

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DOGGIE DENTAL INC., *et al.*,

Plaintiffs,

v.

AHUI, *et al.*,

Defendants.

Civil Action No.

19-1627

(Judge Hornak)

**PLAINTIFFS' SUPPLEMENTAL AUTHORITY REGARDING
DURATION OF TEMPORARY RESTRAINING ORDER**

The *ex parte* Temporary Restraining Order entered in this case is currently set to expire at 12:00 pm ET on Thursday, January 23, 2020. Defendants were both 1) provided notice of the Temporary Restraining Order and 2) served with the Summons and Complaint on Friday, January 17, 2020. At the January 21 hearing on the Order to Show Cause for a preliminary injunction, the Court expressed some concern about how to move forward given the short notice¹ of the hearing provided to Defendants.²

Plaintiffs respectfully submit the path forward is for the Court to 1) reschedule the Show Cause Hearing, and 2) extend the Temporary Restraining Order until conclusion of the Show Cause Hearing. A proposed form of Order is being submitted herewith for the Court's consideration. Once the Show Cause Hearing has been rescheduled, Plaintiffs will provide

¹ As discussed at the hearing, notice was provided to defendants the same day that Amazon confirmed defendants' accounts had been restrained. The Temporary Restraining Order was signed by the Court on December 26, 2019. A copy was provided to Amazon's counsel that same day by email and was hand served upon Amazon's registered agent the following day, December 27, 2019.

² Counsel for defendants Ahui and All Prime appeared at the hearing. Counsel for these defendants and plaintiffs were able to take advantage of the in person meeting. A settlement is pending paperwork for All Prime and is expected with Ahui as well.

notice of the hearing to 1) all of the defendants and 2) the lawyers who have contacted Plaintiffs' counsel about this matter, thereby addressing any due process concerns the Court may have. Although Plaintiffs respectfully submit that the Temporary Restraining Order should be extended to permit the Show Cause Hearing to take place, the Show Cause Hearing should be rescheduled even if the Temporary Restraining Order is not extended.

ARGUMENT

I. THE SHOW CAUSE HEARING FOR A PRELIMINARY INJUNCTION SHOULD BE RESCHEDULED

Irrespective of any action taken to extend the Temporary Restraining Order, the Court should reschedule the Show Cause Hearing for a preliminary injunction. Once the Show Cause Hearing has been rescheduled, Plaintiffs will provide notice to all of the defendants and also to any lawyers that have reached out to Plaintiffs' counsel. A Preliminary Injunction will ensure that defendants' infringing products will not continue to be sold during the pendency of this lawsuit and there will be some funds available to satisfy a judgment.

Plaintiffs' Application contains evidence showing each of the defendants has infringed Plaintiffs' patent and the requirements for a Preliminary Injunction are met as to each of the defendants. *See Declaration of Mary Laplante* [Dkt. 5], and *Memorandum of Law in Support of Ex Parte Application*, pp. 26-35. Online platforms recognize defendants such as those in the present case typically operate in rings. *See Fighting China's counterfeits in the online era*, www.chinadaily.com.cn/business/2017-09/19/content_32200290.htm (last visited Dec. 19, 2019) ("In August ... police in Loudi, Hunn province, broke up a ring producing and selling counterfeit weight-loss drugs...") (attached as Exhibit A). In the present case, however, Plaintiffs are not seeking to hold one defendant responsible for the actions of another defendant.

As such, Plaintiffs are not seeking to restrain the funds of one defendant to compensate for the damages caused by another defendant, nor are Plaintiffs seeking to hold defendants jointly and severally liable for any damages that may be awarded.

The need for a Preliminary Injunction is illustrated by a recent online counterfeiting case in Chicago, *Volkswagen AG v. DXZ Official Store*, No. 18-cv-6611 (N.D. Ill.). This was an online counterfeiting case brought against 198 defendants; counsel appeared for two of the defendants and filed papers in opposition to the preliminary injunction motion arguing, among other things, that the amount of funds restrained was excessive as “they’re freezing two accounts for \$30,000 for a total of \$100 in sales.” (Dkt. 55, page 10) The Court entered a preliminary injunction against the non-appearing defendants and extended the TRO as to the two appearing defendants to permit discovery of sales records. The Court subsequently lifted the restraint on the accounts of the two appearing defendants [Dkt. 56] and severed the action against the two appearing defendants. [Dkt. 57]

The severed case against the two appearing defendants was styled *Volkswagen AG v. hkseller*2011*, No. 18-cv-7621 (N.D. Ill.). In reality, over \$61,000 was restrained in the two accounts and Plaintiffs moved for reinstatement of the asset restraint; defendants’ counsel represented to the Court that at least \$26,000 would remain in the accounts until the date of the hearing on the motion. The Court entered an Order reinstating the asset restraint two days after the hearing. It soon became apparent that prior to the hearing, the defendants had transferred funds out of the account so the account balances were \$26,500. Moreover, in the two-day space between the hearing and the Order, the defendants further depleted the accounts so only \$4,000 was remaining, making the defendants essentially “judgment proof.” The case concluded with defense counsel withdrawing, the defendants defaulting, and the Court entering a final judgment

in which the Court found “Defendants took deliberate action to avoid the asset restraint imposed in this case.” [Dkt. 55]

The evidence submitted by Plaintiffs in the Laplante Declaration [Dkt. 5] confirms Defendants offer for sale and sell Infringing Products. The evidence submitted by Plaintiffs in the Dertsakyan Declaration [Dkt. 6] confirms the irreparable harm being suffered by Plaintiffs. The Court should reschedule the Show Cause Hearing and then enter a preliminary injunction continuing the relief provided in the Temporary Restraining Order.

II. THE TEMPORARY RESTRAINING ORDER SHOULD BE EXTENDED UNTIL THE SHOW CAUSE HEARING HAS OCCURED

This Court has the authority to enter a second extension of the Temporary Restraining Order to permit the defendants to prepare for the Show Cause Hearing for a preliminary injunction. The Temporary Restraining Order was originally entered by the Court on December 26, 2019, for a period of fourteen (14) days and then extended for an additional fourteen (14) day period until January 23, 2019 at 12:00 pm. Defendants were not given notice of the Temporary Restraining Order or the Show Cause Hearing set for January 21, 2020, until Friday, January 17, 2020, the day Plaintiffs’ counsel was told by Amazon that Defendants’ accounts had been restrained. Thus, Defendants’ accounts have currently been restrained by Amazon for less than fourteen (14) days.

Plaintiffs moved for a second extension of the Temporary Restraining Order on January 16, 2020, prior to receiving confirmation from Amazon that Defendants’ accounts had been restrained and prior to receiving the Defendants’ contact information from Amazon. On January 17, 2020, the Court entered an Order requesting supplemental briefing on a second extension of the Temporary Restraining Order. Given that later that day Plaintiffs’ counsel received from

Amazon confirmation of the restraints and the contact information for Defendants, and Plaintiffs' counsel then provided notice of the Show Cause Hearing and also served Defendants with the Summons, Complaint, and expedited discovery, the Motion for a second extension was withdrawn. At the scheduled Show Cause Hearing, the Court expressed concern the notice of the hearing provided to Defendants was insufficient to permit Defendants to prepare for the hearing and renewed its request for authority to further extend the Temporary Restraining Order.

In its Order of January 17, 2020, the Court stated:

the Court is uncertain of its authority under Fed. R. Civ. P. 65(b) to grant a second extension beyond the total of twenty-eight (28) day TRO already granted. *See Nutrasweet Co. v. Vit-Mar Enters., Inc.*, 112 F.3d 689, 692 (3d Cir. 1997) (“The most prevalent view is that a temporary restraining order, even if issued with notice, cannot be continued beyond the periods prescribed in Fed. R. Civ. P. 65(b) without being treated as the equivalent of a preliminary injunction and thus subject to appellate review.”); *Sims v. Greene*, 160 F.2d 512, 516 (3d Cir. 1947) (“[i]t is well settled that no temporary restraining order may be continued beyond twenty days unless the party against whom the order is directed consents that it may be extended for a longer period”); *see also H-D Michigan, LLC v. Hellenic Duty Free Shops S.A.*, 694 F.3d 827, 844-45 (7th Cir. 2012); *Nat’l Mediation Bd. v. Airline Pilots Ass’n, Int’l*, 323 F.2d 305, 305 (D.C. Cir. 1963).

The Seventh Circuit decision in the *H-D Michigan* case – in which the Appeals Court found no issue with a TRO that exceeded twenty-eight (28) days – is instructive given the facts in the present case. In *H-D Michigan*, the Appeals Court affirmed an extension of a TRO beyond the 28-day limit, and explicitly recognized that there will be cases where the maximum 28-day limit does not give the parties sufficient time to prepare for a preliminary injunction hearing. As the Appeals Court noted, the district court in the *H-D Michigan* case extended the TRO for more than the twenty-eight (28) day time period under F.R.C.P. 65(b) relying upon *Trefelner v. Burrell School Dist.*, 655 F. Supp. 2d 581, 598-99 (W.D. Pa. 2009) (Conti, J.) (“Although in ordinary situations the temporary restraining order cannot extend beyond twenty

days without being automatically converted into a preliminary injunction, an extension is reasonable in other situations.” citing 11A *Charles Alan Wright, Arthur R. Miller, Mary Kay Kane* § 2953, at 279, 281-82 (2d ed. 1995)). The extension of the TRO given by Judge Conti permitted the parties to prepare for the preliminary injunction hearing, which would be the case with a further extension in the present case. For example, Defendants would have additional time to prepare for the Show Cause Hearing and Plaintiffs would have the benefit of Defendants responses to the outstanding discovery. Such discovery includes the true name of a defendant, account balances of a defendant, the number of Infringing Products sold by a defendant, the profits earned by a defendant from the sale of Infringing Products, the amount of Infringing Products a Defendant currently has in inventory, sales records, the intentional nature of the infringement of Plaintiffs’ patent by a defendant, corrective advertising needed to be undertaken by Plaintiffs, and steps taken to comply with the Temporary Restraining Order by a defendant.³

Although the Seventh Circuit affirmed the district court’s entry of a TRO that extended more than twenty-eight (28) days, the Appeals Court noted that when a TRO is extended beyond the 28-day limit without the consent of the enjoined party, it becomes in effect a preliminary injunction that is appealable, but the order remains effective. *H-D Michigan*, 694 F.3d at 844-45. The Seventh Circuit then reminded district courts that for a TRO to be viable beyond the 28-day mark as a preliminary injunction, the order must comport with the formal requirements for a preliminary injunction, and both a TRO and preliminary injunction must “state the reasons why it issued,” FRCP 65(d), and a statement of findings of fact and conclusions of law for decisions granting or refusing an “interlocutory injunction” (a phrase that includes preliminary injunctions) is also required. FRCP 52(a)(2). The original Temporary Restraining Order meets both of these

³ The expedited discovery authorized by the Order to Show Cause was served on Friday, January 17, 2020, together with the Summons and Complaint. Responses are due within fourteen (14) days, *e.g.*, January 31, 2020.

requirements. Furthermore, the Seventh Circuit stated that if any party believes the explanation in a TRO that extended past 28 days was not sufficient, the party should give the district court an opportunity to provide further explanation, and if a party does not do so it waives the issue on appeal. *Id.* at 845-46. Similarly, if any Defendant in the present case believes there is not sufficient support in the original Temporary Restraining Order to under FRCP 52(a)(2) or 65(b), the Defendant may request the Court to supplement the Order.

Finally, the Seventh Circuit stated:

[w]e recognize there will be cases where the maximum 28-day limit does not give the parties sufficient time to prepare for a preliminary injunction hearing, let alone time for the district court to decide it. In those case, an extension of the TRO pending a preliminary injunction hearing and decision without consent of the enjoined party is technically a preliminary injunction: it is appealable, and the district court should provide a sufficient explanation of its decision to allow meaningful appellate review. A court reviewing such an order for an abuse of discretion should take into account the urgency with which it was issued and the needs of the district court and the parties, but the law does not allow an indefinite and unreviewable extension of a TRO without the consent of the enjoined party.

Id. at 845 (emphasis added). The second proposed extension in the present case fits squarely within the *H-D Michigan* case – it is a short extension (not an indefinite extension) and it permits Plaintiffs and the Defendants additional time to prepare for the Show Cause Hearing, should the Defendants choose to appear.

CONCLUSION

Plaintiffs thus respectfully request that the Court 1) reschedule the Show Cause Hearing for a preliminary injunction for next week and 2) extend the Temporary Restraining Order pending the Show Case Hearing.

Respectfully submitted,

Dated: January 21, 2020

/s/ Stanley D. Ference III

Stanley D. Ference III

Pa. ID No. 59899

courts@ferencelaw.com

Brian Samuel Malkin

Pa. ID No. 70448

bmalkin@ferencelaw.com

FERENCE & ASSOCIATES LLC

409 Broad Street

Pittsburgh, Pennsylvania 15143

(412) 741-8400 – Telephone

(412) 741-9292 – Facsimile

Attorneys for Plaintiffs