MICHAEL A. JACOBS (CA SBN 111664)
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, CA 94105-2482
Telephone: (415) 268-7000
Facsimile: (415) 268-7522
mjacobs@mofo.com

BENJAMIN J. FOX (CA SBN 193374)
SOO J. PARK (CA SBN 300988)
MORRISON & FOERSTER LLP
707 Wilshire Boulevard, Suite 6000
Los Angeles, CA 90017-3543
Telephone: (213) 892-5200
Facsimile: (213) 892-5454
bfox@mofo.com; spark@mofo.com

Attorneys for Defendant
QUIBI HOLDINGS LLC

REDACTED VERSION OF DOCUMENT FILED UNDER SEAL

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JBF INTERLUDE 2009 LTD – ISRAEL,

Plaintiff,

v.

QUIBI HOLDINGS LLC,

Defendant.

Case No. 2:20-CV-02299

(Related to *Quibi Holdings LLC v. Interlude US, Inc. d/b/a Eko*, No. 2:20-cv-02250-JAK-SK)

OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

Judge: Hon. John A. Kronstadt
Date: May 7, 2020
Time: 11:30 a.m.
Courtroom: 10B

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

TABLE OF ABBREVIATIONS

U.S. Patent No. 10,460,765 to Bloch et al. "Systems and Methods for Adaptive and Responsive Video" (ECF No. 1-4)	'765 patent
Declaration of Blake Barnes in Support of Quibi Holdings LLC's Opposition to Motion for Preliminary Injunction	Barnes Decl.
Declaration of Alan Bovik in Support of Quibi Holdings LLC's Opposition to Motion for Preliminary Injunction	Bovik Decl.
Declaration of Eric Buehl in Support of Quibi Holdings LLC's Opposition to Motion for Preliminary Injunction	Buehl Decl.
Declaration of Joseph Burfitt in Support of Quibi Holdings LLC's Opposition to Motion for Preliminary Injunction	Burfitt Decl.
Declaration of Yoni Bloch in Support of JBF Interlude 2009 Ltd.-Israel's Motion for Preliminary Injunction, dated April 1, 2020 (ECF No. 28-3)	Bloch Decl.
Consumer Electronics Show	CES
Complaint For Patent Infringement, dated March 10, 2020 (ECF No. 1)	Compl.
Declaration of Neel Chatterjee in Support of JBF Interlude 2009 Ltd.-Israel's Motion for Preliminary Injunction, dated April 1, 2020 (ECF No. 30-25)	N. Chatterjee Decl.
Declaration of Sandeep Chatterjee, Ph.D. in Support of JBF Interlude 2009 Ltd.-Israel's Motion for Preliminary Injunction, dated April 1, 2020 (ECF No. 30-17)	S. Chatterjee Decl.
Declaration of Thomas Conrad in Support of Quibi Holdings LLC's Opposition to Motion for Preliminary Injunction	Conrad Decl.
Declaration of Greg Gioia in Support of Quibi Holdings LLC's Opposition to Motion for Preliminary Injunction	Giola Decl.

Declaration of Michael A. Jacobs in Support of Quibi Holdings LLC's Opposition to Motion for Preliminary Injunction	Jacobs Decl.
Declaration of Jeffrey Katzenberg in Support of Quibi Holdings LLC's Opposition to Motion for Preliminary Injunction	Katzenberg Decl.
Declaration of Brian W. Napper in Response to Motion for Preliminary Injunction	Napper Decl.
Memorandum of Points and Authorities in Support of Plaintiff's Motion for Preliminary Injunction, dated April 1, 2020 (ECF No. 30-1)	PI Mot.
Declaration of Robert A. Post, Jr. in Support of Quibi Holdings LLC's Opposition to Motion for Preliminary Injunction	Post Decl.
Declaration of Ivy Sheibar in Support of JBF Interlude 2009 Ltd.-Israel's Motion for Preliminary Injunction, dated April 1, 2020 (ECF No. 30-9)	Sheibar Decl.
Declaration of Clifton (C.J.) Smith in Support of Quibi Holdings LLC's Opposition to Motion for Preliminary Injunction	Smith Decl.
Declaration of Gina Stikes in Support of Quibi Holdings LLC's Opposition to Motion for Preliminary Injunction	Stikes Decl.
Declaration of Daniel Szeto in Support of Quibi Holdings LLC's Opposition to Motion for Preliminary Injunction	Szeto Decl.
Declaration of Jim Williams in Support of Quibi Holdings LLC's Opposition to Motion for Preliminary Injunction	Williams Decl.
FFmpeg is a free and open-source project consisting of a software suite of libraries and programs for handling video, audio, and other multimedia files and streams (*see* ffmpeg.org)	FFmpeg

INTRODUCTION

Plaintiff ("Eko") has filed a meritless lawsuit and motion for preliminary injunction. Quibi mobile app and video service launched on April 6, and already has more than 1.7 million downloads. Quibi features high-quality "Quick Bite" content series such as *I Promise* (documenting LeBron James's "I Promise" school) and *Most Dangerous Game* (a Liam Hemsworth thriller), specially made for mobile phones. Eko seeks to throw a wrench into this promising start, but its motion fails every requirement for the "extraordinary" outcome of preliminary relief. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008).

First, Eko cannot show a likelihood of success on the merits. Its accusation that Quibi's "Turnstyle" feature is the result of trade secret misappropriation fails for many reasons: 1. Quibi independently developed Turnstyle without using any Eko secrets. Quibi's witnesses and contemporaneous documents show Quibi's process of experimentation, creation, design and development—based on an idea Quibi conceived before the employees Eko now accuses of misusing Eko's secrets joined Quibi. 2. Quibi's resulting product bears no resemblance to Eko's claimed secrets. 3. Eko's own conduct is irreconcilable with the actions of a company whose CEO admittedly believed since March 2019 that Quibi was using his "proprietary information." 4. Eko's patent and public disclosures debunk its claims of a trade secret.

From its inception, Quibi has focused on combining outstanding content from media's most creative producers with technology innovations by talented developers, and delivering that content optimized for viewing on its internally developed mobile device app. Quibi's engineers tackled independently the challenge of delivering content to maximize users' experience in two viewing orientations, "landscape" and "portrait." Quibi designed Turnstyle to seamlessly transition between the two modes. It then worked with content producers to deliver content in landscape and portrait cuts to provide users with a unique experience.

In developing Turnstyle, Quibi's developers engaged in a lengthy trial-and-error effort, in which they considered a variety of alternative designs, testing each against its goals for a high-quality user experience. Far from using Eko's claimed secret method, Quibi chose to [redacted] using an *off-the-shelf, open source software component* called "FFmpeg."[1] FFmpeg has an entire feature set devoted to [redacted]. Relying on specifications from Apple (for its platform) and Google (for Android), Quibi developed Turnstyle entirely on its own. It bears no similarity to what Eko vaguely claims as its secrets.

Eko also fails to show likelihood of success because Eko did not disclose—to Quibi or to its employees when they worked at Snap—any of the "secrets" it now speculates Quibi used in developing Turnstyle. As the former Snap employees attest, two of them focus on creative issues, not technology, and learned nothing about Eko's claimed secrets. The third accused employee also was not exposed to—and did not bring to Quibi—Eko's alleged secrets. The testimony of these employees is corroborated by overwhelming evidence of independent creation.

Eko also has not adequately specified its claimed trade secrets nor shown how any claim of secrecy can survive Eko's published patent, the publicly available FFmpeg software, [redacted] and other public domain material. Absent a compelling showing of misappropriation, Eko's motion fails.

Eko fails to demonstrate irreparable harm as well. Eko waited a year to pursue this action after Quibi showed Turnstyle to Eko's CEO who, according to Eko, alleged immediately that Turnstyle was "Eko's proprietary technology." Even after Eko saw Quibi's technology at CES on January 8, 2020, and claimed to be

---

[1] FFmpeg's [redacted] *See, e.g.*, "How to Stitch Videos Together": "FFmpeg is offering an easy way to stich videos together using the filter hstack." https://github.com/stoyanovgeorge/ffmpeg/wiki/How-to-Stitch-Videos-Together.) (Bovik Decl. Ex. 6.) Eko's papers ignore this public material.

"shocked" by Turnstyle, Eko waited three months to seek an injunction.

Eko's delay aside, Eko fails to show harm from the claimed misappropriation or that the balance of the hardships favors it. Eko's core value proposition is interactive, "branching" media content where users choose between story lines. It does not highlight any Turnstyle-like capability to change video content depending on mobile phone position. Quibi focuses on delivering "Quick Bites" content from leading directors and content producers on its mobile streaming platform. The two companies do not compete head-to-head. Absent competition, Eko resorts largely to speculative claims of reputational harm, which are insufficient.

As for the balance of the hardships, Quibi's Turnstyle has little impact on Eko, but ripping it out would significantly damage Quibi and degrade content developed at great expense for Quibi's platform. Nor does the public interest favor an injunction, especially given Quibi's extensive showing of its own innovation.

FACTUAL AND PROCEDURAL BACKGROUND

A. Quibi and Eko

Founded in 2018 by Jeffrey Katzenberg, Quibi Holdings LLC was created to deliver exclusive short-form video content to subscribers on mobile devices. Quibi's streaming service features top talent and extraordinary storytelling, combined with innovative technology delivered through Quibi's app. (*See, e.g.*, Katzenberg Decl. ¶¶ 7-8.) Among other innovations, Quibi's service includes an elegant software feature, Turnstyle, to stream content that can be viewed seamlessly in landscape or portrait mode on Quibi's app, and which adjusts to changes in the orientation of a user's phone. (*See, e.g.*, Post Decl. ¶¶ 19, 24.) Quibi announced its planned launch in spring 2019, and launched on April 6, 2020. (Conrad Decl. ¶ 4.) Quibi obtained a patent on its Turnstyle implementation on February 4, 2020. (U.S. Patent No. 10,554,926 [ECF No. 30-29].)

Eko sells "branching" interactive video content, where users select the plot and endings, and an associated media player app. (Napper Decl. ¶ 8.) Eko has

marketed its entertainment since 2010, and is well-funded with Walmart investing $250 million in a joint venture with Eko in late 2018. (Napper Decl. ¶ 49.) Eko is not a tech "start up," but a 10-year-old company.

B. Development of Quibi's App and the Accused Turnstyle Feature

Quibi began development in August 2018. Quibi's process involved trial-and-error, design, prototyping, implementation, and testing by its employees. (*See, e.g.*, Declarations of Robert Post, Eric Buehl, Blake Barnes.) Quibi used no Eko information. (*Id.*; *see also* Burfitt Decl. ¶¶ 3-22.)

In conceptualizing Turnstyle, Quibi's design team sought to address the user's tendency to change the orientation of her phone from vertical or portrait to horizontal or landscape and back. (Post Decl. ¶ 4; Barnes Decl. ¶ 3.) Because Quibi was building a service optimized for delivering content on mobile phones, Quibi's designers wanted to deliver an optimal experience regardless how the device was held. (Barnes Decl. ¶ 3.) By November 2018, they had conceived of five candidate models that would account for phone orientation. (Post Decl. ¶ 8; *accord* Barnes Decl. ¶ 4; Buehl Decl. ¶ 4.)

One of those models, known internally as "Dual Asset," was later renamed Turnstyle. A Quibi engineer, Eric Buehl, created the first Turnstyle prototype in October 2018. (Buehl Decl. ¶ 6; Post Decl. ¶¶ 6-7.) Quibi's design and content teams evaluated several models and worked with partners, including prominent director Antoine Fuqua, to test content. (Post Decl. ¶¶ 8-10; Barnes Decl. ¶¶ 4-5; Burfitt Decl. ¶¶ 17-21; Smith Decl. ¶¶ 13-14.) After extensive evaluation, the design team decided on Turnstyle. (Post Decl. ¶¶ 7-10; Buehl Decl. ¶ 7.)

Quibi's design team presented the concept of Turnstyle to Quibi's Board in November 2018. (Post Decl. ¶ 10; Barnes Decl. ¶ 6.) Slides from the Board presentation show Turnstyle's feature of seamlessly transitioning from landscape to portrait orientation via a video using characters from the popular *Game of Thrones* series. (Post Decl. ¶ 10 & Ex. E.) After the presentation, Quibi's leaders approved

Turnstyle for implementation. (*See id.* ¶ 11.)

Quibi's team then developed a commercial implementation of Turnstyle. They created eight candidate implementations. (*Id.* ¶ 11, Ex. F.) After further extensive testing for factors such as [redacted] they selected two implementations—one for streamed videos and another for downloaded videos—for the commercial product. (*Id.* -13¶¶ 12.) Both use FFmpeg's [redacted] functionality. FFmpeg is widely used in the entertainment industry to process media content. (*Id.* ¶ 14; Bovik Decl. ¶ 22.)

Quibi's [redacted] which makes use of FFmpeg, is fundamentally different from [redacted]. Using FFmpeg, Quibi actually [redacted] a frame of a vertical video and a frame of a horizontal video together, side-by-side, to create a [redacted] video frame. (Post Decl. ¶ 17.) [redacted] not a [redacted] to users. (*Id.*) When a user receives that video on her phone, [redacted]

Quibi's engineering team decided to encode and deliver audio content separately from video in accordance with Apple and Android guidelines for streaming audio content. (*Id.* ¶¶ 15, 20.) This helps ensure that a user streaming videos can hear continuous audio even if the video is buffering due to network slowness. Quibi invested considerable resources in this effort; it spent [redacted] to develop its app, including Turnstyle. (Gioia Decl. ¶ 8.)

C. Quibi and Its Founder's Limited Contacts With Eko

In March 2017, Jeffrey Katzenberg had an informational meeting with Eko's CEO, Yoni Bloch, at which Mr. Bloch pitched Mr. Katzenberg to invest in Eko. (Katzenberg Decl. ¶ 5.) Eko was promoting its choice-driven, "branching" videos and its commercially-available platform. (*Id.*) The meeting was not conducted under a non-disclosure agreement. (*Id.*) Mr. Katzenberg did not request or expect to receive any proprietary information from Eko. (*Id.*) Mr. Katzenberg later

thanked Mr. Bloch for his visit and decided not to invest in Eko. (*Id.* ¶ 6.)

In 2018, Mr. Katzenberg began building Quibi based on an idea he had conceived several years earlier for a "quick bites" entertainment service. (*Id.* ¶ 7.) He asked Meg Whitman to join as Quibi's CEO. They hired a talented team of engineers, product designers, content executives, and product managers to develop Quibi's service and technology. (*Id.* ¶¶ 8-9.) As summarized above, Quibi's team built the service over the following 15 months.

In February 2019, two Quibi employees met with Eko at a restaurant. Eko pitched video content. (Smith Decl. ¶ 17.) The meeting was not conducted under a NDA, and no proprietary information or trade secrets were exchanged. (*Id.* ¶¶ 17-19.) Contrary to Eko, Quibi's employees never suggested that Quibi was not developing its own platform; development of Quibi's app was well underway. (*Id.* ¶ 17; *compare* Post Decl. ¶¶ 4-14.)

D. Quibi's Employees Demonstrate Features of Turnstyle at Eko's Office

On March 28, 2019, two Quibi employees visited Eko's offices in New York and met with Eko's CEO and two others from Eko. Quibi demonstrated Quibi's Turnstyle feature. (Smith Decl. ¶ 20.) Eko did not object to it (although Eko now claims to have done so). (*Id.* ¶ 21; Burfitt Decl. ¶¶ 23-24.) Instead, Eko's CEO made the offhand comment, "this is similar to my tech" and laughed. (Smith Decl. ¶ 21.) After the meeting, Eko sent Quibi an email stating, in part: "Loved your demo, and excited to see where you guys are headed." (Smith Decl. ¶ 24, Ex. A.)

Quibi's employee C.J. Smith demonstrated Turnstyle to Eko personnel on two more occasions. In May 2019, he demonstrated Turnstyle to Eko's VP of Business Development. (*Id.* ¶ 25.) On January 7, 2020, the night before the CES keynote address, Mr. Smith again demonstrated Turnstyle to Eko. (*Id.* ¶ 26.) Each time, Eko reacted positively. (*Id.* ¶¶ 25-26.)

E. Quibi Publicly Unveils Its App at CES

Mr. Katzenberg, Ms. Whitman, and their team publicly demonstrated Quibi's app, including Turnstyle, during their January 8, 2020 keynote address at CES. Quibi's presentation explained the value proposition of Quibi's service and showed the platform's elegant streaming of content that adjusts seamlessly to changes in orientation of a user's phone. (*See, e.g.*, Conrad Decl. ¶ 15.) Eko attended the keynote. (Compl. Ex. A.)

F. Three Weeks After CES, Eko Sends Quibi a Cease-and-Desist Letter, Then Waits Two More Months to Seek Preliminary Relief

On January 28, 2020, Eko's attorneys sent a demand letter to Quibi, asserting that Quibi's Turnstyle feature employs technology claimed in the '765 patent and misappropriated Eko trade secrets. (Compl., Ex. A.) Eko also asserted that it had disclosed source code to Quibi employees while they worked at Snap. (*Id*. at 2.) Quibi responded on February 10, explaining that Turnstyle does not infringe the '765 patent, and that Quibi's technology was developed independently and not using any Eko trade secret. Quibi also denied that its employees had ever seen Eko source code. (*Id.*, Ex. B.) Eko waited another month to file its lawsuit, doing so only after Quibi sought a declaratory judgment of noninfringement and no misappropriation. (ECF No. 1.) On April 1, 2020, Eko filed this motion for a preliminary injunction. (ECF No. 30-1 ["PI Mot."].) The motion seeks relief on Eko's trade secret claim but ignores the patent infringement claim.

LEGAL STANDARD

A preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter*, 555 U.S. at 22. Eko faces a heavy burden to show that it is "likely to succeed on the merits, that [it] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [its] favor, and that an injunction is in the public interest." *Am. Trucking Ass'ns v. City of L.A.*, 559 F. 3d 1046, 1052 (9th

Cir. 2009); *see also Earth Island Inst. v. Carlton*, 626 F. 3d 462, 469 (9th Cir. 2010). If the evidence is genuinely disputed, plaintiff cannot make the requisite showing. *Marina Vape, LLC v. Nashick*, 2016 U.S. Dist. LEXIS 189500, at *31 (C.D. Cal. May 6, 2016) (denying preliminary injunction where significant "competing evidence" is presented) (citing *Int'l Molders' & Allied Workers' Local Union No. 164 v. Nelson*, 799 F.2d 547, 551 (9th Cir. 1986) ("In deciding a motion for a preliminary injunction, the district court 'is not bound to decide doubtful and difficult questions of law or disputed questions of fact.'")).

ARGUMENT

I. EKO HAS NOT SHOWN LIKELY SUCCESS ON THE MERITS

A. Quibi Developed Its App Independently, Not by Use of Any Eko Secrets

Quibi's independent creation of Turnstyle defeats Eko's misappropriation claim. 18 U.S.C. § 1839(6)(B) (independent derivation is not "improper means"); *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 476 (1974) (trade secret law "does not offer protection against . . . independent invention"); *Shapiro v. Hasbro, Inc.,* 653 F. App'x 568 (9th Cir. 2016) (affirming no misappropriation based on independent creation). While Quibi bears the burden of producing evidence of independent creation, the better view is that Eko bears the ultimate burden of proof on misappropriation and thus on disproving independent creation. *See* 18 U.S.C. § 1839(3)(B); *Sargent Fletcher, Inc. v. Able Corp*., 3 Cal. Rptr. 3d 279 (2003).

Quibi's independent development of Turnstyle is detailed above and in the declarations of Turnstyle's developers. (Post Decl.; Buehl Decl.; Barnes Decl.; Burfitt Decl.)[2] Quibi's developers used trial-and-error exercises to choose a

[2] "There are few more persuasive ways to establish that matter was independently developed than to provide evidence that shows genuine trial and error was involved and, that such trial and error was time consuming, costly and therefore placed in question ultimately achieving a successful result." 1A *Milgrim on Trade Secrets*, Appx. 7A at 3.

technical solution that met Quibi's requirements for a high-quality user experience. Multiple witnesses testify to these efforts; their testimony is corroborated by contemporaneous documents. For example, Exhibit D to Robert Post's declaration reflects Quibi's evaluation in November 2018 of five candidate models that would account for a user's phone orientation. These models included "Punch In," "Portrait Scrubber," "Automatic Transition," "Portrait Messaging," and Dual Asset. (Post Decl. ¶ 8, Ex. D.) Exhibit F to Mr. Post's declaration reflects the developers' evaluation of eight candidate implementations. Quibi's evaluation factors included [redacted] (*Id.* ¶ 11, Ex. F.) Against those criteria, Quibi settled on two implementations—one for streamed videos and another for downloaded videos—for use in the final commercial product. (*Id.* ¶¶ 12-13.) Both implementations rely on an off-the-shelf, open-source software tool, FFmpeg, to [redacted] (*Id.* ¶ 14.) This extensive independent process refutes Eko's claim of misappropriation.

B. Quibi's Turnstyle Is So Different From Eko's Design That There Can Be No Misappropriation Claim

Eko's asserted approach to streaming multiple video streams cannot be found in Quibi's app, so there can be no misappropriation. *See* 18 U.S.C. § 1839(5).

First, as noted, Quibi uses an open source software program, FFmpeg, available by Internet download, to create and [redacted]. (Bovik Decl. ¶¶ 22-28; Post Decl. ¶¶ 14, 17.) By contrast, [redacted] (PI Mot. at 10, ln. 26.)

Second, Quibi delivers one video with vertical and horizontal content [redacted] (Bovik Decl. ¶¶ 30-33.) Although Eko repeatedly refers to its method as [redacted] none of Eko's pre-litigation documents do so. Eko's [redacted]

[redacted] appears driven by Quibi's public descriptions of Turnstyle. (*Id.* ¶ 34.)

Third, Quibi delivers a different video file depending on whether the video is downloaded for later play or streamed. [redacted] (Bovik Decl. ¶ 18; Post Decl. ¶ 18.) By contrast, [redacted]

Fourth, Quibi separately encodes and separately delivers video and audio to users so that audio playback can be continuous even when the video needs more time to buffer due to a slow network. (Bovik Decl. ¶¶ 18, 54; Post Decl. ¶ 20.) By contrast, [redacted] (S. Chatterjee Decl. ¶ 23.)

Eko cannot claim trade secret protection over the mere idea of delivering vertical and horizontal video content and seamlessly transitioning between them. Rather, if there are any secrets at all, they lie in the details of Eko's particular implementation. Quibi does not use that implementation, and no misappropriation claim exists. (Bovik Decl. ¶¶ 19, 30-63.)

C. Eko's Claim that It Disclosed Secrets to Mr. Katzenberg Is False

Eko's allegation that it disclosed secrets to Mr. Katzenberg in March 2017 is disproved by Mr. Katzenberg's testimony and Eko's own evidence. (*See, e.g.*, Katzenberg Decl. ¶¶ 5-6.) Mr. Katzenberg is not a technologist, and the meeting's context—an introductory visit seeking investment from Mr. Katzenberg's holding company—is inconsistent with a technical disclosure. Eko claims to disclose its secrets only under the protection of an NDA. (*See, e.g.*, PI Mot. at 3, 17.) No NDA was in place for the meeting; if an NDA had existed, Eko surely would have cited it. (Katzenberg Decl. ¶ 5.) *See Prostar Wireless Grp., LLC v. Domino's Pizza,*

Inc., 360 F. Supp. 3d 994, 1014 (N.D. Cal. 2018) (party "loses the ability" to claim information as trade secret where information shared without protection of confidentiality agreement). Regardless, nothing Eko claims to have disclosed could constitute a secret in light of public disclosures; Eko's patent and its media player were publicly available at the time. (PI Mot. at 12.)

D. Quibi Did Not Obtain or Use Trade Secrets From Any Former Employee of Snap

Eko's allegations that former Snap employees now working at Quibi used Eko's trade secrets are equally false. (Burfitt Decl. ¶¶ 3-22, 25-27; Smith Decl. ¶¶ 3-9, 12, 15-16; Szeto Decl. ¶¶ 3-5, 11-12.) Eko has apparently abandoned its earlier claim that it disclosed source code to them. (*See* Compl. Exs. A-B.) The former Snap employees who joined Quibi had no visibility into how Eko [redacted] (Burfitt Decl. ¶¶ 9-11; Smith Decl. ¶¶ 6-8; Szeto Decl. ¶¶ 9-10.) C.J. Smith and Dan Szeto focus on creative content. Their background is in film; they are not engineers. At Snap, [redacted]. (Smith Decl. ¶¶ 6-8; Szeto Decl. ¶¶ 3-10.) The third employee, Joseph Burfitt, [redacted] (Burfitt Decl. ¶¶ 3-11.) He conducted no analysis of Eko's process for [redacted] (*Id.*)[3]

Eko's allegations also defy logic. According to Eko, these employees *could have* [redacted] learned Eko's implementation. (PI Mot. at 10.) Why they would have done so Eko does not say; Eko offers no evidence that Snap was interested in

[3] Eko's expert, Dr. Chatterjee, identifies "secrets" that Eko's witnesses do not even contend the former Snap employees received, such as Eko's [redacted] (S. Chatterjee Decl., Ex. B.)

those details. In any event, none of the former Snap employees conducted any analysis of [redacted] (Burfitt Decl. ¶¶ 9-11; Smith Decl. ¶¶ 6-8; Szeto Decl. ¶¶ 9-10.)[4] Other Quibi employees who worked at Snap had never heard of Eko until Eko threatened this lawsuit in January 2020. (*See, e.g.*, Buehl Decl. ¶¶ 9-10.)

The departing employees took no work-related materials when they left Snap. (Burfitt Decl. ¶ 13; Smith Decl. ¶ 9; Szeto Decl. ¶ 11.) The accused employees attest that no misappropriation took place. (Burfitt Decl. ¶¶ 22, 26-27; Smith Decl. ¶¶ 15-16; Szeto Decl. ¶¶ 3-5, 12.)

The former Snap employees' testimony is corroborated by many others. Each describes Quibi's own independent development efforts and testifies that no Eko information was used. (*E.g.*, Post Decl. ¶¶ 25-26; Barnes Decl. ¶¶ 3-8; Buehl Decl. ¶¶ 4-10.) The vast differences between Quibi's Turnstyle and anything Eko points to as its own reinforce their testimony. On these facts, an injunction cannot be granted. *E.g.*, *Int'l Molders' & Allied Workers' Local Union*, 799 F.2d at 551.

E. The Totality of Circumstances and Eko's Own Behavior Refute Eko's Narrative

Eko's claim is based on circumstantial evidence: it disclosed something about [redacted] to personnel at Snap who later joined Quibi; Quibi combines video streams; therefore Quibi misappropriated. To begin with, that is an attenuated chain of causation. But other, more persuasive evidence—even apart from the vast differences between the two companies' designs—refutes this narrative. As Eko acknowledges, almost a year before Quibi's CES presentation, Messrs. Smith and Burfitt showed Eko a demo of Turnstyle. (PI Mot. at 12.) Far from ambushing Eko or attempting to keep secrets, Quibi demonstrated the now-

[4] [redacted] has been publicly available at least since 2017. (Jacobs Decl. Ex. A.) Yet Eko redacted the show's name from its moving papers, preventing Quibi's witnesses from seeing it. (PI Mot. at 10.)

accused technology to Eko's CEO.[5] (Bloch Decl. ¶ 23; Smith Decl. ¶ 20.) Eko's theory thus holds that Snap employees learned Eko's trade secrets, moved to Quibi and misused the secrets, and then walked into Eko's office, signed NDAs, met with Eko's CEO, and showed off what they had personally stolen. (PI Mot. at 9-10, 12-13; Bloch Decl. ¶¶ 11, 17, 23.)[6] Then, despite allegedly being warned by Eko's CEO that the technology was Eko's, they filed a patent application that listed them as inventors on this same technology.[7] That course is implausible.

Eko's own behavior also controverts its claim. Eko asks the Court to accept that Mr. Bloch witnessed the trade secret theft in March 2019, yet continued to pursue a partnership with Quibi up to Quibi's CES presentation. (Bloch Decl. ¶¶ 23-25; Sheibar Decl. ¶ 12.) And even after Quibi's CES presentation supposedly showed that Quibi was "announc[ing] Eko's mobile device . . . technology as its own" (PI Mot. at 2-3), Eko waited three months before seeking relief. Eko filed its complaint only after Quibi, faced with Eko's attempts to undermine Quibi in the press, sought a declaratory judgment.

In sum, Quibi did not conduct itself like one who has misappropriated trade secrets; nor is Eko's conduct consistent with one whose secrets have been stolen.

---

5 Eko also accuses Quibi of "secretly" filing its application for the '926 patent "unbeknownst to Eko." (PI Mot. at 13.) As Eko well knows, all patent applications are "secret" until they are published. Eko's '765 patent application was also "secret" before its publication.

6 As Messrs. Smith and Burfitt note, the March 28, 2019 NDAs were apparently presented on iPads as part of Eko's visitor check-in process. The Quibi employees did not sign them to obtain secrets from Eko. Before the New York meeting, Quibi had developed and installed its prototype app on employee phones to demonstrate to content providers. (Smith Decl. ¶¶ 20-23; Burfitt Decl. ¶¶ 23-25.) Eko's claim that it shared its technology directly with Quibi (PI Mot. at 19-20) is false.

7 Eko challenges that Mr. Smith is not technically skilled yet Quibi listed him as an inventor. As he explains, his contributions to Quibi's patent focused on how best to test and present the *creative content* Quibi acquired. (Smith Decl. ¶ 28.)

F. Eko Has Not Clearly Identified Its Claimed Trade Secrets

Eko's claim also fails because it has not delineated its claimed trade secrets with particularity. The requirement to be clear in enumerating claimed secrets is well-established. It applies to pleading a trade secret claim and to obtaining discovery. *See, e.g.*, *Invisible DOT, Inc. v. Dedecker*, 2019 U.S. Dist. LEXIS 68161, at *11-16 (C.D. Cal. Feb. 6, 2019); *Lamont v. Krane*, 2019 U.S. Dist. LEXIS 77249, at *4 (N.D. Cal. May 7, 2019). For Eko to obtain preliminary relief, it must meet the standard as well. *Lamont*, *supra*, at *4.

Yet even though Eko is seeking an extraordinary remedy, its moving papers utterly fail to satisfy this requirement. *Jobscience, Inc. v. CVPartners, Inc.*, 2014 U.S. Dist. LEXIS 64350, at *6 (N.D. Cal. May 1, 2014) (dismissing claim after plaintiffs failed to identify "each of the precise claimed trade secrets, numbered, with a list of the specific elements for each, as claims would appear at the end of a patent.").[8] Instead, Eko blurs even the legal categories, using "trade secrets" interchangeably with "proprietary" and "confidential" information. (PI Mot. 1, 12, 14, 17, 22.) *See TriNet Grp., Inc. v. Krantz*, 2017 U.S. Dist. LEXIS 226086, at *4-7 (C.D. Cal. Aug. 4, 2017) ("'confidential and proprietary information' . . . and 'trade secrets' . . . are neither synonyms nor coextensive . . . [plaintiff] use[s] them interchangeably, thereby rendering the [] claim unintelligible").

Nor does Eko's proposed order provide clarity; it seeks to bar Quibi from offering its Turnstyle feature with "optimized realtime switching technology." This does not delineate a trade secret, leaving unanswered questions such as what optimizations and what technology. *See, e.g.*, *Am. Red Cross v. Palm Beach Blood Bank, Inc.*, 143 F.3d 1407, 1411-14 (11th Cir. 1998) (vacating preliminary

[8] The *Jobscience* plaintiff "promised it could disclose trade secrets, but when it came time to show us the money, its wallet was empty. . . . This experience has been nothing more than a fishing expedition." 2014 U.S. Dist. LEXIS 64350, at *8.

injunction as impermissibly vague where scope of enjoined secret was unclear).

The declaration of Eko's expert, Dr. Chatterjee, provides no further assistance. He variously refers to: [redacted] (*Compare* Williams Decl. § V.)

None of these satisfactorily enumerate claimed trade secrets. *See, e.g.*, *Vendavo, Inc. v. Price f(x) AG*, 2018 U.S. Dist. LEXIS 48637, at *6-10 (N.D. Cal. Mar. 23, 2018) (allegations that plaintiff misappropriated "source code, . . . and other information" was indicative of "the types of information that generally *may* qualify as protectable trade secrets," rather than pleading what specifically defendant had misappropriated); *Becton, Dickinson & Co. v. Cytek Biosciences Inc.*, 2018 U.S. Dist. LEXIS 85121, at *6-8 (N.D. Cal. May 21, 2018) (allegations that defendants improperly used "source code files," "design review templates," and "fluidics design files" failed to plead a trade secret under DTSA").

Eko's other filings only further blur the issue. While Dr. Chatterjee's declaration says nothing about the trade secret of [redacted] (*see* S. Chatterjee Decl. ¶¶ 16-27), Eko's brief suggests that is the heart of the secret. (PI Mot. at 5, 10; *compare* Williams Decl.) But as noted below, that very capability is disclosed in Eko's patent, so that cannot be a trade secret.

G. Eko's Patent And Other Public Material Defeat Its Claim

Eko's failure to delineate its claimed secrets is particularly stark in light of its

patent. (ECF No. 1-4 ["'765 patent"].) Eko's complaint alleges patent infringement; tellingly, that claim is absent from Eko's motion. Eko sacrificed trade secret protection with the patent application's publication in March 2017. *Fleet Eng'rs, Inc. v. Mudguard Techs., LLC*, 761 F. App'x 989, 994-95 (Fed. Cir. 2019). In asserting a trade secret claim, Eko cannot sidestep its patent disclosures. Nor can it claim trade secret protection for material in other public technology, such as the readily available FFmpeg component and its documentation. Eko does not meet its burden of showing its claimed secrets are indeed secret. *AlterG, Inc. v. Boost Treadmills LLC*, 388 F. Supp. 3d 1133, 1146 (N.D. Cal. 2019) (citing plaintiff's burden to "take care to delineate the boundaries between its trade secrets and its information that has been made public through patents and patent applications").

The '765 patent's disclosure defeats any claim that [redacted] (S. Chatterjee Decl. ¶¶ 18, 21) is a secret. Eko's patent discloses this, as Dr. Chatterjee at least partially acknowledges. (*Id.* ¶ 20.) The '765 patent states:

> [A] media presentation can be dynamically modified using 'parallel tracks,' . . . . For example, referring to FIG. **7,** to facilitate near-instantaneous switching among parallel 'tracks' or 'channels', multiple media tracks (e.g., video streams) can be downloaded simultaneously to a user's device, in separate data streams and/or ***combined together in container structures with associated metadata***.

('765 patent at 8:17-8:28 [emphasis added].) That Eko's patent uses "combined" is of no consequence: [redacted] (S. Chatterjee Decl. ¶ 17.)

Eko also cannot claim that its secret is [redacted] (*Id.* ¶¶ 18, 22.) The patent discloses this. ('765 patent at 8:35-43.) Eko cannot claim secrecy over [redacted]

[redacted] ('765 patent at 8:50-56; *compare* S. Chatterjee Decl. ¶ 18.)

Nor can Eko claim secrecy over [redacted] (PI Mot. at 5, 10):

> For example, if the device is oriented in portrait mode when the video commences, a parallel track associated with the device property value="portrait" can be selected as the track to play . . . . As the video is playing, the relevant properties of the device can be monitored to detect any changes that may affect which parallel track should be selected for playback (return to STEP **720**). If, for example, the device is rotated into landscape mode, the property change is identified and the video for a parallel track associated with the landscape mode can be switched to immediately or after a delay.

('765 patent, 8:64-9:21.)

Eko fails to reckon with these disclosures. Dr. Chatterjee often struggles to distinguish between Eko's patent and its supposed secrets, arguing, for example, that Quibi's patent shows use of Eko's trade secrets, but supporting this by citing to Eko's patent disclosure. (S. Chatterjee Decl. ¶ 51; *compare* Bovik Decl. ¶¶ 66-77.) Eko's expert acknowledges that "then-existing methods" could be used to implement Eko's patented method, but he never defines those methods or distinguishes Eko's alleged trade secrets from them. (S. Chatterjee Decl. ¶ 20.)

This oversight is fatal. The video streaming concepts Eko claims have other well-known implementations. (*See generally,* Williams Decl., Section V.) One of the "then-existing methods" is FFmpeg, which alone defeats Eko's claims of secrecy. (*See* Bovik Decl. ¶¶ 22-26; Williams Decl.) Two of its functions, "hstack" and "vstack," are specifically intended for [redacted] (Bovik Decl. ¶¶ 25-26.) Eko fails to show what, if anything, of its claimed trade secrets survive in view of such public domain material. And that Eko failed even to mention FFmpeg, while at the same time claiming to own [redacted] and seeking to enjoin Turnstyle, is especially damning.

II. EKO HAS NOT SHOWN IRREPARABLE HARM

Eko has not demonstrated it is likely to suffer irreparable injury sufficient to justify injunctive relief. *See, e.g.*, *Wildcat Retro Brands, LLC v. Herman*, 2019 U.S. Dist. LEXIS 168259, at *20 (C.D. Cal. June 3, 2019) (denying preliminary injunction because plaintiff did not establish "likely" irreparable harm).

A. Eko Unreasonably Delayed in Seeking Relief

Eko's delay is irreconcilable with its claims of irreparable harm and need for immediate relief. Eko admits that by March 2019, it believed Quibi was using "Eko's proprietary technology" based on Quibi's Turnstyle demonstration and that Quibi needed a license. (Bloch Decl. ¶ 23.) In the interim, Eko continued to pursue a content deal with Quibi, participating in additional meetings—professional and social. (Smith Decl. ¶¶ 25-26.) Eko then claimed it was "shocked" to see Turnstyle at CES on January 8, yet waited three weeks to send Quibi a demand letter and then delayed two more months before seeking a preliminary injunction—doing so only after Quibi sought a declaratory judgment to clear its good name.

By its own reckoning, Eko waited *over a year* from its discovery of Quibi's alleged misappropriation to bring this motion. Eko's own conduct shows "a lack of urgency and irreparable harm." *Garcia v. Google, Inc.,* 786 F. 3d 733, 746 (9th Cir. 2015); *see also Lateral Link v. Springut*, 2015 U.S. Dist. LEXIS 181032, at *29-31 (C.D. Cal. Feb. 26, 2015) (two months delay); *Javo Bev. Co. v. Cal. Extraction Ventures, Inc.*, 2020 U.S. Dist. LEXIS 31167, at *13 (S.D. Cal. Feb. 24, 2020) (two-month's delay "alone weighs heavily against a finding of irreparable harm").[9]

[9] Eko argument that its NDAs with Snap and Smith and Burfitt establish irreparable harm ignores applicable authority. (PI Mot. at 7-8, 12-13, 20.) *Wyndham Vacation Resorts, Inc. v. Timeshare Relief, Inc.*, 2020 U.S. Dist. LEXIS 26557, at *17-18 (C.D. Cal. Feb. 14, 2020) (declining to presume irreparable harm based on contractual clause); *Sarieddine v. D & A Distr., LLC*, 2017 U.S. Dist. LEXIS 222159, at *3-4 (C.D. Cal. July 13, 2017). An NDA with Snap cannot bind Quibi, and the NDAs with Quibi employees were obtained at the March 28, 2019 meeting, at which time Quibi was already demonstrating its app. (Smith Decl. ¶ 23;

B. Eko Relies Solely on Speculative and Unsupported Harm

Eko also fails to demonstrate that irreparable harm is *likely*, not just possible. *Wildcat Retro Brands, LLC*, 2019 U.S. Dist. LEXIS 168259, at *20. Such a showing is difficult, because Quibi and Eko occupy different positions in the media world and do not compete head-to-head. Quibi offers a broad variety of short-form, high-quality content; Eko offers interactive, branching media. (Napper Decl. ¶¶ 39-44.) Quibi features its Turnstyle capability; Eko does not emphasize a similar feature. At best, Eko's motion presents hypothetical harms—*viz.*, "platitudes rather than evidence." *Herb Reed Enters., LLC v. Fla. Entm't Mgmt.*, 736 F.3d 1239, 1250 (9th Cir. 2013) (finding that "the record fails to support a finding of likely irreparable harm" without concrete evidence).

Eko's claim that it has suffered irreparable injury because Quibi's Turnstyle has created reputational confusion exemplifies such a platitude. *Herb Reed*, 736 F.3d at 1250 (evidence of potential customer complaining about confusion is not irreparable harm). Self-serving declarations cannot demonstrate irreparable harm. *Wells Fargo & Co. v. ABD Ins. & Fin. Servs.*, 2014 U.S. Dist. LEXIS 121444, at *32 (N.D. Cal. Aug. 28, 2014) ("In order to establish harm to its reputation or its goodwill, Wells Fargo must do more than simply submit a declaration insisting that its reputation and goodwill have been harmed"). And Eko's claim defies plausibility. According to Eko, it seeks to generate recognition from an innovation that is half a decade old. If Eko has not become synonymous with its claimed "inventions" after that long, Quibi is not to blame for it.

Eko's speculation that its reputation "*could* be further tarnished," which "*could* cause . . . difficulty recruiting and keeping key employees" reinforces its lack of concrete evidence. (PI Mot. at 22 [emphases added].) This is "[s]peculative

---

Burfitt Decl. ¶¶ 14-27.) Yet Eko conflates its alleged disclosures to Snap with Quibi. (PI Mot. at 19, ln. 16.)

injury [that] does not constitute irreparable injury." *Goldie's Bookstore, Inc. v. Superior Court of Cal.*, 739 F.2d 466, 472 (9th Cir. 1984). The same is true for Eko's assertion that it is harmed because its customers "*may* not consider [its] technology as innovative." (PI Mot. at 22 [emphasis added].) Even if there were evidence of loss of goodwill, "evidence of loss of goodwill is minimized when there is also evidence of a continued ability to serve customers." *Blindlight, LLC v. Cubbinson*, 2017 U.S. Dist. LEXIS 218132, at *14 (C.D. Cal. May 16, 2017).

Eko's argument that it may suffer from "reduced access to funding and increased costs of capital" because "industry analysts and investors *would likely* reduce their expectations for Eko's future revenues and profits" also fails as speculative. (PI Mot. at 23 [emphasis added].) "[S]ubjective apprehensions and unsupported predictions of revenue loss are not sufficient to satisfy plaintiff's burden of demonstrating an immediate threat of irreparable harm." *Caribbean Marine Servs. Co. v. Baldrige*, 844 F. 2d 668, 675-76 (9th Cir. 1988).

C. Eko Fails To Show a Causal Connection of Harm

Even if Eko's assertions rose above speculation, Eko still fails to show a sufficient causal connection between its claimed harm and Turnstyle. *Perfect 10, Inc. v. Google, Inc.*, 653 F.3d 976, 981-82 (9th Cir. 2011) (no irreparable harm without "a sufficient causal connection between irreparable harm to Perfect 10's business and Google's operation of its search engine").

Eko presents no evidence tying any loss to Turnstyle. Eko "failed to submit a statement from even a single former subscriber who ceased paying for [Eko's] service" due to Turnstyle. *Perfect 10*, 653 F.3d at 982.[10] Turnstyle is but one

[10] Eko's claims of [redacted] fail to demonstrate perceived cooling) or actual—not speculative—and significant harm. They are also without first-hand evidentiary support. Quibi nonetheless sought to inquire with these companies, but because Eko submitted the relevant passages under seal, requested Eko's permission. Eko declined Quibi's request. (Jacobs Decl. Ex. B.) Absent corroboration, Eko's claims should be disregarded.

feature of Quibi's app. Quibi is, first-and-foremost, focused on delivering premium media content to the public, and decisions on partnering with, or investing in, Quibi extend well beyond its Turnstyle feature.

Eko's failure to present evidence that it has "lost or will lose any business, market share, or customer goodwill" due to Turnstyle defeats its showing. *Monster Energy Co. v. Vital Pharm., Inc.*, 2019 U.S. Dist. LEXIS 120114, at *26-27 (C.D. Cal. June 17, 2019) (no irreparable harm where "the Court does not have any evidence before it connecting [Plaintiff's] downturns to Defendants' conduct"). Eko offers no evidence of harm "as a result of the . . . alleged misappropriation" to support granting its motion. *Mobile Active Def., Inc. v. L.A. Unified Sch. Dist.*, 2015 U.S. Dist. LEXIS 190231, at *15-17 (C.D. Cal. Dec. 14, 2015) (no irreparable harm where "plaintiff does not provide any illustration of how its cash flow has been impaired or how the very existence of the company has been threatened.").

D. Monetary Damages Are Available and Adequate

Eko's assertions of harm also fail because monetary damages suffice. *Sampson v. Murray*, 415 U.S. 61, 90 (1974) ("Mere injuries however substantial, in terms of money, time and energy … are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.").

Eko describes its harm to customer relationships and loss of reputation as "immeasurable," but both losing a customer and "significant resources [expended] . . . to rehabilitate Eko's reputation as a technology innovator" are quantifiable expenses. (D.I. 30-1 at 21-22.) The "potential loss of market share" or interferences with business opportunities are measurable, "economic damages." *Aurora World, Inc. v. TY Inc.*, 719 F. Supp. 2d 1115, 1126 (C.D. Cal. 2009) ("loss of sales" or "potential loss of market share" are economic damages that do not constitute irreparable injury); *Javo Bev. Co. v. Cal. Extraction Ventures, Inc.*, 2020 U.S. Dist. LEXIS 31167, at *14 (S.D. Cal. Feb. 24, 2020) (defendant's

alleged interference with plaintiff's business opportunity by misusing trade secrets was "purely economic harm").

Eko's other asserted harms are even more clearly economic in nature. Both "price erosion" and the "long-lasting economic harm to Eko through reduced access to funding and increased costs of capital" are precisely the types of economic harm that money damages are designed to address. (PI Mot. at 22-23.) Eko's assertions of "a diminution of revenues, a diminution of the market value of plaintiff's property and the loss of substantial goodwill normally attached to a profitable enterprise . . . are but monetary injuries which could be remedied by a damage award." *L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1202 (9th Cir. 1980) (reversing a grant of preliminary injunction after finding there was no requisite showing of irreparable harm).

III. THE BALANCE OF HARDSHIPS FAVORS QUIBI

The balance of equities tips sharply in Quibi's favor. *Winter*, 555 U.S. at 32. An injunction requiring Quibi to disable Turnstyle would disrupt its service at a critical time when consumers are adopting Quibi's new platform. This disruption would extend well beyond reassigning developers to stripping out the offending technology and seeking to replace it without further legal exposure.[11] It would instead hobble Quibi at a key moment in its trajectory.

Enjoining use of Turnstyle would also have immediate and severe consequences for Quibi's library of content. Quibi specifies to producers that they should provide both a landscape and portrait cut of their material. (Conrad Decl. ¶ 8.) Quibi has completed production and post-production work on 64 shows, at substantial expense. (*Id.* ¶ 9.) If Turnstyle is disabled, these stories will not unfold as their directors envisioned, interfering with their creative visions and the

[11] As discussed above, Eko has not delineated its alleged secrets so it is impossible to quantify design-around cost. But an engineering effort to redesign a significant feature of the Quibi platform would be expensive. (*Id.* ¶¶ 8-9.)

audience's appreciation. (*Id.* ¶¶ 9-11.) Disabling Turnstyle would likely require that subscribers view only one video stream. This would harm the artistic integrity of the material and destroy the value of thousands of hours of arduous work and creativity. (*Id.* ¶¶ 9-13.) This harm to Quibi and its content partners far outweighs any harm to Eko premised on speculation that industry interest may dry up. *See, e.g.*, *PlayMakers LLC v. ESPN, Inc.*, 376 F.3d 894 (9th Cir. 2004) (balance of hardships favored defendant ESPN based on significant financial investment in its series and lost advertising revenue, contrasted with lack of proof of harm to plaintiff). This harm should be given even more weight in light of Eko's delay.

Quibi's reputational interest in Turnstyle is more tangible and substantial than Eko's claimed reputational harm. Quibi has heavily promoted Turnstyle as differentiating Quibi from competitive streaming services in a crowded field. (Conrad Decl. ¶¶ 14-18.) Interrupting use of the technology would substantially tarnish Quibi's brand during the important early days following launch. (*Id.* ¶ 18.)

Finally, Eko's claim of indirect reputational harm from Quibi's innovations falls far short of the direct harm that Quibi and its founder Jeffrey Katzenberg are suffering from Eko's smear campaign. As described above, Eko has sought to place stories suggesting that Quibi, with Mr. Katzenberg's active participation, stole trade secrets from Eko. (*Supra* pp. 11-12.) Without a shred of evidence, Eko's brief accuses Mr. Katzenberg personally of "steal[ing] Eko's trade secrets," (PI Mot. at 25), and asserts that he thinks he can get away with it because of his "star power." (*Id.* at 2.) The harm to Mr. Katzenberg is real. He is a longtime, respected leader in the entertainment industry. (Katzenberg Decl. ¶¶ 2-4.) Having personally participated in the marketing of Turnstyle, his good name is tied up in the resolution of this matter. (Stikes Decl. ¶¶ 3-6.) Eko's negative press campaign drove Quibi to file this case. (*Id.* ¶ 10.) On this record, an injunction would be unprecedented.

IV. THE PUBLIC INTEREST DISFAVORS PRELIMINARY RELIEF

A preliminary injunction here would adversely affect the public interest. *Winter*, 555 U.S. at 24 ("courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction"); *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1138-40 (9th Cir. 2009) (court may deny relief implicating the public interest even when postponement may burden plaintiff).

Eko has not clearly shown any element of a trade secret claim. It has not defined its secrets; it has not shown that its claimed secrets are in fact secret; it cannot overcome Quibi's well-corroborated evidence of independent development; it has not shown that Quibi used its secrets. Eko's claims of irreparable harm are highly speculative. Under these circumstances, the public interest cannot favor shutting down Quibi's innovative feature, for which Quibi received a patent.

Eko's attempt to obtain a trade secret injunction based on a feature *it* patented is contrary to the public interest. A patent represents a bargain. In exchange for openly disclosing how to make the claimed invention, and the best mode for doing so, a patentee obtains exclusivity. *AK Steel Corp. v. Sollac*, 344 F.3d 1234, 1244 (Fed. Cir. 2003) ("[A]s part of the quid pro quo of the patent bargain, the applicant's specification must enable one of ordinary skill in the art to practice the full scope of the claimed invention."). Eko claims it withheld secrets from its patent (S. Chatterjee Decl. ¶¶ 36-37) and that those secrets are so valuable that the Court should enjoin Turnstyle—even though Eko's own expert says the patent could be implemented with "known methods." (*Id.*) In short, Eko seeks to avoid its bargain with the PTO and the public.[12]

[12] On the best mode requirement, *see* Brian J. Love and Christopher B. Seaman, *Best Mode Trade Secrets,* 15 YALE J. L. & TECH. 1, 22 ("Relying on unclean hands, a court could at minimum dismiss a parallel trade secret claim brought in a case where the asserted trade secret should have been disclosed as the best mode in the inventor's patent. Accused infringers can reasonably argue that it is unjust for courts to allow patentees to violate the best mode . . . then improperly reap the benefits of their misconduct by turning to trade secrecy.").

Eko's vague claims here also implicate California's keen public interest in employee mobility. *Mattel, Inc. v. MGA Entm't, Inc.*, 782 F. Supp. 2d 911, 940 (C.D. Cal. 2011). Much of Eko's claim is that it showed some material to certain employees at Snap, Quibi later hired them, Quibi came up with something vaguely similar, so Quibi should be enjoined. More should be required lest employers be deterred from hiring experts in their chosen field. *GlobeSpan, Inc. v. O'Neill*, 151 F. Supp. 2d 1229, 1235 (C.D. Cal. 2001) (imputing employee's prior knowledge to employer "runs counter to California's public policy favoring employee mobility").

V. OVERBREADTH AND BOND

As noted above, Eko's proposed injunction is fatally vague and overbroad, and should be denied on that basis alone. (*Supra* pp. 15-16.) Quibi is still calculating the loss if, notwithstanding its strong showing, an injunction were to issue. Any bond should be substantial, on the order of $40 million. Quibi requests permission to supplement the briefing this issue should it become ripe to do so.

CONCLUSION

Eko has failed to make the demanding showing required of a preliminary injunction movant. Its motion should be denied.

Dated: April 13, 2020

MORRISON & FOERSTER LLP

By: */s/ Michael A. Jacobs*
Michael A. Jacobs

Attorneys for Defendant
QUIBI HOLDINGS LLC

42225506