IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

UPROCK, INC., et al.,

Plaintiffs,

vs.

SHERIFF JAMES O. TRACY, JR., et al.,

Defendants.

ORDER

Case No. 2:05CV732

This matter is before the court on Plaintiffs'[1] motion for a Temporary Restraining Order, which the court has treated as a motion for a preliminary injunction. A hearing on the motion was held on September 16, 2005. At the hearing, Plaintiffs were represented by Brian Barnard, and Defendants[2] were represented by Peter Stirba. Before the hearing, the court considered carefully the memoranda, affidavits, and other materials submitted by the parties. Since taking the matter under advisement, the court has further considered the law and facts relating to this motion and the arguments presented by counsel. Now being fully advised, the court renders the following Order.

[1]Plaintiffs are Uprock, Inc. ("Uprock"), Brandon Fullmer ("Mr. Fullmer") dba Uprok Records, Nick Mari ("Mr. Mari") dba Hi Point Entertainment ("Hi Point"), and Richard & Trudy Childs' Family Trust ("Trust") (collectively, "Plaintiffs").

[2]Defendants are Sheriff James O. Tracy, Jr. ("Sheriff Tracy"), Utah County Sheriff; Lt. Grant Ferre, Utah County Sheriff's Department; Kay Bryson, Utah County Attorney; Jerry D. Grover, Jr., Chair, Utah County Commission; Steve White, Utah County Commissioner; Larry Ellertson, Vice Chairman, Utah County Commission; and Utah County, a municipal entity and body politic (collectively, "Defendants").

I. BACKGROUND

The Trust owns a 350-acre ranch ("Ranch") in the Diamond Fork area of Spanish Fork Canyon in Utah County, Utah. For the last three years, the Trust has leased the Ranch to various promoters and other individuals to stage musical events.[3] Hi Point and Uprock leased the Ranch from the Trust on July 16 and August 20, 2005 for this purpose.

Prior to the event on August 20, Mr. Fullmer, on behalf of Uprock, sought and was granted a mass gathering permit from the Utah County Health Department ("Health Department").[4] *See* Utah Admin. Code R392-400. On the permit application, Mr. Fullmer indicated that there would be over 1000 people attending, ten portable restrooms, three water stations with 3,000 free bottles of water, and two first-aid stations with five licensed EMTs. The application also provided that the beginning date and time for the event would be August 20 at 12:00 p.m. to "load in," and the ending date and time would be August 21 at 12:00 p.m. to "load out." While Mr. Fullmer claimed that he informed the Health Department that the mass gathering would be less than twelve hours in duration, there is nothing on the permit application to indicate this.[5]

The Food Program Manager for the Health Department, Jay Stone ("Mr. Stone") issued

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[3]Plaintiffs describe the gathering as a "musical concert" or an "album launch event." Defendants describe it as a "rave" and explain that a rave has a particular meaning to law enforcement as a gathering where primarily young people are initiated into the drug culture. However, the court will refer to it as a "mass gathering" or "event."

[4]Mr. Fullmer did not seek a permit from either the Health Department or the Utah County Commission for the July 16, 2005 event, and accordingly, it was shut down.

[5]Mr. Mari stated in his affidavit that he was involved in obtaining the mass gathering permit and that he also informed the Health Department that the mass gathering would be less than twelve hours in duration. However, the application does not indicate that either Hi Point or Mr. Mari applied for the permit and lists only Uprock as the operator.

the permit. Mr. Stone indicated that he "informed Mr. Fullmer that he would have to check further with zoning and with the Sheriff's Office" and that he did not leave Mr. Fullmer "with the impression that Uprock had fully complied with all requirements once it had obtained the temporary mass gathering permit." Mr. Fullmer and Mr. Mari, however, claimed that no one from Utah County ever informed Uprock or Hi Point that any additional permits or licenses were required to stage the August 20 event.

Defendants claim that the mass gathering was promoted on a website known as "utrave.org." Specifically, Defendants contend that an announcement regarding the event was posted on August 8, 2005 indicating that the gates would open at 8:00 p.m. with music going from 9:00 p.m. to 7:00 a.m. the next day and that everyone would need to leave the property by 2:00 p.m. on August 21. The posting also informed prospective attendees that camping would be available at the Ranch.

The music began at approximately 9:00 p.m. At 10:00 p.m., the Utah County Major Crimes Task Force sent four undercover narcotics officers into the event. These officers purchased controlled substances, including Ecstacy, from individuals attending the event. The officers also observed rampant drug use throughout the mass gathering.

The EMTs hired by Mr. Fullmer to staff the first-aid stations were originally told that their services were needed until 3:00 a.m. Upon arrival at the event, they were informed that they may be needed until the following morning. The EMTs also discovered upon arrival that there were no first-aid stations and no medical equipment at the event. As such, the EMTs were required to set up ad hoc first-aid stations in the back of their personal vehicles.

The EMTs further indicated that drug use was excessive throughout the event. For

instance, they noted that the smell of marijuana was prevalent and that one of the EMTs was offered marijuana. And, the EMTs observed numerous individuals who had symptoms indicating illicit drug use, specifically Ecstacy. These symptoms included dilated pupils, slowed speech, staggered walking, underdress, lethargy, and unresponsiveness. The EMTs were concerned that given the prevalence of drug use at the event, a person could have a cardiac arrest or overdose on drugs. They believed that if an overdose occurred, they would be unable to provide sufficient medical care because (1) they did not have the proper equipment to handle a cardiac arrest at the scene, (2) dispatch would be unable to comprehend them over the loud music if an ambulance was needed, and (3) an ambulance would have a difficult time reaching the event due to the remoteness of the location and the steepness of the dirt access road. Because of this, they alerted the Utah County Sheriff's office of the situation.

At approximately 11:30 p.m., Utah County SWAT officers entered the Ranch, stopped the music, and disbanded the mass gathering while a Utah County Sheriff's helicopter circled overhead. The officers were uniformed and armed. The officers arrested and/or cited approximately 30 attendees for a number of offenses including the sale and possession of controlled substances, possession of paraphernalia, disorderly conduct, illegal possession of alcohol, and illegal possession of firearms.

Mr. Fullmer asserts that Sheriff Tracy informed him that the event was being shut down because Uprock and Hi Point did not have the required license from the Utah County Commission pursuant to Utah County Ordinance 13-4-2-1.[6] However, Sheriff Tracy contends

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[6]This ordinance provides:
No person shall permit, maintain, promote, conduct, advertise, act as entrepreneur, undertake, organize, manage, or sell or give tickets to an actual or reasonably

that Mr. Fullmer indicated to him that he understood that the event was being disbanded because of the presence of illegal drugs. Sheriff Tracy also stated that, during this conversation, Mr. Fullmer confirmed he had not obtained the appropriate license from the Utah County Commission.

Plaintiffs filed an action under 42 U.S.C. § 1983 claiming that by shutting down the event, Defendants violated a multitude of Plaintiffs' constitutional rights under the First, Fourth, Fifth, and Fourteenth Amendments to the United States Constitution. Plaintiffs also claim that the Utah County Ordinance § 13-4-2-1 is facially unconstitutional because it gives too much discretion to Defendants in determining which events must have a license. In their present motion, Plaintiffs seek an injunction enjoining Defendants from enforcing the portion of the Utah County Ordinance § 13-4-2-1 that requires a license from the Utah County Commission for temporary mass gatherings which can reasonably be expected to continue for twelve or more hours when Plaintiffs have determined that the event will not continue for that amount of time.

II. DISCUSSION

In order to obtain preliminary injunctive relief, the moving party must establish:

> (1) substantial likelihood that the movant will eventually prevail on the merits; (2) a showing that the movant will suffer irreparable injury unless the injunction issues; (3) proof that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) a showing that the injunction, if issued, would not be adverse to the public interest.

SCFC ILC, Inc. v. Visa USA, Inc., 936 F.2d 1096, 1098 (10th Cir. 1991). Because a preliminary

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> anticipated assembly of two hundred fifty (250) or more people which continues or can reasonably be expected to continue for twelve (12) or more consecutive hours, whether on public or private property unless a license to hold the assembly has first been issued by the County Commissioners.

Utah Co. Ordinance § 13-4-2-1.

injunction is an extraordinary remedy, "the right to relief must be *clear and unequivocal*." *See id.* (emphasis added).

In the instant case, Defendants argue that because Plaintiffs seek to alter the status quo, they must "satisfy an even heavier burden of showing that the four factors listed above weigh *heavily and compellingly* in movant's favor before such an injunction may be issued." *Id.* at 1098 (emphasis added). The status quo is defined as "the last uncontested status between the parties which preceded the controversy." *Id.* at 1100 n.8 (quotations and citations omitted). Here, Plaintiffs are challenging the constitutionality of an ordinance that existed prior to the event giving rise to the controversy. Therefore, because Plaintiffs are seeking to alter the status quo, they must demonstrate that the four factors "weigh heavily and compellingly" in Plaintiffs' favor.[7] *Id.* at 1098.

At this point in the proceedings, Plaintiffs have not met their burden of establishing a substantial likelihood of success on the merits. While Plaintiffs request this court to grant a temporary restraining order or preliminary injunction on the grounds that the ordinance at issue is unconstitutional, Plaintiffs disregard the fact that Defendants had several grounds on which to shut down the event. For instance, because of the rampant drug use, the event constituted a public nuisance under Utah Code Ann. § 76-10-803(1)(d) (2002) (making it a nuisance crime to maintain a place where the unlawful sale, distribution, or acquisition of controlled substances occurs). Further, Plaintiffs failed to fulfill all the conditions required of them by the Health Department's permit. *See* Utah Admin. R392-400. Plaintiffs did not have any of the required

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[7]However, even if the heightened standard did not apply in this case, Plaintiffs' motion would be denied because they have not demonstrated a "clear and unequivocal" right to relief. *Visa, Inc.*, 936 F.2d at 1098.

equipment or facilities for first aid stations–the EMTs were forced to set up ad hoc first-aid stations out of the rear of their personal vehicles. Plaintiffs did not provide the proper number of portable restrooms nor provide the requisite amount of free drinking water.

At the hearing, Plaintiffs argued that the appropriate remedy for a public nuisance or a violation of the Health Department permit is a court-ordered injunction to stop the mass gathering. The court does not agree. Given the large number of people, the illegal drug use, the remote location, and the lack of first-aid stations, there was an immediate threat of harm to the health, safety, and welfare of the attendees. Accordingly, the court finds that seeking an injunction was not a feasible alternative for Defendants.

Furthermore, Plaintiffs have failed to establish that they will suffer irreparable injury if the injunction is not granted. Plaintiffs have not demonstrated that they, in fact, intend to stage another event imminently which would justify this court granting the extraordinary remedy of a preliminary injunction. Should Plaintiffs choose to stage another event that could reasonably be expected to continue for more than twelve consecutive hours, Plaintiffs are not prevented from seeking the appropriate license from the Utah County Commission.

Additionally, Plaintiffs have not established that the threatened injury outweighs any damage the proposed injunction may cause Defendants. Again, Plaintiffs failed to demonstrate that they intend to stage another event. Moreover, Defendants have a substantial interest in continuing to require permits for large public gatherings in order to protect the health, safety, and welfare of the public.

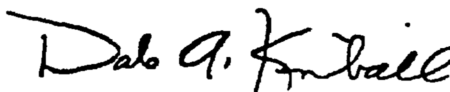
Finally, for the same reasons that the court found the event to be a public nuisance, the court finds that the public interest is best served by declining to enter a preliminary injunction.

III. CONCLUSION

Plaintiffs have failed to satisfy any of the four requirements for obtaining a temporary restraining order or preliminary injunction. For the foregoing reasons, and good cause appearing, IT IS HEREBY ORDERED that Plaintiffs' Motion for a Temporary Restraining Order [docket #5] is DENIED.

DATED this 22nd day of September, 2005.

BY THE COURT:



DALE A. KIMBALL
United States District Judge