qwest Communications Corp. v. City of Berkeley*, 146 F. Supp. 2d 1081, 1103 (N.D. Cal.
11 2001).

12 By contrast, the *only* thing at stake here was \$104,476.64. Indiegogo’s share of that money is
13 \$8,800.96, and Carreon’s donation was \$10. Inman had promised to donate his portion of the money to
14 the American Cancer Society and the National Wildlife Fund, who are both defendants in this case, and
15 instructed Indiegogo to send his portion of the money to those charities directly. Carreon presents no
16 evidence that Inman intended to do anything else. Nor does Carreon make any substantive argument that
17 Indiegogo is not entitled to its customary fee.⁹

18 Carreon writes that “[d]enying a preliminary injunction . . . will result in irreparable harm,
19 because once the money is transferred to Inman, there will be no way to be sure it reaches the NWF and
20 the ACS, no way to get it back and return it to the donors, and no way to re-apportion the tax-write-off to
21 the donors.” (TRO at 10.) But none of these things is true. Even if Inman were to have misappropriated
22 any amount of money (which he cannot, since Indiegogo sent it to the charities instead of to him, at his
23 own request), he would have been theoretically susceptible to a lawsuit for damages. The National
24 Wildlife Fund and American Cancer Society are major national charity organizations who are parties to

25
26 ⁸ To the extent Carreon’s claim is based on California Business & Professions Code § 17500, he may not
27 seek money damages at all. *Brown v. Allstate Insurance Co.*, 17 F.Supp.2d 1134, 1140 (S.D. Cal. 1998).

28 ⁹ Carreon does write that Inman and Indiegogo “did not disclose Indiegogo’s fees at any time.” (TRO at
7-8.) This is untrue, since Indiegogo’s fees are set forth in the publicly available terms and conditions on
the Indiegogo website. (Rubin Decl., Ex. A.)

1 this lawsuit, and Carreon has not suggested that they are incapable of refunding the money were that to
2 prove necessary. Likewise, Indiegogo is perfectly capable of refunding \$8,800 at the conclusion of this
3 litigation, and has maintained records of the BearLove campaign's donors. (Rubin Decl., ¶ 11.) As for
4 the tax write-off, Carreon's assertions are pure speculation. They are unsupported by any citation to the
5 tax code, any declaration of a competent tax professional, or anything else. On a motion for
6 extraordinary relief on which Carreon bears the burden, they should be disregarded entirely. In any
7 event, the contention that Inman would be unjustly enriched by a \$200,000 tax deduction appears
8 frivolous on its face. Any deduction Inman may have been able to take as a result of this campaign
9 would be offset by at least an equivalent increase in income, thus leaving Inman at break-even or worse.

10 Carreon suggests that the *other donors* to the BearLove campaign will be irreparably harmed by
11 the fact that their contribution may not be tax-deductible if the money goes through Inman. (TRO at 7-
12 8.) As discussed above, the money collected by Indiegogo did not go through Inman. In any event,
13 Carreon's contention is again unsupported by any legal or factual basis that could serve to discharge
14 Carreon's burden of proof. And Carreon cites no evidence that any donor to the BearLove campaign
15 (including himself) was under the impression that his donation would be going directly to the charities
16 and thus would be tax-deductible. Indeed, Inman's description of the BearLove campaign on the
17 Indiegogo website accurately states: "I'm going to try and raise \$20,000 and instead send it to the
18 National Wildlife Federation and the American Cancer Society." (Ex. B to TRO.) It says that he
19 intended temporarily to take possession of the money (to photograph it) before turning it over to the
20 charities. (*Id.*) And Indiegogo's terms and conditions tell funders that "Indiegogo makes no
21 representations regarding the deductibility of any Contribution for tax purposes. Please consult your tax
22 advisor for more information." (Rubin Decl., Ex. A, at 5.)

23 Furthermore, this is not a class-action lawsuit. The irreparable harm must be to Carreon, not to
24 third parties. *See Sharp Healthcare v. Leavitt*, No. 08-CV-0170, 2008 WL 962628, at *3 (S.D. Cal. April
25 8, 2008) (noting that injuries to third parties are "generally not relevant" to the irreparable harm analysis,
26 with narrow exceptions not applicable here). Again, Carreon has not suggested, much less carried the
27 burden of proving, that any defendant is incapable of refunding the amounts of money at issue here, and
28 Indiegogo has records of who donated to the BearLove campaign. (Rubin Decl., ¶ 11.)

1 Finally, the timing of Carreon’s application demonstrates that there is no irreparable harm here.
2 Carreon’s complaint was filed over two weeks ago. At that point, both the end date of the BearLove
3 campaign and the timeframe for disbursement of the money to Inman after the end date (within five
4 business days) were known to Carreon. Indeed, Carreon’s original complaint *cites* the campaign end date
5 *and* the same set of Indiegogo terms and conditions that contain the timeframe for disbursement. (Dkt. 1,
6 ¶¶ 7, 35) Carreon could have applied for a TRO immediately. Instead, he waited to serve his papers
7 until the middle of the period of time in which disbursement was to occur, presumably in an effort to
8 manufacture an emergency. The Court should not countenance this gamesmanship. *See Richardson v.*
9 *Robison*, No. 08CV902, 2008 WL 2338611, at *4 (S.D. Cal. June 5, 2008) (denying TRO application in
10 part on the basis of the plaintiffs’ “delay and lack of diligence” in filing the application, which prejudiced
11 Defendants’ ability to defend).

12 C. No Likelihood of Success on the Merits

13 Carreon cannot demonstrate a likelihood of success on the merits with respect to his substantive
14 claim against Indiegogo – or even raise serious questions going to the merits of that claim. This is so for
15 two reasons. *First*, to the extent the claim is intelligible, it appears to be based *solely* on Indiegogo’s
16 publication of content generated and provided by Inman. As such, Indiegogo is immune from liability
17 under section 230(c)(1) of the Communications Decency Act (“CDA”). *Second*, to the extent Carreon’s
18 claim is based on the Supervision of Trustees and Fundraisers for Charitable Purposes Act, Cal.
19 Government Code sections 12580 *et seq.*, the claim fails because that statute does not create a private
20 right of action. Instead, it creates a registration, compliance, and enforcement scheme to be implemented
21 by the Attorney General, with a prescribed schedule of civil penalties, and contains no provision that
22 states or implies that a private plaintiff may sue to enforce it.

23 1. CDA Immunity

24 Carreon’s claim against Indiegogo is barred under section 230(c)(1) of the CDA. Section 230
25 was passed in order to “encourage the development of technologies which maximize user control over
26 what information is received by individuals, families, and schools who use the Internet and other
27 interactive computer services.” 47 U.S.C. § 230(b)(3). Accordingly, section 230(c)(1) reads, in relevant
28 part: “No provider or user of an interactive computer service shall be treated as the publisher or speaker

1 of any information provided by another information content provider.” 47 U.S.C. § 230(c)(1).

2 The Ninth Circuit has held that subsection (c)(1) protects from liability: “(1) a provider or user of
3 an interactive computer service (2) whom a plaintiff seeks to treat, under a state law cause of action, as a
4 publisher or speaker (3) of information provided by another information content provider.” *Barnes v.*
5 *Yahoo!, Inc.*, 570 F.3d 1096, 1100-01 (9th Cir. 2009). The court further explained that in considering
6 whether a cause of action seeks to treat the defendant as a publisher or speaker of information provided
7 by another, “what matters is not the name of the cause of action – defamation versus negligence versus
8 intentional infliction of emotional distress – what matters is whether the cause of action inherently
9 requires the court to treat the defendant as the ‘publisher or speaker’ of content provided by another. To
10 put it another way, courts must ask whether the duty that the plaintiff alleges the defendant violated
11 derives from the defendant’s status or conduct as a ‘publisher or speaker.’ If it does, section 230(c)(1)
12 precludes liability.” *Id.* at 1101-02.

13 Carreon’s claim against Indiegogo easily falls within section 230(c)(1) immunity. Indiegogo
14 operates a service that “provid[es] third parties with neutral tools to create web content,” which is
15 “squarely within the protections of § 230.” *Goddard v. Google, Inc.*, No. C 08-2738, 2008 WL 5245490,
16 at *3 (N.D. Cal. Dec. 17, 2008). And *all* of Carreon’s allegations treat Indiegogo *solely* as the neutral
17 publisher or speaker of content provided by Inman. The First Amended Complaint admits that the
18 BearLove campaign was “initiated” by Inman and published by Indiegogo. (Dkt. 12, ¶ 49.) There is no
19 allegation that Indiegogo contributed in any way to the content or substance of the BearLove campaign,
20 or that Indiegogo did *anything* but publish Inman’s campaign (as it would any other user’s) and then
21 decline to remove it.

22 Moreover, each of Carreon’s purported statutory rights of action depends on Indiegogo’s status as
23 the publisher or speaker of content provided by Inman. Carreon’s claim under California Business &
24 Professions Code § 17500 (the false advertising statute) is that Indiegogo “ma[de] or disseminate[d] . . .
25 over the Internet, [a] statement . . . which . . . by the exercise of reasonable care should be known, to be
26 untrue or misleading . . . with the intent not to sell . . . those services . . . as so advertised.” (*Id.*, ¶ 52.)
27 The statement in question is indisputably Inman’s; Indiegogo only published it. The statement that
28 allegedly “represented to all prospective donors that the NWF and the ACS would be recipients of the

1 Charitable Fund,” supposedly made in violation of Cal. Government Code § 12599(f), was likewise
2 authored by Inman. (*Id.*, ¶¶ 54, 61.) And Carreon’s allegations that Indiegogo failed to register or make
3 disclosures under other sections of § 12599 likewise treat Indiegogo as the publisher of information
4 provided by Inman, since they arise out of *Inman*’s statements that he was soliciting money for charity.
5 (*Id.*, ¶¶ 28-30.)

6 Carreon may not avoid § 230 by recharacterizing Indiegogo’s conduct as a breach of some
7 independent statutory duty. So long as his claim *ultimately seeks to hold Indiegogo responsible for*
8 *publishing content originating with Inman*, it is barred. *See Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816,
9 831 (2002) (declining to hold eBay liable under a statute regulating the sale of collectible memorabilia
10 because the allegations “ultimately seek to hold eBay responsible for . . . dissemination of representations
11 made by the individual defendants” who posted eBay auctions, placing the case within the ambit of
12 section 230); *Goddard*, 2008 WL 5245490, at *3, 5 (dismissing claims against Google’s AdWords
13 program for various statutory and common law violations because “Plaintiff claim[ed] in essence that she
14 was harmed because Google hosted certain online content.”). And that is precisely what Carreon is
15 attempting to do.

16 Because the nature of Carreon’s allegations against Indiegogo make this a clear case for § 230
17 immunity, Carreon cannot demonstrate the likelihood of success on the merits – or even serious
18 questions going to the merits – and his application for a TRO should be denied.

19 **2. No Private Right of Action Under the California Supervision of Trustees and**
20 **Fundraisers for Charitable Purposes Act.**

21 To the extent Carreon’s claim against Indiegogo is based on the Supervision of Trustees and
22 Fundraisers for Charitable Purposes Act, Cal. Government Code sections 12580 *et seq.*, that claim is
23 barred because the statute does not create a private right of action, and Carreon has no standing to sue for
24 its violation. The statute establishes a scheme for supervision of charitable fundraisers *by the Attorney*
25 *General*, and prescribes penalties that it envisions will be sought by the Attorney General – not by a
26 private party. For this additional reason, Carreon cannot demonstrate a likelihood of success on the
27 merits, and his TRO application should be denied.

28 “[A] statute creates a private right of action only if the statutory language or legislative history

1 affirmatively indicates such an intent” – either explicitly expressed, or strongly implied. *Farmers Ins.*
2 *Exch. v. Superior Court*, 137 Cal. App. 4th 842, 851 (2006). If a statute provides a comprehensive
3 scheme for enforcement by an administrative agency, and does not mention a private right of action, that
4 is a strong indication that the legislature did not intend to create a private right to sue for its violation. *Id.*
5 For example, the California Supreme Court has held that section 790.03 of the insurance code, which
6 prohibits various unfair practices by insurers (including misrepresentations to the public), did not create a
7 private right of action, despite a provision stating that actions by the Insurance Commissioner did not
8 “relieve or absolve” an insurer from “any civil liability or criminal penalty under the laws of this State
9 arising out of [the prohibited unfair practices].” *Moradi-Shalal v. Fireman’s Fund Ins. Cos.*, 46 Cal.3d
10 287, 294, 304-305 (1988). The court found no indication of legislative intent to create a private right to
11 sue under the statute, particularly in light of its extensive provisions for administrative enforcement, and
12 noted that traditional common law tort remedies remained available to plaintiffs in the appropriate
13 circumstances. *Id.* at 304-05.

14 The California Supervision of Trustees and Fundraisers for Charitable Purposes Act is Article 7
15 in the chapter of the California Government Code entitled “Attorney General.” It applies to various
16 charitable corporations, trustees, fundraisers, and other organizations “over which the state or the
17 Attorney General has enforcement or supervisory powers.” Cal. Government Code § 12581. The statute
18 requires the Attorney General to “establish and maintain a register” of such organizations, § 12584,
19 allows the Attorney General to make rules and regulations concerning registration and reporting by such
20 organizations, *Id.* §§12585-86 and 12587, and prescribes a schedule of fines and penalties for violations
21 “to be used by the Department of Justice solely for the administration of the Attorney General’s
22 charitable trust enforcement responsibilities.” *Id.* §§ 12586.2, 12591.1. The statute states that “[t]he
23 *Attorney General* may institute appropriate proceedings to secure compliance with this article and to
24 invoke the jurisdiction of the Court.” *Id.* § 12591.1. The statute further notes that “[t]he primary
25 responsibility for supervising charitable trusts in California, for ensuring compliance with trusts and
26 articles of incorporation, and for protection of assets held by charitable trusts and public benefit
27 corporations, resides in the Attorney General,” and goes on to discuss the Attorney General’s right to file
28 enforcement actions and recover fees and costs. *Id.* § 12598. It references “any case where *the Attorney*

1 *General has authority to institute an action or proceeding under this article,”* noting that the Attorney
2 General may accept an assurance of voluntary compliance, and states that “[a]ny action brought *by the*
3 *Attorney General* under the statute may be brought within 10 years of the cause of action having accrued.
4 *Id.* § 12596.

5 *Nowhere* amidst the lengthy discussion of the Attorney General’s regulatory and enforcement
6 powers does the Supervision of Trustees and Fundraisers for Charitable Purposes Act mention a private
7 right to sue. Nor is there any mention of such a right in the legislative history, which makes clear that the
8 bill was discussed in the context of expanding the Attorney General’s ability to oversee registered
9 charities. *See, e.g.,* California Bill Analysis, Senate Floor, 1997-1998 Regular Session, A.B. 1810 Sen.,
10 (July 28, 1998).

11 From Carreon’s First Amended Complaint, it appears that he relies on two portions of the statute
12 to imply a private right of action. Carreon cites section 12591, which – *after* noting that “[t]he Attorney
13 General may institute appropriate proceedings to secure compliance with this article and to invoke the
14 jurisdiction of the Court” – states that:

15 *Nothing in this article shall impair or restrict the jurisdiction of any court*
16 *with respect to any of the matters covered by it, except that no court shall*
17 *have jurisdiction to modify or terminate any trust of property for charitable*
purposes unless the Attorney general is a party to the proceedings.

18 (Dkt. 12, ¶ 6.) This language addresses only jurisdiction and says nothing about a private right to sue. It
19 is consistent with the California Supreme Court’s holding in *Moradi-Shalal* that where a statute does not
20 create a private right of action, traditional common law remedies for the underlying acts that violate the
21 statute may still be available when their requirements are met. *Moradi-Shalal*, 46 Cal. 3d at 304-305.
22 But it is not the expressed or strongly implied intent to create a private right of action that the law would
23 require to enable Carreon to sue under the statute.

24 The First Amended Complaint also appears to rely on the portion of § 12599(f) that provides that
25 “failure to comply with [the] registration or annual renewal and financial reporting requirements
26 [prescribed for commercial fundraisers] shall be grounds for injunction against solicitation in this state
27 for charitable purposes and other civil remedies provided by law.” (Dkt. 12, ¶ 22.) This likewise cannot
28 be read as intending to create a private right of action in light of the clear statements elsewhere in the

1 statute that it is the *Attorney General* who is empowered to enforce this law in the courts.

2 Carreon cites three cases holding that a party with a “sufficient special interest” in a charitable
3 trust may sue to enforce its terms. *Holt v. College of Osteopathic Physicians and Surgeons*, 61 Cal.2d
4 750, 754 (1964); *L.B. Research & Education v. UCLA Foundation*, 130 Cal.App.4th 171, 176 (2005);
5 *San Diego Etc. Boy Scouts of America v. City of Escondido*, 14 Cal.App.3d 189, 194 (1971). This law is
6 inapposite. In *Holt* and *San Diego Etc.*, the plaintiffs were trustees with claims to the property. *Holt*, 61
7 Cal. 2d at 752-53; *San Diego Etc. Boy Scouts of America*, 14 Cal.App.3d at 192. If those cases are
8 relevant to this situation at all, they are relevant to the question whether the National Wildlife Fund or the
9 American Cancer Society could sue for its share of the BearLove Campaign’s proceeds; they do not
10 support the contention that *Carreon* may do so. In *L.B. Research*, the Plaintiff donor was found to have
11 standing to sue to enforce the terms of the trust because the recipient had accepted the funds subject to
12 certain conditions. *L.B. Research & Education*, 130 Cal.App.4th at 179-81. Here, Carreon’s only
13 interest in the BearLove campaign is a \$10 contribution, given free of any conditions whatsoever.

14 Even more to the point, the lawsuits in those cases were filed to *enforce the terms* of a charitable
15 trust – not for purported violations of a regulatory statute by failing to register, make disclosures to the
16 Attorney General, and the like. The Courts held that interested private parties as well as the Attorney
17 General may bring a claim to enforce a charitable trust. The claim against Indiegogo recited in Carreon’s
18 amended complaint is not for enforcement of a charitable trust, however, but rather for the “imposition”
19 of a charitable trust, on the ground that several sections of the California Supervision of Trustees and
20 Fundraisers for Charitable Purposes Act had allegedly been violated. There is no support for the notion
21 that a private party may bring such an action.¹⁰

22 In short, there is *no* indication that the California legislature intended to create a private right to
23 sue for violations of the California Supervision of Trustees and Fundraisers for Charitable Purposes Act,
24 which entrusts its enforcement to the Attorney General. Carreon thus has no standing to sue for any
25 violations of that statute. This is another reason why Carreon cannot show a likelihood of success on the

26
27 ¹⁰ Indiegogo does not concede that the funds raised by Inman are in fact a “charitable trust,” that Inman
28 or Indiegogo are covered by charitable fundraising laws, or that any fiduciary duty is owed to the
contributors to the BearLove campaign; these questions need not be answered to dispose of Inman’s
application.

1 merits here.

2 **D. The Balance of Equities Favors Indiegogo.**

3 As discussed above, the denial of a preliminary injunction in this case will not cause Carreon any
4 harm, much less irreparable harm. His \$10 has been donated to charity, less his portion of Indiegogo's
5 processing fee, under precisely those terms under which he made his contribution. By contrast, should an
6 injunction be granted, Indiegogo would be forced to violate its terms and conditions by not disbursing the
7 campaign funds on the schedule set forth therein. Indiegogo's reputation with its users and the public
8 will also be put at risk. The balance of equities does not favor an injunction.

9 **E. The Public Interest Does Not Favor an Injunction.**

10 An injunction is not needed to "preserve a fund for a charitable purpose, and prevent it from
11 being diverted to private purposes," as Carreon suggests. (TRO at 10.) This case has little to do with
12 preserving anything for a charitable purpose. Instead, it stems from a personal dispute between Carreon
13 and Inman, and perhaps some ill-behaved readers of Inman's "Oatmeal" website. Carreon is using that
14 dispute to attempt to interfere with a charitable fundraiser that has raised over \$200,000 for
15 unquestionably good causes, in the process embroiling three innocent co-defendants – including two
16 charities – in expensive litigation in federal court. The public interest cannot favor expending judicial
17 resources to issue and enforce an injunction in a case like this. Carreon's application for a TRO should
18 be denied.

19 **V. CONCLUSION**

20 Indiegogo respectfully requests that the Court deny Carreon's request for a TRO and an order to
21 show cause re preliminary injunction.

22 Dated: July 1, 2012

DURIE TANGRI LLP

23
24 By: /s/ Eugene Novikov
EUGENE NOVIKOV

25 Attorneys for Defendant
26 INDIEGOGO, INC.