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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BMADDOX ENTERPRISES LLC, Plaintiff, v. MILAD OSKOUIE, OSKO M LTD, and PLATINUM AVENUE HOLDINGS PTY, LTD, Defendants.	Case No. 1:17-cv-01889-RA-HBP
MILAD OSKOUIE and PLATINUM AVENUE HOLDINGS PTY, LTD, Counterclaimants, v. BMADDOX ENTERPRISES LLC and BRANDON MADDOX, Counterdefendants.	

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISSOLVE OR MODIFY THE *EX PARTE* ASSET RESTRAINING ORDER

August 16, 2017

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PRELIMINARY STATEMENT

Defendants Milad Oskouie ("Mr. Oskouie"), Osko M Ltd ("OML") and Platinum Avenue Holdings Pty, Ltd. ("Platinum," collectively with Mr. Oskouie and OML, "Defendants"), by their attorneys, Lewis & Lin LLC, hereby move this Court under Fed. R. Civ. P. 60, 64 and 65 to dissolve or modify the *ex parte* temporary restraining order issued by this Court on May 30, 3017 granting Plaintiff BMaddox Enterprises, LLC's ("BME's") request to restrain all of the Defendants' assets pending a hearing on BME's request for a preliminary injunction (ECF Doc. 15, the "Asset Restraining Order").

As a threshold matter, Plaintiff BMaddox Enterprises, LLC ("BME") has utterly failed to meet the procedural and substantive requirements for such drastic injunctive relief. BME's dissipation argument rested solely on the theory that Defendants are foreign residents—no other evidence demonstrating one scintilla of the risk of dissipation was presented by Plaintiff. In contrast, Defendants have appeared to dispute BME's claims, have assented to the Court's jurisdiction to assert counterclaims, and, most importantly, have not done anything in an attempt to frustrate a judgment on the merits.

Next, BME has used the broad the Asset Restraining Order to sweep Defendants' unrelated business activities and assets within in its scope, specifically <TheUnitutor.com>. BME should not be able to use the Asset Restraining Order as a sword against Defendants, especially when their personal and business activities unrelated to BME's claim for copyright infringement have nothing to do with this case.

Finally, while the ostensible purpose of the Asset Restraining Order was to temporarily restrain Defendants' accounts pending a preliminary injunction hearing, that hearing has been consolidated with the trial on the merits—meaning Defendants effectively cannot "transfer[] . . .

any money" to pay for living expenses, personal expenses, normal business expenses and/or their legal bills in this matter, *for months, if not over a year*.

Simply put, the Asset Restraining Order is too broad in scope and prejudicial to Defendants. Given the absence of any showing of risk of dissipation by BME, the Asset Restraining Order should be dissolved.

PROCEDURAL and FACTUAL BACKGROUND

On or around March 14, 2017, Plaintiff BMaddox Enterprises, LLC's ("BME's") moved *ex parte* for, *inter alia*, an asset restraining order solely on the basis that "Defendants have used several techniques to conceal their identities—including using domain privacy services . . ." (ECF Doc. 23 at 32).

By Order dated March 16, 2017, the Court denied BME's request, with leave to renew "addressing the likelihood of dissipation of the claimed assets." (ECF Doc. 17).

On or around March 29, 2017, BME again moved *ex parte* for, *inter alia*, an asset restraining order. (ECF Doc. 24, the "Second *Ex Parte* Application").

Based on the showing before it at the time, by Order dated May 30, 3017, the Court granted BME's *ex parte* request to restrain all of Defendants' assets pending a hearing on BME's request for a preliminary injunction (ECF Doc. 15, the "Asset Restraining Order").

The Asset Restraining Order stated, in relevant part, as follows:

> 1. Defendants and any persons in active concert or participation with them who have actual notice of this Order shall be temporarily restrained and enjoined from transferring or disposing of any money or other of Defendants' assets until further order by this Court;
>
> 2. PayPal, Inc. ("PayPal"), Stripe, Inc. ("Stripe"") and WePay, Inc. ("WePay") shall within two (2) business days of receipt of this Order:

> a. Locate all accounts and funds connected to Defendants or Defendants' websites; and;
> b. Restrain and enjoin such accounts or funds from transferring or disposing of any money or other of Defendants' assets until further ordered by this Court;
>
> 3. Any banks, savings and loan associations, payment processors, credit card companies, or other financial institutions for Defendants or Defendants' websites shall within two (2) business days of receipt of this Order:
> a. Locate all accounts and funds connected to Defendants or Defendants' websites; and;
> b. Restrain and enjoin such accounts or funds from transferring or disposing of any money or other of Defendants' assets until further ordered by this Court;

(ECF Doc. 15, at 3-4).

Armed with the Asset Restraining Order, on or around June 5, 2017, BME's counsel sent subpoenas to, *inter alia*, PayPal and Stripe, Defendants' payment processors. Declaration of Milad Oskouie dated August 16, 2017 ("Oskouie Decl."), ¶ 11. Upon information and belief, PayPal and Stripe responded to BME's counsel, providing information about all Defendants' accounts, including accounts for The UniTutor and Infinite Conversions. Oskouie Decl., ¶ 12. In response, PayPal and Stripe froze all of Defendants' accounts, even those related to TheUniTutor.com website. Oskouie Decl., ¶ 12.

The Asset Restraining Order was extended *ex parte* until June 29, 2017 by order of this Court dated June 7, 2017 (ECF Doc. 18).

At all relevant times, Defendant OML contracted with Symantec Corporation to offer Symantec's Norton Shopping Guarantee™ service to customers on TheUniTutor.com. Oskouie Decl., ¶ 15. Norton Shopping Guarantee benefits include, *inter alia*, $1,000 in purchase insurance for sales on TheUniTutor.com. Oskouie Decl., ¶ 15. On or about June 8, 2017, BME's counsel forwarded the Asset Restraining Order to Symantec to take down Okso M's Norton Shopping Guarantee™ service. Oskouie Decl., ¶ 16.

On or about August 4, 2017, BME's counsel forwarded the Asset Restraining Order to BlueHost, the domain registrar for <TheUniTutor.com> *only*, to place a registrar lock on <TheUniTutor.com>. Oskouie Decl., ¶ 17.

Upon information and belief, BME's counsel has continued to send the Asset Restraining Order to Defendants' various financial institutions—without regard to the fact that Defendants' other business divisions, like TheUniTutor.com, obviously have accounts and/or assets in Defendants' names. Oskouie Decl., ¶ 18. In order words, while the Asset Restraining Order ostensibly relates only to this case, BME has and is using it to shut down every aspect of Defendants' business and personal life.

By Order dated August 9, 2017, following a hearing on Defendants/Counterclaimants' Motion for a Temporary Restraining Order and Preliminary Injunction—but without Defendants being heard on the issue of the Asset Restraining Order, the Court consolidated the hearing on BME's request for a preliminary injunction and the trial on the merits, and extended the Asset Restraining Order "until trial is complete or this matter is otherwise resolved." (ECF Doc. 39).

BME's use of the Asset Restraining Order to restrain unrelated assets, as well as the order's general restriction on Defendants transferring *any money* is having a serious negative impact on Defendants' (especially the individual defendant's) ability to function on a day-to-day basis. Oskouie Decl., ¶ 19. On or about August 9, 2017, Mr. Oskouie's personal bank accounts were locked, presumably by virtue of BME's use of the Asset Restraining Order. Oskouie Decl., ¶ 29.

Defendants' monthly personal and business expenses include:

- £2000 on rent
- £300-400 on utilities.

- £300 or so on food.
- £3400 a month on SEO for TheUniTutor.com.
- £500 on other marketing for TheUniTutor.com
- £1000 on other business expenses
- £2000 on general travel and entertainment expenses
- in addition to their legal bills in this matter.

Oskouie Decl., ¶ 27.

ARGUMENT

I. Plaintiff Has Failed to Demonstrate a Significant Threat of Irreparable Injury in the Absence of an Asset Freeze

Normally, "district courts have no authority to issue a prejudgment asset freeze pursuant to Rule 65 where such relief was not traditionally accorded by courts of equity." *Gucci America, Inc. v. Weixing Li,* 768 F. 3d 122, 129 (2d Cir. 2014). In the rare cases where the Court may exercise its equitable power to do so, Courts by and large decline to do so when the Plaintiff has not shown irreparable harm or a likelihood of success on the merits. *See JSC Foreign Econ. Ass'n Technostroyexport v. Int'l Dev. & Trade Servs.*, Inc., 295 F. Supp. 2d 366, 389 (S.D.N.Y. 2003). Irreparable harm exists "where, but for the grant of equitable relief, there is a substantial chance that upon final resolution of the action the parties cannot be returned to the positions they previously occupied." *Sterling Ornaments Pvt. Ltd. v. Hazel Jewelry Corp.*, 2015 WL 3650182, at *1 (S.D.N.Y. June 10, 2015) (denying request for temporary restraining order freezing defendants' assets). Thus, in order to obtain an asset freeze injunction, plaintiff must show "a significant risk that the assets frozen would dissipate rendering enforcement of a judgment impossible." *Klipsch Grp., Inc. v. Big Box Store Ltd.*, No. 12 CIV. 6283 AJN, 2012 WL 5265727, at *11 (S.D.N.Y. Oct. 24, 2012).

Here, plaintiff has presented absolutely no evidence from which this Court can infer that any sales proceeds are being secreted or diverted, or that there is even a possibility that Defendants will divert their sales proceeds prior to the conclusion of this litigation.[1] "Unless and until" plaintiff produces evidence of improper asset diversion of secretion, the freeze order should not continue. *See SEC v. International Loan Network*, 770 F. Supp. 678, 697 (D.D.C. 1991), *aff'd,* 968 F.2d 1304 (1992).

The sole basis for plaintiff's request for an asset freeze was Defendants' foreign status. In the Second *Ex Parte* Application, BME's dissipation argument then rested on the fact Defendants were "based outside of the United States," thus claiming that dissipation was likely, but offered no particularized evidence that Defendants were secreting or would transfer funds. Instead, BME's primary argument was that Defendants *would* "smash their stereos and remove their assets from the financial service providers used." (ECF Doc. 24 at 17). In support of their argument, BME simply reiterated their claims that Defendants had committed copyright infringement, providing purported evidence in support of those claims, rather than any specific evidence that Defendant were a risk to dissipate funds. *Id.* In fact, the words "harm," "prejudice," and "injury" appear nowhere in BME's briefing—no such discussion occurred.

To substitute for this dearth of evidence, plaintiff offered one conclusory argument—that Defendants had engaged in a campaign of "material misrepresentations" as to their ownership of FFLTrust.com as well as their identities. (ECF Doc. 24 at 16). As a threshold matter, Defendants did not obfuscate their identity, nor move assets out of any account but for legitimate business purposes. Oskouie Decl., ¶ 20. Plaintiff's claims of non-responsiveness to Plaintiff's allegations

[1] Although Plaintiff has not met its burden, should the Court so desire, Defendants will gladly provide the Court with assurances that they have not and do not intend to hide assets or transfer them fraudulently. *See* Oskouie Decl., ¶ 32.

as being an indication that Defendants are "above the law" are false. Oskouie Decl., ¶ 21. Defendants hired two law firms in Australia to counteract Plaintiff's specious claims of infringement, and engaged in discourse denying same for over a year. Oskouie Decl., ¶ 22. Further, Defendant Platinum's attempt to get a US-based payment processor ("PAI") undermines Plaintiff's argument that Defendants are trying to evade US enforcement. Oskouie Decl., ¶ 23. Furthermore, the use of WHOIS privacy services is not indicative of an attempt to hide—Plaintiff's principal, Counterdefendant Brandon Maddox, uses WHOIS privacy services on <MiladOskouie.com> and <AustralianHacker.com>. Oskouie Decl., ¶ 24.

Plaintiff's request for an asset freeze contains no particularized argument that Defendants, rather simply foreign individuals and entities, will *dissipate funds*—it simply contains arguments in support of Plaintiff's claims of infringement. Foreign status, standing alone, is not indicative of a risk of dissipation, much less irreparable harm, especially where, as is the case here, a defendant has a viable business. *See Klipsch Grp., Inc.*, 2012 WL 5265727, at *11 ("The Court is not persuaded that there is a risk of DealExtreme ceasing its United States operations or radically altering its payment processing system for worldwide sales in its $130 million a year business solely to avoid paying a judgment in this case."). Plaintiff here has offered no evidence that the Defendants have secreted their assets, are likely to secret their assets before the termination of this litigation, or that there is any threat that any sales proceeds are being secreted or diverted. Nor can plaintiff do so.

Defendants' use of PayPal or Stripe to process customer payments is not *ipso facto* a reason to restrain all of Defendants' assets—even if Defendants' constituent bank accounts are not in the United States. *See Klipsch Grp., Inc.*, 2012 WL 5265727, at *11 (Opining that, "[t]he PayPal account here is one where funds flow in and out daily and the captured funds appear to

represent the proceeds of DealExtreme's myriad worldwide sales during the week the asset restraint was imposed. Plaintiff's argument that all of this money is "relate to the profits" of counterfeiting and is fair game for an asset freeze because some potentially modest proceeds from the sale of counterfeit goods passed through that account at a prior time" is insufficient to continue an asset freeze over the unrelated assets.).

Further, the mere use of monies from those non-U.S. bank accounts, as Defendants have obviously done prior to institution of this lawsuit, does not indicate an effort to *frustrate a judgment*. *See Sterling Ornaments Pvt. Ltd.*, 2015 WL 3650182, at *2 ("Sterling relies on Ozkan's admission that he used "some money" from [corporate defendant] Hazel's bank account, which held both Hazel's own money and customer payments collected on behalf of Sterling, to help finance the purchase of his home. . . .But however wrongful Ozkan's use of the money in Hazel's account for this purpose may have been, it does not reflect an effort to frustrate a judgment"). This is especially true where, as here, Defendants were aware of Plaintiff's claims for over a year before Plaintiff filed this action and made no effort to conceal their use of either PayPal or Stripe, or to pay their ordinary expenses. Oskouie Decl., ¶¶ 20-23, 32. This is not evidence, nor will any evidence be discovered, that Defendants did anything to avoid reckoning herein.

In short, Plaintiff's arguments are insufficient to show irreparable harm *in the absence of an asset freeze*. *See, e.g.*, *Haggiag v. Brown*, 728 F. Supp. 286, 291 (S.D.N.Y. 1990) (denying asset freeze where plaintiffs failed to present "any significant evidence of any massive dissipation of assets of the sort which would be required in order for the drastic remedy sought by plaintiffs to be appropriate"). In the absence of any showing of irreparable harm in the absence of an asset freeze, the Asset Restraining Order should be dissolved.

II. Plaintiff Has Failed to Show That the Balance of Hardships Tips, Sharply or Otherwise, in Its Favor

Plaintiff has not offered and cannot offer anything in the way of evidence to suggest that the balance of hardships tips even slightly in its favor. Instead, plaintiff simply assumes that Defendants are liable and states, in conclusory fashion, that "there is little to no risk that assets generated through legal activities would be frozen if this Court grants the *temporary* relief Plaintiff requests." (ECF Doc. 24 at 7-8). However, Plaintiff has known since the receipt of subpoena responses on or around early June 2017 that Defendants had *separate* PayPal and Stripe accounts for its unrelated, legal activities on, *inter alia*, TheUniTutor.com and Infinite Conversions—in addition to Mr. Oskouie's separate personal accounts with PayPal that had nothing to do with collecting customer payments from FFLTrust.com. Oskouie Decl., ¶ 12. All of these accounts were frozen. Oskouie Decl., ¶ 12. Thus, the "little to no risk" that Plaintiff proposed in its request is present and real for Defendants. *See* Oskouie Decl., ¶ 30.

In this case, a continuation of the Asset Restraining Order would virtually put the Defendant entities out of business and the individual defendant, Mr. Oskouie, out of house and home. *See* Oskouie Decl., ¶ 25. If the case were ultimately resolved in Defendants' favor, it would probably be too late to resurrect not only FFLTrust.com, but also TheUniTutor.com—a division of Osko M that has no relationship to the instant dispute. *See* Oskouie Decl., ¶ 26. There is also little doubt that the hardship will fall squarely on Mr. Oskouie and his family, for whom the asset freeze would result in significant injury.

This financial terrorization of Mr. Oskouie and his family is ultimately the result BME and Brandon Maddox want, as evidenced by yet *another* harassing, defamatory letter sent to Mr. Oskouie's parents on July 21, 2017: "[Ms.] Amini, I noticed you are a very caring mother. You co-signed each of your son's bank accounts. I also see you are the co-owner of the home you are

living in currently. . .Milad is living the highlife, unemployed lawyer in London living off what he stole from me." Oskouie Decl., ¶ 31. In addition, BME's counsel sent a request to BlueHost, Defendants' domain name registrar for <TheUniTutor.com>—i.e. the business division that has nothing to do with the instant case—for BlueHost to place a "registrar lock" on that unrelated domain name under the false pretense that it was an "asset" subject to the Asset Restraining Order. *See* Oskouie Decl., ¶ 17. TheUniTutor.com was launched in 2012, therefore it could have nothing to do with this case—and BME's counsel was aware of this fact no later than when it received the subpoena responses from PayPal and Stripe. Nonetheless, it sent the Asset Restraining Order anyway. In other words, the broad language of the Asset Restraining Order permits BME's counsel to freeze assets that have nothing to do with the limited equitable remedy of an "accounting of profits" for copyright infringement as it relates to FFLTrust.com. The Court should not permit BME to continue to abuse the permissible scope of an asset freeze in this manner. *See Klipsch Grp., Inc.*, 2012 WL 5265727, at *7 (While the Court "has the power to freeze assets to preserve a later aware of an equitable account, such freeze should be confined in scope to the likely *profits* of counterfeiting activity.").

The asset freeze continues to make it difficult for Defendants to meet their ordinary financial obligations, and if not dissolved, will continue to do so *for months, if not over a year*. *See* Oskouie Decl., ¶ 28. Defendants will have no ability to pay for any of their expenses (which amount to nearly £10,000 per month, exclusive of legal bills in this matter), much less run their existing unrelated businesses, should the injunction wrought by the Asset Restraining Order continue. *See* Oskouie Decl., ¶¶ 27-28.

III. The Public Interest Does Not Favor Continuing the Asset Freeze Requested by Plaintiff

The public interest is not benefitted by the imposition of an asset freeze—issued *ex parte*, without Defendants having any opportunity to be heard in response to same—where it is not supported by any competent evidence concerning the risk of dissipation. Plaintiff's only argument was that Defendants are foreign residents that would not show up—well they all are here, and have asserted counterclaims herein. Thus, this transparently abusive, xenophobic, bullying tactic in the form of an asset freeze should not be tolerated by the Court.

CONCLUSION

Based on the foregoing, Defendants respectfully request that the Court dissolve the Asset Restraining Order.

DATED this 16th day of August 2017,

Respectfully Submitted:

LEWIS & LIN, LLC

By: */s/ David D. Lin*
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