

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

FILED

OCT 3 2007

**MICHAEL W. DOBBINS
CLERK, U.S. DISTRICT COURT**

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

SPEAR SYSTEMS, INC., a
Wyoming corporation;

BRUCE PARKER, individually, and as an officer
or director of Spear Systems, Inc.;

LISA KIMSEY, individually, and as an officer
of Spear Systems, Inc.; and

XAVIER RATELLE, individually, and doing
business as eHealthyLife.com,

Defendants.

Case No. 07 C 5597

Judge Wayne R. Andersen

Magistrate Judge Michael T. Mason

**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") in the Midwest Region, Chicago, Illinois.
2. The FTC has not attempted to notify Defendants of the FTC'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 reasons set forth below.

3. The evidence set forth in the Memorandum Supporting the FTC'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 Defendants have engaged, and are likely to continue to engage, in a scheme designed to deprive consumers of substantial amounts of money through fraud and deception.

4. The evidence shows that Defendants market dietary supplement products, including pills that allegedly contain Hoodia gordonii and cause significant weight loss and a "natural" product that purportedly elevates one's human growth hormone level and thereby dramatically reverses the aging process. Defendants misrepresent the efficacy of the products and make bogus and unsubstantiated claims, the only purpose of which is to induce consumers to part with their money. Moreover, 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.

5. The systematic fraud perpetrated by Defendants provides motivation and opportunity for the dissipation of assets and destruction of records, especially given that much of the evidence is in electronic form and that the Defendants appear to use an offshore company and bank accounts. The evidence also demonstrates that Defendants have gone to great lengths to disguise their actual identities and avoid detection. (*See* TRO Memo at pp. 3, 8, 15.) They use false addresses and routing information in their e-mail messages. They use Web sites that

contain no contact information whatsoever. In addition, Defendants regularly transfer funds overseas and convert funds to anonymous pre-paid debit cards. Thus, it is likely that Defendants can and would move assets and records outside of this Court's reach.

6. 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 the FTC's TRO Motion prior to a hearing thereon.

7. 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:

A. In *FTC v. Dennis Connolly, et al.*, SACV06-701 DOC (C.D. Cal. 2006), the FTC requested a non-noticed *ex parte* TRO and asset freeze against all defendants. The Court declined to issue an asset freeze against two of the three individual defendants and issued an order to show cause why an asset freeze should not issue as to them. The defendant with the asset freeze and one of the defendants with the order to show cause then withdrew amounts totaling close to \$750,000 from a joint account within 24 hours. The judge subsequently extended the asset freeze over all defendants. Approximately \$420,000 was recovered.

B. In *FTC v. Physicians Healthcare Development, Inc.*, CV02-2936 RMT (JWJx) (C.D. Cal. 2002), the Commission provided notice of the filing of an *ex parte* action to

the individual defendants, who were represented by counsel at the TRO hearing. The day after the TRO was issued by the Court and served on defendants, Commission staff found that the defendants' computer and other business records had been removed from their business premises and documents had been shredded. Witnesses advised that defendants' employees removed computers and other items on the day of the hearing.

C. In *FTC v. Hanson Publications, Inc.*, No. 1:02 CV 2205 (N.D. Ohio 2002), Canadian defendants transferred \$105,000 from a U.S. account to a Canadian account within two days of receiving service of the TRO, but because this violated the TRO, the Court later secured return of this money, making its return a precondition to release of attorney fees.

D. In *FTC v. The Tungsten Group*, No. 2: 01 CV 773 (E.D. Va. 2001), the Commission obtained an *ex parte* TRO in a case involving fraudulent advance-fee loans. The asset freeze frustrated one defendant's later attempt to withdraw funds from a frozen account. Another defendant was persuaded by counsel to return money he had wrongfully wired out of an account covered by the TRO before his bank could freeze the account.

E. In *FTC v. SkyBiz.com, Inc.*, No. 01-CV-396(K) (N.D. Okla. 2001), within days of the service of the TRO with an asset freeze provision, one of the primary defendants convinced an overseas trustee to withdraw \$1,000,000 from the offshore account of a foreign affiliate. Because a domestic correspondent bank had been served with the TRO, it refused to transfer the funds. The money in the offshore account was preserved, and ultimately used to provide \$20 million for consumer redress.

F. In *FTC v. Productive Marketing*, Civ. No. 00-06502 (C.D. Cal. 2000) the defendants' attempt to withdraw money from their bank was stopped by the TRO.

G. 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.

H. 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.

I. 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.

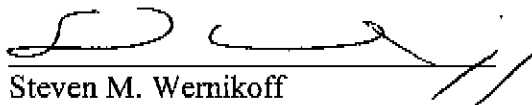
J. In *FTC v. Empress Corporation, d/b/a American Publishers Exchange*, CV-S-95-01174-LDG (D. Nev. 1995), defendants disposed of or concealed numerous business records on the night of December 6, 1996. Earlier that day, the U.S. Department of Justice had announced that Attorney General Janet Reno was 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.

8. 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 Defendants.

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

Executed on October 3, 2007



Steven M. Wernikoff
Attorney for Plaintiff
Federal Trade Commission
55 West Monroe Street, Suite 1825
Chicago, Illinois 60603
(312) 960-5634 [Telephone]
(312) 960-5600 [Facsimile]