

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

FILED

MAY 18 2005

JUDGE AMY ST. EVE
United States District Court

_____)	
FEDERAL TRADE COMMISSION,)	
)	
Plaintiff,)	Case No. 05C 2889
)	
v.)	Judge Amy J. St. Eve
)	
CLEVERLINK TRADING LIMITED, <i>et al.</i>)	Magistrate Judge Jeffrey Cole
)	
Defendants.)	
_____)	

PLAINTIFF'S EX PARTE MOTION FOR A TEMPORARY RESTRAINING ORDER, OTHER EQUITABLE RELIEF, AND ORDER TO SHOW CAUSE WHY A PRELIMINARY INJUNCTION SHOULD NOT ISSUE

Plaintiff, the Federal Trade Commission ("FTC"), by its undersigned attorneys, having filed its Complaint in this matter seeking preliminary and permanent injunctive and other equitable relief, pursuant to Sections 13(b) and 19 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §§ 53(b) and 57b, and Section 7(a) of the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 ("CAN-SPAM Act"), 15 U.S.C. § 7706(a), moves this Court on an *ex parte* basis, without notice to Defendants, for a Temporary Restraining Order with Asset Preservation, Other Equitable Relief, and Order to Show Cause Why a Preliminary Injunction Should Not Issue ("TRO").¹ In support thereof, Plaintiff states:

1. Plaintiff seeks an Order:
 - A. Temporarily restraining Defendants from further violations of the CAN-SPAM Act, 15 U.S.C. § 7701, *et seq.*, as alleged in the Complaint;

¹ Plaintiff's Proposed Temporary Restraining Order, Other Equitable Relief, and Order to Show Cause Why a Preliminary Injunction Should Not Issue has been filed concurrently with this motion.

B. Temporarily preserving Defendants' assets and requiring repatriation of Defendants' assets and documents;

C. Temporarily restraining and enjoining Defendants from destroying or concealing documents, and from transferring, concealing, or otherwise disposing of assets;

D. Granting Plaintiff leave for expedited discovery; and

E. Requiring Defendants to show cause why this Court should not issue a preliminary injunction extending such temporary relief pending an adjudication on the merits.

2. *Ex parte* relief is necessary here. An *ex parte* TRO is warranted where the facts show that irreparable injury, loss, or damage will result before the defendant can be heard in opposition. *See* Fed. R. Civ. P. 65(b). Cases involving unfair and deceptive practices such as this fit squarely within the category of cases where *ex parte* relief is appropriate and necessary. As in the other cases in this district where courts have granted the FTC an *ex parte* TRO with asset preservation,² irreparable injury, loss, or damage will likely result if Defendants receive

² *See, e.g., FTC v. 3R Bancorp, et al.*, No. 04 C 7177 (N.D. Ill. Nov. 17, 2004) (Lefkow, J.); *FTC v. 120194 Canada Ltd., et al.*, No. 04 C 7204 (N.D. Ill. Nov. 8, 2004) (Gottschall, J.); *FTC v. AVS Marketing, Inc., et al.*, No. 04 C 6915 (N.D. Ill. Oct. 28, 2004) (Moran, J.); *FTC v. Harry*, 04 C 4790 (N.D. Ill. July 27, 2004) (Manning, J.); *FTC v. Phoenix Avatar, LLC, et al.*, 04 C 2897 (N.D. Ill. April 23, 2004) (Holderman, J.); *FTC v. 9094-5114 Quebec Inc., et al.*, 03 C 7486 (N.D. Ill. Oct. 23, 2003) (Leinenweber, J.); *FTC v. QT Inc., et al.*, 03 C 3578 (N.D. Ill. May 29, 2003) (St. Eve, J.); *FTC v. STF Group, Inc., et al.*, 03 C 977 (N.D. Ill. Feb. 12, 2003) (Zagel, J.); *FTC v. CSCT, Inc.*, 03 C 880 (N.D. Ill. Feb. 11, 2003) (Coar, J.); *FTC v. 1492828 Ontario Inc., et al.*, 02 C 7456 (N.D. Ill. Oct. 17, 2002) (Guzman, J.); *FTC v. Bay Area Bus. Council, Inc.*, 02 C 5762 (N.D. Ill. Aug. 15, 2002) (Darrah, J.); *FTC v. Stuffingforcash.com, Inc.*, 02 C 5022 (N.D. Ill. July 16, 2002) (Norgle, J.); *FTC v. TLD Network Ltd.*, 02 C 1475 (N.D. Ill. Feb. 28, 2002) (Holderman, J.); *FTC v. 1st Financial Solutions, Inc.*, 01 C 8790 (N.D. Ill. Nov. 19, 2001) (Kocoras, J.); *FTC v. Growth Plus Int'l Marketing, Inc.*, 2001 WL 128139 (N.D. Ill. Jan. 9, 2001) (Aspen, J.).

notice of this action. In short, if Defendants' assets are not preserved, those assets may disappear, along with any hope of adequate equitable redress.

3. As explained in more detail in the FTC's memorandum (the "TRO Memo") and exhibits supporting this Motion filed herewith, Defendants' business operations are permeated by, and reliant upon, deceptive acts or practices in violation of Sections 5 of the FTC Act, 15 U.S.C. §§ 45 and 52, and the CAN-SPAM Act, 15 U.S.C. § 7701, *et seq.* The FTC's experiences have shown that defendants engaged in such deceptive practices may withdraw funds from bank accounts and move or shred inculpatory documents if given notice of the FTC's action.³ Indeed, as explained in the FTC's TRO Memo at pp. 15-16, such behavior seems especially possible in this case in light of Defendants' carefully orchestrated attempt to hide their responsibility for the spam in this case, and their current usage of offshore bank accounts and payment processors. They use false addresses and routing information in their e-mail messages. They provide false registration information for Internet domain names that they purchase for Web sites that they operate. Faced with complaints regarding spamming from their U.S. credit card processor, they began operating as a company from Cyprus, utilizing a bank account in Cyprus, and a credit card processor in the Caribbean. In short, this is an operation set up specifically to avoid responsibility for the illegal actions it takes.

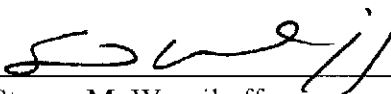
³ See Declaration and Certification of Plaintiff's Counsel Pursuant to Fed. R. Civ. P. 65(b) and Local Rule 5.5(d) In Support of Plaintiff's *Ex Parte* Motion For Temporary Restraining Order and Motion to Temporarily Seal File, attached to this motion as **Attachment A**.

4. As in other cases in this District where courts have granted *ex parte* relief, irreparable injury, loss, or damage will likely result if Defendants receive notice of this action. Therefore, the FTC requests that the Court grant Plaintiff's Motion *ex parte* and waive notice of this Motion to Defendant. The FTC respectfully refers the Court to Plaintiff's TRO Memo and supporting exhibits. The FTC has not previously applied for relief sought in this *ex parte* motion or any similar relief against Defendant.

WHEREFORE, Plaintiff Federal Trade Commission respectfully requests that this Court grant Plaintiff's *Ex Parte* Motion for a Temporary Restraining Order, Other Equitable Relief, and Order to Show Cause Why a Preliminary Injunction Should Not Issue.

Respectfully Submitted,

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General Counsel



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**DECLARATION AND CERTIFICATION OF PLAINTIFF’S COUNSEL
PURSUANT TO FED. R. CIV. P. 65(b) AND LOCAL RULE 5.5(d) IN
SUPPORT OF PLAINTIFF’S *EX PARTE* MOTION FOR TEMPORARY
RESTRAINING ORDER AND MOTION TO TEMPORARILY SEAL FILE**

I, Steven M. Wernikoff, declare as follows:

1. I am an attorney employed by Plaintiff Federal Trade Commission (“FTC” or “Commission”).
2. Plaintiff has not attempted to notify Defendants of Plaintiff’s *Ex Parte* Motion for a Temporary Restraining Order, Other Equitable Relief, and Order to Show Cause Why a Preliminary Injunction Should Not Issue (“TRO Motion”), filed contemporaneously herewith, nor should such notice be given, for the following reasons:
 - A. The evidence set forth in the Memorandum Supporting Plaintiff’s *Ex Parte* Motion for a Temporary Restraining Order, Other Equitable Relief, and Order to Show Cause Why a Preliminary Injunction Should Not Issue (“TRO Memo”), and in the accompanying

exhibits, which I have personally reviewed, show that Defendant has engaged, and is likely to continue to engage, in a scheme designed to gain substantial amounts of money through unfair and deceptive practices. The evidence shows that Defendants routinely violate central provisions of the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (“CAN-SPAM Act”), 15 U.S.C. § 7701, *et seq.*, causing serious detrimental harm.

B. The systematic law violations perpetrated by Defendants provide motivation and opportunity for the dissipation of assets and destruction of records, especially given that much of the evidence is electronic and that the Defendants use offshore bank accounts. The evidence demonstrates that Defendants have gone to great lengths to disguise their actual identities and avoid detection. (*See* TRO Memo at 15-16.) They use false addresses and routing information in their e-mail messages. They provide false registration information for Internet domain names that they purchase for their “lonely house wives” Web sites. Faced with complaints regarding spamming from their U.S. credit card processor, they began operating as a company from Cyprus, utilizing a bank account in Cyprus, and a credit card processor in the Carribean. In short, this is an operation set up specifically to avoid responsibility for the illegal actions it takes. Thus, it is likely that Defendants can and would move assets and records outside of this Court’s reach.

C. There is good cause to believe that immediate and irreparable damage to the Court’s ability to achieve effective final relief in the form of monetary redress will occur from the sale, transfer, concealment, or other disposition by Defendants of assets that were collected from their illegal scheme, and from the destruction, transfer, concealment, or other

disposition of records, if Defendants are notified of Plaintiff's TRO Motion prior to a hearing thereon.

D. Moreover, as illustrated by the following examples (provided upon information and belief), it has been the FTC's experience that defendants who receive notice of the FTC's intent to file an action alleging fraud may attempt to undermine the FTC's attempts to preserve the status quo by immediately dissipating or concealing assets, as well as by destroying documents:

i. In *FTC v. Intelinet.com, Inc.*, CV-98-2140 CAS (C.D. Cal. 1998), the FTC obtained an *ex parte* TRO. The FTC served the TRO on banks where the defendants were known or suspected to have accounts. While the person who was serving the TRO for the FTC was at one of the banks and speaking to a branch manager about the TRO, one of the defendants came into the bank, after having been served with the TRO, and attempted to withdraw money from his account there. He was unsuccessful.

ii. In *FTC v. Intellicom*, CV-97-4572 TJH (C.D. Cal. 1997), the FTC obtained an *ex parte* TRO and served banks where the defendants were known to have accounts. One defendant, whose bank was served earlier in the day, called the bank and asked the branch manager to wire out approximately \$100,000 held in an account that was specifically frozen by the TRO. The branch manager encountered a red flag in the system, discovered the account had been frozen, and refused to release the funds.

iii. In *FTC v. Equifin International, Inc.*, CV-97-4526 DT (C.D. Cal. 1997), after an *ex parte* TRO was issued against the corporate defendants and their owner, and the TRO was served on corporate defendants, but not yet served on the individual defendant, the

individual defendant directed an affiliate to withdraw bank funds from an account containing defendants' credit card revenues. Upon demand of the receiver, the defendant returned the monies.

iv. In *FTC v. Empress Corporation, d/b/a American Publishers Exchange*, CV-S-95-01174-LDG (D. Nev. 1995), defendants disposed of or concealed numerous business records on the night of December 6, 1996. Earlier that day, the U.S. Department of Justice had announced that Attorney General Janet Reno was coming to Las Vegas the next day to make a major announcement regarding enforcement efforts against telemarketing fraud. On December 7, 1996, the Commission executed an *ex parte* TRO with asset freeze against defendants.

v. In *FTC v. Showcase Distributing, Inc.*, CV-95-1368-PHX-SMM (D. Ariz. 1995), shortly after the individual defendant was served with an *ex parte* TRO, he and his wife went to an ATM and withdrew money from an account covered by the TRO, "just to show they could do it."

vi. In *FTC v. Thomas E. O'Day*, No. 94-1108-CIV-ORL-22 (M.D. Fla. 1994), the district court denied the Commission's request to issue a TRO with asset freeze without notice, and scheduled a noticed hearing on the relief sought. Several days later, the Federal Bureau of Investigation executed a search warrant on defendants' business premises as the Commission served notice of its action and the upcoming hearing. Within hours, an individual defendant withdrew approximately \$200,000 from one of his bank accounts.

vii. In *FTC v. United Consumer Services*, No. 94-CV-3164-CAM (N.D. Ga. 1994), the Commission attempted to serve a TRO with asset freeze on a defendant

who was traveling on business. When defendant's lawyer notified his client of the order, defendant went directly to his bank and removed \$100,000 from a corporate bank account. The Commission learned of the withdrawal only after receiving the account statements from the bank. After being served with an order to show cause why defendant should not be held in contempt for violating the asset freeze, the defendant finally produced the money at a deposition.

viii. In *FTC v. Lopinto*, CV S-93-561 (LDG) (D. Nev. 1993), the district court issued an *ex parte* TRO with an asset freeze in June 1993. The order was served on a bank where one of the defendant businesses maintained an account. However, before the bank could implement the freeze, an agent of the defendant business (who knew of the freeze) withdrew \$12,300 from defendant's account.

ix. In *FTC v. Academic Guidance Services*, No. 92-3001 (AET) (D.N.J. 1992), defendants discovered that the Commission intended to file a case against them (and seek an *ex parte* TRO) the following week. An informant told the Commission that defendants then leased a document shredder and spent the weekend destroying documents. The Commission verified that a shredder had been leased, and one of defendant's employees confirmed that documents had been shredded.

x. In *FTC v. Applied Telemedia Engineering and Management, Inc.*, No. 91-635 (S.D. Fla. 1991), defendants were advised, pursuant to an agreement with the Commission, that the Commission had filed its complaint and intended to seek a TRO with an asset freeze from the court. When the Commission's agents went to defendants' offices to serve process, they observed defendants removing boxes of documents from the premises. The Commission moved for, and received, an *ex parte* TRO the following day.

3. Accordingly, Plaintiff respectfully submits that it is in the interest of justice and the public interest that the FTC's *Ex Parte* TRO Motion be heard without notice to Defendant.

I state under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on May 16, 2005



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